



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

**AT NAKURU**

**CRIMINAL APPEAL NO. 141 OF 2009**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 143 OF 2009**

*(From original conviction and sentence in criminal case No. 7425 of 2008 of the Chief Magistrate's Court at Nakuru - B. Kituyi {R.M.})*

**DUNCAN CHEBON.....**

**1<sup>ST</sup> APPELLANT**

**ANDREW LWANGU.....**

**.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....**

**.....RESPONDENT**

**JUDGMENT**

The Appellants were jointly charged with the offence of stealing stock contrary to Section 278 of the Penal Code (*Cap. 63, Laws of Kenya*). They each faced an alternative charge of handling stolen stock contrary to section 322(2) of the Penal Code.

Both Appellants pleaded not guilty and the prosecution called six witnesses, and at the end of their evidence the Appellants gave unsworn statements denying both charges. Upon review of the evidence both Appellants were found guilty of the main charge of stealing stock and were convicted and sentenced to five years out of a maximum of fourteen years prescribed by Section 278 of the Penal Code.

The Appellants have both appealed to this court on grounds which amount to appeals against sentence, and not conviction. The 1<sup>st</sup> Appellant's grounds of appeal are -

- (1) that he did not plead guilty at the trial,**
- (2) that he is a first offender,**
- (3) that he was married with three children at the time of the commission of the offence, and he was the sole bread winner,**

**(4) that he wished to be present during the hearing of the appeal.**

Andrew Luanga, the 2<sup>nd</sup> Appellant had six grounds of appeal -

**(1) that he did not plead guilty to the charge and he requests for leniency due to his health status;**

**(2) that the sentence was harsh and very much painful to him considering his medical history since 1998;**

**(3) that he is a first offender and beseeched the court to take into account the period that he has been in remand in custody;**

**(4) that he has been, and he is still under medical treatment as from 3<sup>rd</sup> September, 1998, and that the prison treatment continues with his anti-retroviral virus programme as indicated in his out-patient card dated 15<sup>th</sup> May 2009 at the Nakuru Provincial General Hospital;**

**(5) that he begs for further consideration of the fact that he is a middle-aged 44 years and has young children to cater for;**

**(6) that he pleads for leniency, and begs this court to temper justice with mercy and review the severe sentence imposed on him.**

As these appeals arose from the same conviction they were consolidated by order of court made on 15<sup>th</sup> July 2010 and heard together. As already indicated the appeals were against sentence and both Appellants pleaded for leniency in their submissions to court.

Mr. Nyakundi, learned State Counsel submitted that the Appellants were sentenced to five years out of the possible fourteen years.

The punishment for stock theft is fourteen years. There is no option of a fine. The Appellants were lucky they were sentenced to five years. The Appellants have sought mercy. Both are first offenders, and sole bread winners for their families. The first Appellant has three children. The 2<sup>nd</sup> Appellant is a middle aged man of 44-45 years of age. He is under treatment for HIV-AIDS.

I have considered the Appellants plea that justice be tempered with mercy. I have also considered the period the Appellants were in custody. The Appellants were arrested on 6<sup>th</sup> December 2006 and were sentenced on 20<sup>th</sup> May 2009. In other words the Appellants were in custody for a period of 2 years, 4 months and 20 days. They have been imprisonment from 20<sup>th</sup> May 2009 to 12<sup>th</sup> November 2010, that is a period of one year, 5 months, 21 days. That would be a total of three years 10 months and 11 days.

Taking into account the health condition of the 2<sup>nd</sup> Appellant in particular, and also taking into account that the stolen animals were by a stroke of coincidence and luck that the owners recognized their animals being driven away by the Appellants along Kabarak road, and taking into account the plea for leniency by the Appellants, I would uphold their conviction and sentence, but reduce their respective sentences from four years to commence from the date of their arrest and detention.

There shall be orders accordingly.

**Dated, delivered and signed at Nakuru this 12<sup>th</sup> day of November 2010**

**M. J. ANYARA EMUKULE**  
**JUDGE**