

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
AT SHINYANGA**

**CRIMINAL APPEAL NO.22 OF 2020**

*(Originating from Criminal Case No. 13 of 2014 of the Kahama District Court)*

**ISSA PAUL..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*Date of the last Order: - 25<sup>th</sup> June, 2020*

*Date of the Judgement: -14<sup>th</sup> August, 2020*

**MKWIZU, J.:**

This is an appeal arising from Criminal case No. 13 of 2014, of Maswa District Court, whereby the appellant was charged with the offence of escaping from lawful custody contrary to section 116 of the Penal Code Cap 16 R:E 2002

Brief facts are that, the appellant person as a prisoner with No. 60/2011 was charged that on 11.06.2013 at 1100 hrs at Maswa Health College within Maswa District in Simiyu Region, unlawful escaped from the lawful

custody of A3204 SSG T. Ashery. The appellant readily plead guilty to the charge and all facts establishing the offence. Upon that plea of guilty, trial Magistrate proceeded to convict the appellant under section 228 (1) of the Criminal Procedure Act and sentenced him to serve a prison term of 3 years. Aggrieved, appellant lodged his petition of appeal to this court with the following grounds:

- (1) *That, my Lord, the trial court magistrate erred in law and in facts to convict and sentence me to serve three years imprisonment for the offence of escaping from lawful custody without considering that three years is very harsh sentence compared to the circumstances of the case.*
  
- (2) *That My, the trial court magistrate erred in law and in facts to convict and sentence me for my own plea, the plea was unequivocal plea since it was obtained through coercion/duress.*

The appeal was heard in the absence of the appellant who had agreed to have his appeal so proceed. By the order of the court, Ms. Immaculate

Mapunda learned State Attorney for the respondent/ Republic filed a written submission supporting the appeal.

Ms. Mapunda submitted that, the sentence imposed to the appellant was excessive. She said section used to charge the appellant does not provide punishment hence the court was required to invoke provisions of section 35 of the Penal Code which provides general punishment for the offences where penalty is not prescribed. She said, going by section 35, appellant was supposed to be sentenced to two (2) years jail term. Ms Mapunda requested the court nullify the sentence imposed to the appellant as it was excessive and it be declared that appellant has completed serving his two years sentence with which he was supposed to serve.

On the second ground of Appeal where the trial magistrate is faulted for convicting and sentencing the appellant on an equivocal. Citing the case of **Buhimila Mapembe V. Republic** [1988] TLR 174, Ms Mapunda submitted that, the appellant plea to the charge and the facts narrated by the prosecution taken cumulatively indicates that the appellant properly pleaded guilty and for that reason the plea was unequivocal. She explained

further that, the admitted facts did disclose that appellant escaped from the lawful custody of A. 3204 SSG T. Ashery.

I have given the grounds of appeal, submissions by the learned State Attorney and the entire proceedings a careful scrutiny. The issue for this court's determination is mainly whether the appeal is meritorious or not.

I will start with the 2 ground of appeal that the trial court convicted and sentenced the appellant on equivocal plea of guilty. The trial court's records read:

*"Date: 18/2/2014*

*Coram: A.S Chugulu – SRM*

*Prosecutor: INSP Karinga*

*Court Clerk: Tabu*

*Accused: Present in person*

*Prosecutor: This is a fresh case*

*COURT: The charge read over fully explained to accused person who is asked to plea thereto.*

*ACCUSED PLEA: "It is true"*

*COURT: Entered as a plea of guilt.*



A.S. CHUGULU

SENIOR RESIDENT MAGISTRATE

18/02/2014

**PP:** For facts now.

**FACTS BY PUBLIC PROSECUTOR**

*That the accused person is a prisoner no 60/2011 Issa s/o Paulo 22years, a Sukuma his tribe and a resident of Bariadi. He was charged with escape from lawfully custody C/S 116 of the Penal Code (Cap 16 of the law. R.E 2002) That on 11.06.2013 at about 1100hrs Maswa Health college within Maswa District in Simiyu Region the accused did unlawfully escape from lawful custody of A 3204 SSD. T. Ashery. Whereby the accused was a prisoner at Malya Prison. He was convicted and sentenced to go in Prison for 15 years. He has original with bulgary and stealing at Bariadi. That on 01.02.2014 the accused was arrested and taken at Bariadi. He was transferred to Maswa Police Station for further interrogation. On 18.02.2014 that accused was accordingly charged with said offence before the court. He has entered the Plea of Guilty. That is all.*

**COURT:** *The accused asked if he admits the facts of case.*

**ACCUSED'S REPLY:**

*Facts are correct and true*

**Accused:** *Issa Paulo – 18.02.2014.*

**Prosecutor:** *Karinga – 18/02.2014*

A.S. CHUGULU

SENIOR RESIDENT MAGISTRATE

18/02/2014

**RULING**

*The facts which the accused has admitted without qualification, find him guilty of escape from lawfully custody C/S 1116 of the Penal Code Cap 16 of the law, R.E 2002. I duly convict him forthwith on his own plea.*

*Order accordingly.*

A.S. CHUGULU

SENIOR RESIDENT MAGISTRATE

18/02/2014

**RECORDS OF PREVIOUS CONVICT.**

*The accused is a prisoner, I pray for stiff punishment against accused person. That will be a lesson to him.*

**ACCUSED'S MITIGATION.**

*I pray for Court's Leniency. I don't have an intension to commit the offence, I have sent by Prisoner Officer to buy cigarette. I met with my wife and my sick child. Thus why I decided to rescue the life of my child."*

A perusal of the above extract shows clearly that what the appellant conceded to corresponds directly with the charge and the information

narrated to him by the prosecution. The appellant's plea is also supported by the appellants mitigation that he escaped from the lawful custody to serve the life of his child who was sick. The plea was nothing but non equivocal plea of guilty. Section 360(1) of the CPA states

*"No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinated court except as to extent of legality of the sentence."*

The above provision restricts an appeal on a plea of guilty, unless it is on extent of legality of the sentence. The 2<sup>nd</sup> ground of appeal lacks merit.

In the first ground of appeal, appellant faults the trial court for sentencing him to **three years imprisonment**, which, he said, is excessive sentence.

Section 116 of the Penal Code Cap 16 provides:

*"A person who escape from lawful custody is guilty of an offence"*

As correctly submitted by the learned State Attorney, the provision in which the appellant is charged does not provide for a sentence. The guidance

therefore is to be sought under section 35 of the Penal Code: The section states:

*"When in this Code no punishment is expressly provided for any offence, shall be punishable with imprisonment for a term not exceeding two years or with a fine or both."*

This is the law, having convicted the appellant under section 116 above, trial magistrate was enjoined to make use of the provisions of section **35** where the sentence provided for is two years with or without fine. Trial Magistrate instead, sentenced the appellant to three years jail term. This is in contravention to the above cited provisions of the Penal Code. This complaint is therefore meritorious. In **Benedetha Paulo V. Republic** (1992) TLR 97 the court of Appeal stated that:

*"The court have power to interfere with the sentence imposed on an appellant by trial subordinate court if it find that the sentence is excessive, inadequate and if the sentence was unlawfully imposed "*



Guided by the above decision, and having found that the sentence was excessive, the sentence of three years imposed on the appellant is hereby quashed and set aside and substituted thereof to that of ***two (2) years*** imprisonment under section 35 of the Penal Code R.E 2019. As the records would reveal, appellant was sentenced on 18/2/2014 meaning that the two years has already elapsed, in other words, by this date, appellant has completed serving his two years sentence resulting into an immediate release from custody unless otherwise held.

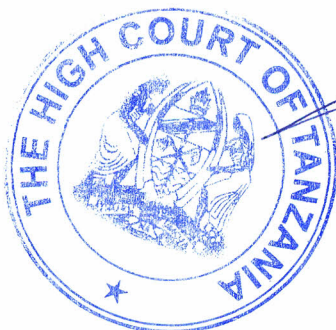
On the foregoing reasons, the appeal is partly allowed to the extent indicated above, otherwise it is dismissed.

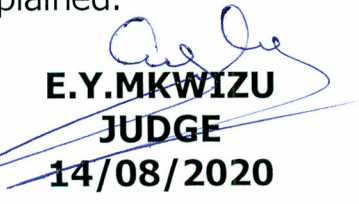
It so ordered.

**DATED** at **SHINYANGA** this **14<sup>th</sup>** day of **AUGUST**, 2020.

  
**E.Y.MKWIZU**  
**JUDGE**  
**14/08/2020**

**COURT:** Right of appeal explained.



  
**E.Y.MKWIZU**  
**JUDGE**  
**14/08/2020**