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Kimutai v Republic (Criminal Petition E019 of 2022) [2023] KEHC 21639 (KLR) (8 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21639 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E019 OF 2022

RN NYAKUNDI, J

AUGUST 8, 2023

BETWEEN

JOHN KIMUTAI .... PETITIONER

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The petitioner approached this court vide a Petition dated 12th September 2022 seeking resentencing. The petitioner was sentenced to 15 years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual offences Act*. Being dissatisfied with the sentence and conviction in Kapsabet Criminal Case no. 1771 of 2017, he instituted an appeal in the high court being Eldoret High Court Criminal Appeal No. 213 of 2019 which was heard and dismissed by Hon. Olga Sewe on 28th January 2022.

2. He then instituted the present appeal premised on the grounds that he is remorseful, reformed, a father and that the victim has forgiven him and wants him home to assist look after their child. The parties prosecuted the petition vide written submissions.

Petitioner's Case

3. Learned counsel Mrs Isiaho for the petitioner filed submissions on 23rd January 2023 with the following background in mind. Counsel submitted that the Petitioner was in a sexual relationship with one M.L then aged 16 years and he did not know that she was a minor at the time due to her physical features.

4. Learned counsel for the petitioner submitted that this court is clothed with the jurisdiction to determine this petition as per the provisions of article 165(3) of the Constitution of Kenya as the same is for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Counsel urged that the minimum sentence provided under section 8(4) of the *Sexual Offences Act* denied the trial court the discretion to mete out appropriate sentence. Therefore,

the petitioner seeks the sentence so imposed to be set aside for being inconsistent with the Constitution on the following grounds:

a. He is a first offender

b. He is extremely remorseful

c. He has completely reformed and is ready for social re-adaptation into society

d. He is now a father with the responsibility of taking care of his child

e. The victim is now an adult and has forgiven him hence wants him home in order to assist her look after their child

f. He lost his mother while incarcerated and having failed to attend her funeral and/or burial, he has been greatly tortured

g. Urges your lordship to consider his remission

5. Citing the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR. Learned counsel submitted that the provisions of Section 8 of the sexual offences act must be interpreted so as not to take away the discretion of the court in sentencing. In appropriate cases, like this is, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. Further learned counsel contended that in terms of Article 165 (3) (b) of the Constitution Provides that Subject to clause (5) the High Curt shall have: " jurisdiction to determine the question whether a right of fundamental freedom in the Bill of Right has been denied violated, infringed or threatened

6. It is the petitioner's case that he has been rehabilitated and has since acquired skills during his stay in the prison. His decision to approach this court through a re-sentencing petition resonates with the decision of justice H.A. Omondi in Eldoret Criminal Appeal No. 104 of 2012 *Emmanuel Kibet Lagat v. Republic* where she stated;

> " would under the circumstances direct that the appellant flies a petition for re-sentencing so as to capture correct facts such as period spent, whether there has been any change within the time he has been in rehabilitation, reports from prison, and any other life changing skill acquired.

7. He maintained that he is remorseful for his actions and has reformed in prison. He urged the court to resentence him to time served in prison. In construing the ambit of the constitution threshold of this petition learned counsel placed reliance on the principles in the following cases: " *Francis Muruatetu & another –v- Republic* (2017) eKLR, *Dismas Wafula Kilwake v Republic* (2018), *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others*, *William Okungu Kittiny v Republic* KSM CA Criminal Appeal No 56 of 2013 (2018) eklr, *Morris Mukhebi Muhanya v Republic* (2020) eKLR, *Elishal Oloo Oyugi v Republic* (2019) eKLR, *John Chidia Lwaina v Republic* CA 29 OF 2020 Hon. Rachel Ngetich J.

8. The foregoing legal picture underscores the pivotal position of the High Court as the Court of first instance and the Supreme Court as the ultimate repository of the Judiciary's power in the case of fundamental rights and freedoms. The Kenyan constitution probably is one of the most progressive instrument and is the duty of the court to delve into the text as a whole purposively to guarantee and protect the rights of the citizens.

Respondent's Case

9. Learned counsel for the state Mr. Mugun submitted that there is conflicting jurisprudence on whether the mandatory nature of the penalty under the Sexual Offences Act are unconstitutional for divesting courts of judicial discretion while sentencing. He cited the cases of Court of Appeal in *John Bundi Koome v Republic* [2022] KECA 1065 (KLR), *Onesmus Safari Naao v Republic* [2021] KECA 154 (KLR) and *Hassan Mutwiri v Republic* [2022] KECA 471(KLR) on discretion when sentencing. He also cited the case of *Joshua Gichuki Mwanai v Republic* [2022] KECA 1106 (KLR) and *Peter Kamau Njuguna v Republic* Criminal Appeal No 111 of 2015 (unreported) on the application of discretion by courts during sentencing.

10. Learned Counsel stated that the mandatory nature of the sentence under the Sexual Offences Act are not unconstitutional and can still be meted out in the befitting circumstances. Further, that we can also surmise that perhaps there is need to amend the Sexual Offences Act to create room for discretion in sentencing especially in cases where minors, between the ages of 16 and 17 wilfully engage themselves in sexual conduct.

11. Further learned Counsel submitted that When considering a matter for resentencing, the Court must evaluate the evidence in respect of each case and determine whether there were aggravating factors. The following mitigating circumstances speak in favour of reviewing the sentence:

    a. The complainant was almost 17 years old at the time of the offence.

    b. The complainant and the petitioner were in a boyfriend/girlfriend relationship.

    c. At the time of committing the offence, the Petitioner was 21 years old. As such there wasn't an imbalance of power at play in the relationship.

    d. The sexual encounter between them was "consensual"

    e. The complainant admitted that prior to his arrest, the petitioner took up responsibility for the minor born out of the incident. It has been said that it might be in the best interest of that minor if the petitioner gets a reduced sentence so that he can continue catering for their child's interests.

12. In addition learned Counsel further urged that Section 333(2) states that empowers courts to consider the period spent in custody prior to a sentence. If there is evidence that the petitioner spent time in remand awaiting the conclusion of his trial, then that period should be factored into the final sentence. In his concise summary, learned counsel for the state argued and invited the court to be guided by the principles in the following dicta. " *John Bundi Koome v Republic* (2022) KECA 1065, *Onesmus SafarinNgao v Republic* (2021) KECA 154 (KLR) , *Hassan Mutwiri v Republic* (2022) KECA 471(KLR), *Joshua Gichuki Mwangi v Republic* (2022) KECA 1106 (KLR), *Peter Kamau Njuguna v Republic*, *Domnic Kimaru Tanui v Republic* *Athanus Lijodi v Republic* (2021) eKLR

13. The most contentious issue in this petition is the nature and character of the sentence imposed by the trial court for the offence of defilement contrary to Section 8(1) as read together with Section 8(3) of the *Sexual Offences Act*. It is also appropriate at this stage to appreciate that the petitioner did file an appeal referenced as Criminal Appeal Non 213 of 2019 before the session judge Olga Sewe. On appeal the learned judge appreciated the circumstances of the offence as captured by the trial court and subsequent findings on conviction and sentence. In totality the session judge also profoundly and in detail discussed the verdict of 15 years custodial sentence. In the result she found no merit on both conviction and sentence hence dismissing the appeal in its entirety.

Analysis & Determination

14. When considering this matter the question of jurisdiction is of significance. The petition is premised for resentencing which squarely invokes the provisions of Article 50 (6) (a) & (b) of the Constitution thus: "A person who is convicted of a criminal offence may petition the High Court for a new trial if (a) the persons appeal if any has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for the appeal and (b) new and compelling evidence has become available

15. The constitution itself enables the courts to promote fundamental rights and freedoms. The intertextual interpretation achieves unit of purpose and promotes the goals and spirit of the constitution. It is therefore the position of the petitioner that the adjudication of his criminal proceedings from the trial court and later at appeals level, he is yet to receive substantive justice in so far as the remedy on sentencing is concerned.

16. The petition as filed invokes Section 28, 50, 2(p) & 165 of the *Constitution* as read with Section 333(3) of the *Criminal Procedure Code*. Being a constitution petition one cannot lose sight of the extract in the case of *Pinder v The Queen* (2002) UKPC 46, (2003) 1 AC 620 an approach to constitution interpretation. "A constitution is an exercise in balancing the rights of the individual against the democratic rights of the majority. On the one hand, the fundamental rights and freedoms of the individual must be entrenched against future legislative action if they are to be properly protected, on the other hand, the powers of the legislature must not be unduly circumscribed if the democratic process is to be allowed its proper scope. The balance is drawn by the Constitution. The judicial task is to interpret the constitution in order to determine where the balance is drawn, not to substitute the judges view where it should be drawn."

17. One of the real issues confronting this court as far as the petition is concerned, and which must be answered accordingly is whether the trial court and subsequently the High Court erred in law in the interpretation and application of the facts on the question of determining the appropriate sentence for the petitioner. To this end, the petitioner and the respondent have adopted an approach articulating trajectory which clearly envisages that Article 50 (6) (a) & (b) of the *Constitution* ought to come to the aid of the petitioner. In essence calling for a declaration in Article 23 (3) of the Constitution. So the decision which flow from the constitutional foundation has to be styled in consonant with the decision by the Tanzanian Court of Appeal in *Ndyanabo v Attorney General* (2001) EA 485 " ...the constitution ..is a living instrument having a soul and a consciousness of its own...Courts must endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (time) with the lofty purposes for which its makers framed it...fundamental rights have to be interpreted in a broad and liberal manner...ensuring that our people enjoy their rights, our young democracy not only functions but grows, and the will and dominant aspirations of the people prevails.

18. In this scenario the petitioner is vested of the burden and standard of proof to establish that a particular infringement, threats, or violation to fundamental rights and freedoms has occurred and unless a proper remedy is granted in this respect certain violations with far reaching consequences would abide. That is the threshold outlined in *Mumo Matemo v Trusted Society of Huma Rights Alliance* Civil APP. 290/2012 (2013) eKLR the court said: " If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure tht justice is done to his case) tht he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

19. This petition turns on to interpretation of Article 50 (2) (p) and 28 of the Constitution. It is therefore necessary to restate the provisions as an opening remark in this analysis. In Article 28 the frame has provided "Every person has inherent dignity and the right to have that dignity respected and protected. The importance of this right is central to the Bill of Rights and can only be limited in justifiable circumstances in a country like Kenya which affirms Article 10 on National values and principles of governance based on Human Dignity, equality, social justice, inclusiveness, equality, human rights, non- discrimination and protection of the marginalised. In my view recognizing a right to dignity by the constitution is an acknowledgement of the intrinsic worthy of human beings to be treated as worthy of respect and concerned.

20. In Canadian case of *Egan v Canada* (1995) 29 CRR (2d) 79 104-5 the court went on to appreciate this right which is at the heart of mankind as follows; " This court has recognised that inherent human dignity is at the heart of individual rights in a free and democratic society….Equality, as that concept is enshrined as a fundamental human right…means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that threats them as less capable for no good reason, or that otherwise offend fundamental human dignity.

21. The Kenyan courts are also in agreement on a list of actions which violate human dignity, torture, slavery, subjection to humiliating or inhuman punishment sometimes applied under the deterrence objective to punish the convict in imposing long term sentences.

22. Here we have a petitioner who is aggrieved with the use and application of the verdict meted out by the trial court totalling to a period of 15 years imprisonment. The characteristic of such was also affirmed by the High Court on Appeal. As is often the case in principle our legal system has come to appreciate the ideal of discretion in the spirit of the law has to be exercised by the trial courts in balance of other factors to deviate from any prescription of a minimum sentence. The universal and predominant characteristic of the depth of our jurisprudence is that forever minimum mandatory sentences remain not be the only option in the sentencing scheme. Central as we have seen in Rule 4 *UNODC* " The purpose of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to protect society against crime and to reduce recidivism. Courts are required to approach the imposition of sentence conscious that the legislature has ordained minimum sentences as the sentence that should ordinarily be imposed in absence of weighty justification. However, the Supreme Court decision in Muruatetu the underlying personal circumstances of the offender, the degree of participation, the seriousness of the offence, the age of the offender, mitigation factors, are not to be departed from so as to follow the prescription of minimum sentences. The inquiry to all those considerations are of significance and must be characterised in any verdict against a convict so as not to occasion prejudice or injustice.

23. The question therefore is whether or not the petitioner has discharged the burden of proof that the circumstances of the petition constitutes substantial and compelling new evidence for this court to exercise jurisdiction to review the sentence. It will no doubt be particularised on a case by case basis as the need arises. The approach is indicated in *S v Mofokeng* 1999 (1) SACR 502 where it was held " for substantial and compelling circumstances to be found, the fact of the particular case must present some circumstance that is so exceptional in nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case, to the extent that it could be described as compelling the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified."

24. The petitioner raised concerns about the sentence and it being dismissed by the superior court without giving due diligence to the mitigating factors. The court acknowledges that on reflection the petitioner might have well regretted his conduct therefore heartily remorseful. Turning to the circumstances of the case, the facts are crystal clear and the approach taken by the two courts. Are there circumstances or factors which escaped both courts that imposition of a lesser sentence was necessary. Though he was not clear from his affidavit the petitioner alludes to the fact that his victim apparently could have been mistaken as genuinely not to fall within the ambit of a girl between 18 years. That interpretation is not textually conceivable from the record as lead evidence during the resentencing stage. This is hardly surprising since the session magistrate and thereafter the session judge have considerable experience and expertise in criminal procedural and substantive law. Both of them have had experience of conducting trials and of making rulings in accordance with the law, fairness and justice.

25. In decisions like this as to what the interest of justice requires calls for an exercise of judgement in which a number of relevant factors have to be taken into account and weighed in the balance. It seems very likely that the reason why the petitioner decided to question the legitimacy of the 15 years custodial sentence is because first the appeals court dismissed it and whether he would succeed before the court of appeal is moot. Typically the resentencing jurisdiction is purely donated by the broader aspect of jurisprudential development and Article 50 (6) (a) & (b) of the Constitution.

26. It is helpful to ask the question whether the petitioner has contestably presented strong points of evidence apparent credible to fit the critical threshold in Article 50 (6) (b). There is no new and compelling evidence untainted by the petitioner revealed before this court. With regard to the custodial sentence besides the longevity of it there is no evidence that its disproportionate to the severity of the crime. In this sense, prima facie the sentence for purposes of the objectives of criminal law. Needles to say I find no violation to the petitioners right to dignity.

27. I am also cognisance to the fact that under Article 27 of the Constitution everyone is equal before the law and has the right to equal protection and benefit of the law. The first is the issue of what comes as relevant when it comes to determine the similarities of people's situation. What the constitution tells us is for the state to create the type of society based on equality, dignity, and free from discrimination on any of the grounds provided for in Article 27(4). The equality clause in our constitution espouses formal equality which means the sameness of treatment where the law must treat individuals the same manner regardless of the circumstances. On the other hand, is substantive equality in which the circumstances prescribed in Sub section 4 have to be taken into account of any inquiry so as the law to ensure equality of outcomes.

28. Does the 15 year sentence bear a rational connection to the legitimate purpose of the statute? does the differentiation in sentences of other convicts under the *Sexual Offence Act*, amount to unfair discrimination to the petitioner.

29. The petition filed ought to have laid before this court evidence in answer to the following two stage analysis: (i) Firstly, does the differentiation amount to "discrimination" if it is on a specified ground, then discrimination will have been established. If it is not on a specific ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristic which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner (ii) If the differentiation amounts to discrimination does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of the

enquiry, the differentiation is found not to be unfair, then their will be a violation of Article 27 (1) & (4) of the constitution. If the discrimination is found to be unfair then a determination will have to be made as to whether the sentence of fifteen years can be justified under the limitation clause in Article 24 (1) of the *Constitution*.

30. Basically this means the petitioner has to present cogent evidence that the impugned sentence imposed by the trial court discriminates between him and other categories of convicts. This is a threshold test which has not been established by the petitioner in his affidavit and submissions by both counsels who attempted to apply the foundation of conception of dignity. A theme that runs throughout the petition is how best to understand constitutional view of dignity and equality before the law.

Whether the court should interfere with the petitioners' sentence

31. This court is clothed with jurisdiction under article 165(3)(b) of the *Constitution* which provides as follows;

    (3) Subject to clause (5), the High Court shall have—

        (a) unlimited original jurisdiction in criminal and civil matters;

        (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

32. Further, article 50(2)(p) as read with 50(2)(q) of the *Constitution* provides this court with jurisdiction to review a sentence as follows;

    (2) Every accused person has the right to a fair trial, which includes the right—

        (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

        (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

33. The offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* provides a sentence of 15 years as a mandatory minimum sentence. At the time of the appeal, the petitioner relied on the decision of Muruatetu which on being considered by the judge, found no merit in interfering with the sentence. There is no quarrel with the statement by the judge on affirming the verdict on sentence by the trial court. Fortunately, the emerging jurisprudence emphasises that mandatory sentences are considered unconstitutional by their very nature depriving trial courts the discretion to consider other factors that might influence a departure from the minimum sentence. A sample case reference herein appropriately restate the law on this predominant subject of our time in transforming the criminal justice system from the old adage to the new strategic legal direction. consequently, the petitioner has once again been provided with an opportunity to seek resentencing. In *Maingi & 5 others v Director of Public Prosecutions & another* Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) where G.V Odunga J (as he then was) stated as follows;

> To the extent that the Sexual Offences Act prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the Constitution. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine)

34. The Court of Appeal in Criminal Appeal no. 84 of 2015 – *Joshua Gichuki Mwangi v Republic* (2022) eKLR held that;

> We acknowledge the power of the Legislature to enact laws as enshrined in the Constitution. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.
>
> This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the Constitution. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of the Constitution to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Constitution.

35. Overall the purpose of sentencing is stated as being to punish the offenders to the offences which they have been convicted. When the crime is very serious, the aim of assisting the offender to lead a crime free life can barely inform the court's sentence for that function remains the responsibility of the Department of correctional services. The object of the sentencing is not to satisfy the public opinion but to serve the public interest. As noted earlier, there is no new compelling evidence that the sentence imposed was not appropriate save for the exceptional circumstances relating to the application of section 333(2) of the *CPC* on giving credit to the convict as an integrated package of the period spent in a pre-trial remand. It seems unlikely from the evidence adduced that the petitioner's sentence is by all means punitive, harsh or excessive to bring it within the jurisdiction of Article 50 (6) (a) & (b) of the Constitution. The classic statement even to a resentencing court is whether the judgement complained of namely the sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which a resentencing court considers the impugned sentence must bear in mind that the exercise of discretion to review it should be determined and governed by established principles. It must appear in the resentencing process that some error has been met in exercising the discretion and in this case they were extraneous and irrelevant matters which plainly rendered the sentence unjust. Error is depended upon a range of factors to be established by the applicant/ petitioner in the proceedings.

36. From the facts of the case it is discernible that the petitioner and the complainant were in a relationship which had began when she was in class 8. In her testimony, she had accepted him as her boyfriend at that point in time. At the time of the offence the complainant was 16 years old and the accused was 23 years old meaning that their relationship, which began in 2014, had began when the accused was 21 years old and the complainant was 14 years old. The complainant testified that she was agreeable to the sexual intercourse and that they regularly had unprotected sex which culminated in a pregnancy. When the child was born, a DNA test was conducted on the child and the petitioner confirming that he was indeed the father. The petitioner testified that as far as he was aware, the complainant was an adult and that he did not know she was a school girl.

37. The issue of relationships between a minor and an adult has arisen several times in our courts. There is no substantial legislation that envisions such situations and as such, despite the reality of the existence

of such relationships, many an accused person has found themselves behind bars for the offence. In the present case, it is clear that there existed a relationship between the complainant and the petitioner and as a result, there is now a child whose father has been imprisoned as a result of his conception. We cannot turn a blind eye to the reality of the situation on the ground, more so in rural areas and in the African setting. In the rural African setting, it is not unusual for relationships between minors or between a minor and an adult to occur. Some of these relationships evolve into sexual ones and some even end up in marriage at a young age. This creates a scenario where there can be a miscarriage of justice as the law prohibits sexual relationships where minors are involved as a minor cannot consent to sex.

38. In *Martin Charo v Republic* [2016] eKLR the court pronounced itself on a similar situation as follows;

> It is important to distinguish between law and morals. It is the law that a child below the age of 18 years cannot consent to sex. Section 8 (5) qualifies the provisions of Section 8 (1) to 8 (4) which penalizes defilement. It can easily be concluded that it is immoral for one to have sex with a child under the age of 18 years. However, where the same child under 18 years who is protected by the law opts to go into men's houses for sex and then goes home, why should the court conclude that such a person was defiled. In my view that cannot be defilement. The complainant normally does not complain but is made to be the complainant because she is under 18 years. My view is that such a behaviour is that of an adult and not of a child. Children are not meant to enjoy sexual intercourse. Whenever they do, then that becomes the behaviour of an adult. Although the public will frown upon an adult who engages in sex with such a child, we should not forget that circumstances have changed. Young children engage in sex at very young age. This is not out of defilement. Conviction of a defiler should be based on actual circumstances and proof that the complainant was indeed defiled. This is more so when one considers the lengthy sentences imposed by the law for such an offence. It is unfair to send someone to 20 years imprisonment yet the complainant was enjoying the relationship.

39. The answer to this petition presumably is set on three strands of meaning of dignity:

(i) bearing the idea of dignity as inherent value and the idea of dignity as behaviour character, or bearing that is dignified focusing on the outcome of this relationship.

(ii) The idea of dignity that of status that the petitioner through this illicit sex Act then a human being was born whom requires to assert intrinsic status as the biological father

(iii) The idea of dignity which bears towards other of indebtedness and to keep them secure in everything yet the dignified person on the other hand is somebody who shows dignity in character or bearing with the ability to resist natural impulses. Let me call it respect observance to figure out within the comprehension of dignity whether it is a fine decision to engage in premarital sex likely to endanger the human rights of others. Just as I respect the speed limit by driving below a certain speed respect for other people's right more so the vulnerable class of the female gender below 18 years of age. Being persuaded by the petitioner, that the sentence be diverted to a non-custodial sentence or to perfectly release him from custody would be in all dimensions of the law on the philosophy of sentencing to open a Pandora's box to open some set of new basic rules that it is morally correct to engage in a love affair with a minor and if it does yield conception and birth of a baby, the specific bundle of human rights defined as fundamental in the constitution will accrue in such particular local circumstances.

40. Upon consideration of the petition, the affidavits in support of the same and the submissions of the parties, I find that the petition in so far as Section 333(3) is meritorious which states:

> " Subject to the provisions of section 38 of the *Penal Code* (Cap 63), 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 into account of the period spent in custody."

41. It is in the light of this I affirm the sentence of 15 years imprisonment with a commencement date from the date of arraignment for plea before the Kapsabet Magistrates's Court in CR. Case no 1771 of 2017. In the premises the committal warrants to prison be duly amended in consonant with Section 333(2) in the criminal procedure code.

Orders accordingly. Rights of an Appeal is explained.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 8TH DAY OF AUGUST 2023

..

R. NYAKUNDI

JUDGE