

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MISCELLANEOUS CRIMINAL REVISION**  
**APPLICATION NO. E045 OF 2025**

**PENINAH NZISA NDIMU .....**  
**APPLICANT**

**VERSUS**

**REPUBLIC .....**  
**RESPONDENT**

*(Being sentence review arising from Mavoko Criminal Case No.  
E045 of 2025)*

**RULING**

- 1.** The Applicant filed the present application seeking revision of sentence pursuant to the provisions of section 333(2) of the Criminal Procedure Code. It urged the court to take into account the 10 months period she spent in custody prior to release on bond.
2. The Applicant herein was charged with 12 counts of obtaining money by false pretence contrary to section 313 of the penal code. She pleaded not guilty and the matter proceeded to full hearing. At the close of the prosecution case, the trial court found that the applicant had a case to answer for counts 1, 3, 4, 7, 8, 9, 10, 11, and 12. Upon hearing the defence the trial court proceeded to convict her

and sentenced her as follows; *i have considered the pre-sentence report, I do not from the said report the accused is not remorseful from the manner in which the offence was committed. It was breach of trust that the complainants had placed upon the accused. Accordingly the accused is sentenced as follows;*

*Count 1 a fine of kshs 605,000/= in default 1 year imprisonment*

*Count 3 fined kshs 15,000/- in default 3 months imprisonment*

*Count 4 fined kshs 33,000/- in default 6 months imprisonment*

*Count 7 fined kshs 26,000/- in default 6 months imprisonment*

*Count 8 fined kshs 16,000/- in default 6 months imprisonment*

*Count 9 fined kshs 50,000/- in default 6 months imprisonment*

*Count 11 fined Kshs 200,000/- in default 1 year imprisonment*

*Count 12 fined kshs 225,000/- in default 1 year imprisonment*

The trial court directed the *sentence to run consecutively.*

3. The respondent opposed the application, contending that the sentence was already lenient and noting that a similar

application had been dismissed by the lower court. They thus urged this court to dismiss the application.

4. **Section 333(2)** of the **Criminal Procedure Code** provides as hereunder: -

***“(2) Subject to the provisions of section 38 of the Penal Code 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.”***

5. The proviso to section **333(2)** of the CPC, is couched in mandatory terms. Courts are duty-bound to factor in the period an accused person has spent in custody prior to the sentencing. The Court of Appeal in **Ahamad Abolfathi Mohammed & Another Vs. Republic Criminal Appeal No 135 of 2016(unreported)** emphasized that 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 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.”*

6. Similarly, the Court of Appeal in **Bethwel Wilson Kibor vs. Republic** (2009) eKLR held that: -

*“By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years’ period that the appellant had been in custody. The appellant told us that as at 22<sup>nd</sup> September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence...”*

7. ***The Judiciary Sentencing Policy Guidelines:*** - reinforces this principle by stating that failure to account for pre-sentence custody leads to excessive punishment and undermines proportionality in sentencing.
8. In the present case, the record shows that the Applicant was arrested on 13th May 2022 and remained in custody until 10th February 2023, when she was released on bond. The trial court, however, did not expressly state that this period was considered in computing the sentence.
9. Failure to take into account the period spent in custody contravenes section 333(2) of the Criminal Procedure Code and results in an unlawful deprivation of liberty. Courts must ensure that sentences reflect both the punitive and corrective purposes of criminal justice, while remaining proportionate and lawful.
10. Consequently, I find that the Applicant is entitled to have the period spent in custody factored into her sentence. The computation of her sentence shall therefore include the period between 13th May 2022 and 10th February 2023 when she remained in remand custody.
11. Orders accordingly.

Dated, signed and delivered at Machakos this 26<sup>th</sup> day of March, 2026

**RHODA RUTTO**

**JUDGE**

**In the presence of:**

.....Applicant

.....Respondent

Selina Court Assistant

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