

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAPENGURIA.**

**CRIMINAL APPEAL NO. E010 OF 2025**

**GILBERT KIPTANUI MGOGOI .....**

**APPELLANT**

**- V E R S U S -**

**REPUBLIC .....**

**RESPONDENT**

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**J U D G E M E N T .**

The appellant **Gilbert Kiptanui Mwogoi**, was convicted by the Principal Magistrate Kapenguria for the offence of obtaining money by false pretenses contrary to section 313 of the Penal Code in Criminal Case No. E011 of 2025. **Republic -V- Gilbert Kiptanui Mwogoi.**

The particulars of the charge are that on 18/12/2024, at Makutano Township in West Pokot Sub County, with intent to defraud, jointly with another not before the court, obtained from **Farah Ali Farah** Five hundred thousand shillings (Kshs.500,000/=) by falsely pretending that he would supply

one thousand two hundred (1,200) bags of maize, a fact he knew to be false.

He denied the offence and the case proceeded to full trial with the prosecution calling a total of five (5) witnesses while the accused gave a sworn statement in his defence. Upon conviction the appellant was sentenced to one (1) year imprisonment. He has appealed against sentence, the main ground being that the court did not take into account the period that he had spent in remand.

His submissions are all new mitigating factors that he requests the court to take into account. He did not raise all these grounds before the trial court. He merely asked for the court's leniency and stated that he was remorseful.

The Prosecution opposed the appeal for the reason that the court gave a very lenient sentence and not the maximum and the court should not interfere with it. Section 333(2) of the Criminal Procedure Code provides as follows **“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.**

**In *Ahamed Abdulfathi Mohammed -V- Republic (2012)*  
KECA**

**By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "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 and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012.**

Guided by the above decision, the sentencing court is mandated to take into account the period an accused has spent in remand.

In this case, the court when sentencing, did not state whether it considered the appellant's mitigation or not, or that he was a first offender. Apart from other mitigating factors, the court is required to take into account the period an accused has spent in remand. did not do so. Though the sentence is not harsh in

the circumstances, the court should have factored in the sentence the period the appellant spent in remand. The appellant was arraigned before court on 8/1/2025. He was in remand for about seven (7) months. The sentence of one year should therefore commence on 8/1/2025. It is so ordered.

**Judgment Delivered, Dated and Signed** at Kapenguria this **12<sup>th</sup>** day of **November, 2025**

**R. WENDOH  
JUDGE**

**Judgment delivered in the presence of:-**

Mr. Mokaya for Respondent/ Prosecution Counsel

Appellant – present

Juma/Hellen – Court Assistants