

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION NO. E121 OF
2025

AYUB ODUOR MESO.....
APPLICANT

VERSUS

REPUBLIC.....
....RESPONDENT

RULING

1. The Applicant herein, vide his Notice of Motion dated 29th July, 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 throughout his trial

before the lower court. The remand period totaled 254 days. He was ultimately convicted and on 28th May, 2025, sentenced to serve 5 years imprisonment.

3. While sentencing the Applicant, the learned trial Magistrate stated as follows:

“Probation Officer (sic) together with the accused mitigation is considered. The accused failed to secure bond and has been in custody for 8 months. The court has taken that period into consideration and sentences him to serve 5 years imprisonment”.

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 254 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 either that the sentence of imprisonment of 5 years be lessened or reduced by 254 days or that the sentence runs from the date that the Applicant took plea, which was on 16th September, 2024.
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 5 years imprisonment shall run from 16th September, 2024.

10. This file is closed.

DELIVERED (virtually) DATED and SIGNED this 7th day of
October, 2025.

JOE M. OMIDO

JUDGE

APPLICANT: Present, virtually.

RESPONDENT: **Ms. Muema.**

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