

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL MISC. APPL. NO. 97 OF 2019

SIYAT MOHAMED ALI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By an application filed on 15th October, 2019 the applicant seeks for resentencing based on Section 333(2) of the Criminal Procedure Code. In his affidavit in support he urges the court to consider the case of **Francis Karioko Muruatetu & Others vs Republic Petition No. 15 and 16 (Consolidated) of 2015 (Muruatetu Decision)**.
2. The application is opposed by the State on grounds that this court has no jurisdiction to revisit the issue as it already rendered its judgement on appeal; and that the applicant ought to have gone to the Court of Appeal if dissatisfied with the judgement on first appeal.
3. The applicant was charged with the offence of rape contrary to Section 3(1) (a) (b) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 15th of January 2017 at 10.30 am at [Particulars withheld] area of Wajir South Sub-County within Wajir County he intentionally had carnal knowledge of KAB (name withheld) without her consent.
4. He faced an alternative count of indecent assault contrary to Section 11(a) of the said Act.
5. After a full trial, the applicant was convicted of the main count and sentenced to serve 10 years imprisonment.
6. Having been aggrieved by the judgement, he moved this court on 9th May 2017 on an appeal. This court found his appeal lacking in merit and dismissed the same.
7. In his written submissions filed in court on 13th January 2021 the applicant attempted to mitigate against the 10 years jail term. Further he sought to have time spent in custody considered and he placed to serve the remainder of his term on probation.
8. In its directions on the **Muruatetu case** issued on 6th of July, 2021 the Supreme Court clarified and explained further the judgement as not to include cases other than those falling within Section 204 of the Penal Code.
9. As regards to Section 333(2) of the Criminal Procedure Code, the same obligates the court to consider the time an accused spent in custody while the trial takes place.
10. From the record, in sentencing the applicant, the court considered several factors but did not indicate its consideration of the term the applicant served in custody awaiting trial and determination of the case.
11. The applicant was first arraigned in court on 23rd of January 2017. He was convicted on 10th April 2017. He was therefore in custody for about 3 months. A remand prison is not the best of places to be and three months therein is not a small deal. If considered it will certainly reduce the sentence.
12. The application therefore succeeds to the extent that the 10-year jail term will be computed from the 23rd of January 2017 when he first appeared in court so as to take account of the days spent in custody.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 14TH DAY OF OCTOBER, 2021.

ALI-ARONI

JUDGE