



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KERUGOYA**

**CRIMINAL REVISION NO. E004 OF 2020**

*(From original conviction and sentence in Criminal Case No. 362 of 2014 of the*

*Principal Magistrate's Court at Wang'uru & Criminal Appeal No. 6 of 2018*

*High Court at Kerugoya)*

ZABLON MUTHIE GACHARE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

**RULING**

1. The applicant Zablun Muthie Gachare was charged and convicted for the offence of **Gang Rape Contrary to Section 10 of the Sexual Offences Act**. He was sentenced to 15 years imprisonment on the 27.2.2015.

His appeal to this court was dismissed on the 8.5.2020.

He then filed this application on the 30.9.2020 seeking for review by reduction of the sentence as well as a prayer under **Section 333 (2) of the Criminal Procedure Code** seeking that the period he spent in custody be considered and factored in the sentence.

2. The Applicant's prayer for re-sentencing by reduction of his sentence pursuant to the "**Muruatetu**" Supreme Court decision has been overtaken by events.

On the **6.7.2021**, the Supreme Court, while giving guidelines and directions on the applicability of its judgment in the "**Muruatetu**" decision – **Francis Karioko Muruatetu & Another V. R (2017), eKLR**, delivered on the 14.12.2017, rendered itself that **the decision on Muruatetu and the guidelines apply only in respect to sentence of Murder under Section 203 and 2014 of the Penal Code**.

3. To that extent then, the re-sentence application for the offence of gang-rape is excluded and cannot be entertained. It is dismissed.

4. On the matter of period spent in remand, a perusal of the trial court proceedings show that the applicant was arrested on the 2.7.2014 and was in custody upto date of judgment on the 27.2.2015, a period of seven months twenty-five days.

The offence under **Section 10 of the Sexual Offences Act** carries a minimum sentence of fifteen years imprisonment which is what the trial court imposed to the applicant.

In the case **Daniel Kaberu V. R (2021) eKLR**, the court was dealing with statutory minimum sentence and resentencing pursuant to **Muruatetu** decision.

The appellate court proceeded to consider the time spend in custody and imposed the minimum sentence.

5. In **Criminal Revision No. 165 of 2019 Jonathan Odhiambo Owiti -vs- R (2021) eKLR**, the court discussed at length the provisions of **Section 333 (2) of the Penal Code** and rendered that the proviso to **Section 333 (2) CPC** 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 an accused person, and faulted the trial court for not directing that the sentence should run from the date of arrest.

6. The Applicant should therefore benefit from the court's holding. I therefore find and hold that the period of seven months and twenty-five days ought to be taken into account in the Applicant's sentence.

The applicant's application succeeds on that limb alone. The fifteen years imprisonment meted to the applicant shall therefore run from the date he was arrested, the 2.7.2014.

It is so ordered.

**DATED AND SIGNED THIS.....DAY OF.....2021**

**J. N. MULWA**

**JUDGE**

**DATED AND DELIVERED AT KERUGOYA THIS 15TH DAY OF DECEMBER 2021**

**R. M. MWONGO**

**JUDGE**