

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.172 OF 2008

ERICK CHEBON NALEKEM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.1211 of 2006 by Hon W. M. Kagendo, Senior Resident Magistrate dated 31st July, 2009]

JUDGMENT

Although the appeal raises six grounds, counsel for the appellant only argued the ground on the sentence imposed by the learned trial magistrate. The appellant was convicted in the 1st count of **stealing stock** contrary to **section 278** of the **Penal Code** and in the 2nd count of **escape from lawful custody** contrary to **section 123** of the **Penal Code**. With regard to count 1, he was sentenced to two (2) years imprisonment while in count 2 he was sentenced to serve 1 year imprisonment. The sentences were ordered to run concurrently.

Before sentencing the appellant, the learned magistrate was alerted to the fact that the appellant was already serving a sentence of five (5) years in criminal case No.2905/04, 6 years and 1 year in counts 1 and 2 in criminal case No.1665/05. The latter sentences to run concurrently.

The appellant being aggrieved preferred this appeal. As I have explained at the beginning of this judgment, the submissions by the appellant's counsel concentrated only on the ground of sentence, and specifically that the learned trial magistrate ought to have taken into account the previous sentences in imposing the sentence in the two counts before her and ought to have ordered them to run concurrently. Counsel for the appellant referred the court to the cases of **Republic V. Ames**, **Republic V. Carey** (1938), All ER 515, **Burton Mwakapesile V. Republic** (1965) EA 407 and **Ngubuini V. Republic** (1987) KLR 517 for the proposition that sentences in other concluded trials ought to be taken into account when sentencing an accused person for the present offence.

Learned counsel for the respondent did not oppose the appeal and asked the court to exercise its discretion to order the sentences to run concurrently.

I have considered the submissions. There is merit in those submissions based on the cited authorities. The learned magistrate's attention was drawn to the fact that the appellant was serving sentences adding in aggregate to 11 years. Adding the 2 years, the subject of this appeal, the appellant is supposed to serve 13 years.

The correct position in terms of the cited authorities is that the trial magistrate ought to have ordered the three separate sentences to run concurrently, which in effect would have meant the appellant serving six years. This appeal will and is hereby allowed, for those reasons. The sentence imposed is set aside and substituted with an order that the three separate sentences to run concurrently and the appellant to serve six years in total in the case that has given rise to this appeal, in criminal case No.2905 of 2004 and No.1665 of 2005. The period of this sentence to be computed from the date of sentence herein.

Dated, Signed and Delivered at Nakuru this 2nd day of December, 2011.

W. OUKO

JUDGE