

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION NO. E150 OF
2025

RASHID ABDALLA.....
APPLICANT

VERSUS

REPUBLIC.....
....RESPONDENT

RULING

1. The Applicant herein, vide his Notice of Motion dated 14th August, 2025, seeks an order for the review of his sentence, so that the period that he spent in custody awaiting conclusion of his trial before the lower court is taken into account, in line with *Section 333(2) of the Criminal Procedure Code, Cap 75 Laws of Kenya*, which provides that:

333(2) Subject to the provisions of Section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

2. I have gone through the record of the lower court and note that the Applicant remained in custody for a period of 41 days

before being released on cash bail. He was ultimately convicted and on 2nd August, 2023 sentenced to serve 2 years imprisonment.

3. While sentencing the Applicant, the learned trial Magistrate did not take into account the 41 days that the Applicant had been in custody.
4. The question that then abounds is whether the learned trial Magistrate complied with *Section 332(2)* of the *Criminal Procedure Code* when sentencing the Applicant.
5. The Court of Appeal in **Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR** held that: -

““Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody...”.

6. The *Judiciary Sentencing Policy Guidelines* provides that:

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive

punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

7. It is clear from the record of the trial court and from the authority above that the period of 41 days that the Applicant remained in custody while his trial proceeded were not properly taken into account by the trial court, as provided for under *Section 333(2) of the Criminal Procedure Code*.
8. From the authority and the text above, the trial court should have ordered that the sentence of imprisonment of 2 years be lessened or reduced by 41 days.
9. In the result, and considering the foregoing, the Applicant’s application is merited. I allow it and review the sentence only to the extent that his sentence of 2 years imprisonment shall be reduced by 41 days.
10. This file is closed.

DELIVERED (virtually) DATED and SIGNED this 14th day of October, 2025.

JOE M. OMIDO

JUDGE

APPLICANT: Present, virtually.

RESPONDENT: **Ms. Muema.**

COURT ASSISTANTS: **Mr. Ngoe & Mr. Juma.**