

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL MISC. APPLICATION NO. E251 OF 2025**

**NYAMWEYA DENNIS MACAHANA .....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 19<sup>th</sup> December 2024, the Applicant seeks for the following Orders;-
  - 1) *The honourable Court be pleased to Order that his sentence in the Chief Magistrates Court Criminal Case No. E5043 of 2021 to run from the date he was remanded.*
  - 2) *The honourable court be pleased to invoke Section 333 of the Criminal Procedure Code.*
  - 3) *The honourable court be pleased to make any other order that it would deem fit in the interest of justice.*
2. In his supporting Affidavit, sworn on even date, he states that he was charged with the offence of stealing stock contrary to Section 278 of the Penal Code in **Criminal Case No. E5043 of 2021** and was sentenced to serve three years imprisonment .
3. Citing Article 165 (3) and (9) of the Constitution of Kenya 2010 , he states that throughout his trial, he remained in custody and therefore, he was praying that his sentence runs from the date of arrest as provided for under Section 333 of the Criminal Procedure Code.
4. The Respondent filed his Replying Affidavit sworn on 22<sup>nd</sup> day of July 2025 by James Kihara, a Prosecution Counsel at the Office of the Director of Public

Prosecution. He stated that subject to verification of court proceedings, he has no objection to this Court considering time spent in custody.

5. Confirming that indeed the applicant was charged with the offence of stealing stock contrary to Section 278 of the Penal Code in **Criminal Case No. E5043 of 2021** and that he remained in custody, he deponed that he has no objection to this Court considering the time the applicant spent subject to verification of the court proceedings.

### **Determination**

6. After considering the application, the Response thereto and the lower court record being Criminal Case No. E5043 of 2021, there is no doubt that the Applicant herein (2<sup>nd</sup> accused) and another (1<sup>st</sup> accused) were arrested and charged in the stated case for the offence of stealing Stock contrary to section 278 of the Penal Code.
7. They also faced an alternative charge of handling suspected stolen property contrary to section 322 (2) of the Penal Code.
8. On 4/11/2021, they pleaded not guilty to both the main and the alternative charge.
9. The record further shows that the case against the 1<sup>st</sup> Accused was withdrawn on 8<sup>th</sup> November 2022 under section 87 (a) of the Criminal Procedure Code.
10. After the full hearing of the case, the trial Magistrate Hon. B. Ochien (CM) rendered his judgment on 11<sup>th</sup> December 2023 whereby he convicted the Applicant herein on the main charged being the offence of stealing Stock contrary to section 278 of the Penal Code.
11. On 6<sup>th</sup> December 2024, the honourable Magistrate sentenced the applicant herein to serve three (3) years imprisonment. When sentencing, he stated :-

***“ Having noted that the accused has been in custody since late 2021 for about two years, I hereby sentence him to three (3) years imprisonment. R/A 14 days.”***

12. It is obvious from the sentence that the honourable Chief Magistrate did not take into consideration the mandatory provisions of Section 333 (2) of the Criminal Procedure Code. Indeed, the Court of Appeal in **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR** held: -

***“The appellants have been in custody from the date of their arrest on 19<sup>th</sup> June 2012. 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(s) 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.”.*

13. In this case, the Court notes that the Applicant was arrested on 3<sup>rd</sup> November 2021 and arraigned in court for plea on 4<sup>th</sup> November 2021. Though bond terms were issued, the Applicant did not raise bond and remained in custody throughout the trial.
14. Consequently, the application dated 19<sup>th</sup> December 2024 is allowed in that under Section 333 (2) of the Criminal Procedure Code, the Applicant's sentence of three (3) years imprisonment shall run from the date of arrest which is 3<sup>rd</sup> November, 2021.

**Dated, signed and delivered at Nakuru this 26<sup>th</sup> Day of February, 2026.**

**PATRICIA GICHOHI  
JUDGE**

**Nyamweya Dennis Machana-Applicant- absent**

**Ms Anyumba for the Respondent**

**Erickson , Court Assistant**