



**Salwa v Republic (Miscellaneous Criminal Case E074 of 2025)
[2026] KEHC 5004 (KLR) (20 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 5004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL CASE E074 OF 2025**

**AC BETT, J
APRIL 20, 2026**

BETWEEN

ISMAEL SALWA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was convicted for the offence of stealing a motorcycle contrary to Section 278 A of the Penal Code and sentenced to serve four (4) years imprisonment on 8th August 2024.
2. By an application dated 27th May 2025, the Applicant prayed that the court do factor in the time that he spent in remand custody after his arrest by applying the provisions of Section 333 (2) of the Criminal Procedure Code.
3. In his submissions, the Applicant urged the court to consider his mitigating circumstances in line with Section 329 of the Criminal Procedure Code and to exercise leniency.
4. In pronouncing the sentence, the trial Magistrate noted:-

“I have considered the probation officer’s report dated 7/8/2024, the submissions by the prosecution and the defence, the period the accused has been in custody and the mitigation by the accused. I have also taken into consideration the fact that he is not willing at all to compensate the Complainant. I therefore order that the accused serve imprisonment for a period of four years.”
5. The Respondent did not oppose the application.



6. The High Court’s supervisory jurisdiction is derived from Article 165 (6) of *the Constitution* and Section 362 of the Criminal Procedure Code which allows the court to review the legality and propriety of sentences imposed by the subordinate court.

7. The trial court record shows that the Applicant was arraigned in court on 4th April 2023. At that time, it was indicated that he was a convict in another case and so bond was not considered. On 31/8/2023, the Prosecution informed the court that the Applicant had served a sentence of four (4) months in the Busia Case. Subsequently, he was granted bond but was unable to meet its terms. According to the Sentencing Policy Guidelines:

“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.”

8. In *Bethwel Wilson Kibor v. Republic* [2009] KECA 143 (KLR), the court 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.”

9. The imperative to take Section 333 (2) of the Criminal Procedure code into account while sentencing was underscored in *Ahamad Abolfathi Mohammed & Another v. Republic* [2018] KECA 743 (KLR) when the Court of Appeal stated:-

“The appellants have been in custody from the date of their arrest on 19th 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.”

10. Being guided by the foregoing, it is necessary to consider whether the trial Magistrate was in substantive compliance of Section 333 (2) of the Criminal Procedure Code as merely mentioning that the time



spent in custody has been considered is insufficient as it must be taken into account to proportionately reduce the sentence.

11. The maximum penalty for stealing a motor vehicle under Section 278A is seven (7) years imprisonment. The Applicant was a young man aged 24 years at the time of the conviction but much younger at the time of the offence. He sought for leniency as he had heavy family responsibilities including two (2) wives and three (3) children. The prosecution was not opposed to a non-custodial sentence. However, the Probation Officer who conducted the Social Inquiry recommended an alternative sentence as he was reluctant to recommend a non-custodial sentence due to the offender's personal circumstances although he found that the Applicant was the sole provider of the family.
12. I am of the view that if the trial Magistrate had taken due consideration of the fact that the Applicant had stayed in custody for over one year, in light of the mitigating factors, the sentence imposed would have been lighter.
13. In the end, I allow the application and direct that the Applicant's sentence do run from the date when the court was informed of the fact that the Accused had served his sentence in Busia Criminal Case No. E507 of 2023 where he had been convicted of assault. The upshot is that the sentence shall run from 31st August 2023.
14. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 20TH DAY OF APRIL 2026.

A. C. BETT

JUDGE

In the presence of:

The Applicant in person

Mr. Sirtuy for the Respondent

Court Assistant: Polycap

