IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, GATEMBU, MURGOR JJ,A)

CRIMINAL APPEAL NO. 207 OF 2013

BETWEEN

PAUL CHEGE WANYOIKE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret (F. Ochieng, J.)

dated 14th November 2013

in

H.C.CR.A. NO. 87 OF 2011)

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JUDGMENT OF THE COURT

The appellant, **Paul Chege Wanyoike**, was charged in the Principal Magistrates' Court at Kapsabet with the offence of defilement contrary to ***section 8 (1)*** as read with ***section 8(3) the Sexual Offences Act No. 3 of 2006*** the particulars of which were that on 4th September 2011, at Baraton Centre in Nandi County, the appellant did cause his penis to penetrate the vagina of the complainant, ***DJH, PW1*** a girl aged 14 years.

He also faced an alternative charge of indecent act contrary to ***section 11(1)*** of the ***Sexual Offences Act,*** the particulars of which were that on the same day and place he intentionally and unlawfully caused his penis to come into contact with the thighs of the complainant, a girl aged 14 years namely, ***DJH.***

The appellant denied the charges, and in his defence claimed to have been in Kakamega. It was also his testimony that a grudge existed between him and the complainant's father over a sewing machine.

For lack of evidence, the trial magistrate acquitted him of the first count of defilement, but convicted him on the alternative count of an indecent act. Dissatisfied with that decision, he appealed to the High Court that upheld the trial court's decision.

The appellant's appeal to this Court is on the grounds of appeal and submissions that were presented in

Court. In summary, the appellant complained that the sentence of 20 years imposed by the trial court was illegal; that the charge sheet was defective as that the evidence tendered by the witnesses was at variance with the charge sheet; and that in sentencing the appellant the trial court did not take into account the 9 months period that the appellant had been held in custody.

Ms. R.N. Karanja, learned Prosecution Counsel for the State opposed the appeal and submitted that the appellant was properly identified as he was known to the complainant as she had worked in his house for a month. The appellant defiled her whilst she was on her way home from his house, where she worked. The evidence was corroborated by ***Sharon Cherop PW2*** and ***Nancy Chepchirchir PW3***, who both confirmed the identity of the appellant as the lighting was sufficient. ***Silas Ruto PW 4*** the clinical officer examined the complainant and found that though the hymen was broken; it was not a fresh tear. It was also submitted that the complainant was a child as the immunization card produced in court specified her age as 14 years. Finally, with respected to the alleged grudge with the complainant's father, counsel submitted that was found by the courts below to be farfetched.

We have considered the submissions and find that the issues for our consideration are whether the charge was defective and at variance with the evidence; whether the sentence of 20 years was legal, and whether the period served in custody ought to have been taken into account in computing the period of sentence.

This is a second appeal and our duty at this instance is to determine only matters of law. As this Court stated in ***David Njoroge vs Republic [2011] eKLR,*** in a second appeal;

> ***"Only matters of law fall for consideration as the Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principals in making the findings."***

We will begin by considering whether the charge was defective, and at variance with the complainant's evidence. The appellant argued that the alternative count of indecent act in the charge sheet referred to the contact of his penis with the complainant's thighs yet, there was no evidence to show that any contact was made with her thighs, and as a consequence, the offence was not proved.

When the trial court considered the evidence, it found that the offence of defilement was not proved, as there was no evidence of penetration. But based on the complainant's evidence that the appellant had tried to defile her, the court convicted the appellant of the offence of an indecent act.

In the same vein, the High Court had this to say;

> ***"The penis of the appellant definitely made contact with the thighs of the complainant, when the appellant was trying to insert his penis into the vagina of the complainant."***

The charge sheet read, that the appellant ***"did intentionally and unlawfully cause his penis to come into contact with the thighs of*** [DJh]***…"***. The question that then arises is whether the reference solely to the complainant's thighs conformed to the requirements of the Sexual Offences Act. ***Section 11 (1)*** of the Act, stipulates that an indecent act with a child is an offence. According to ***section 2*** of the ***Sexual Offences Act***, an indecent act in law means an unlawful intentional act which causes contact between any part of the body of a person, with the genital organs, breasts or buttocks of another. Therefore, an indecent act, as of necessity, involves contact with the genital organs, breasts or buttocks of either the victim or the offender.

Having said that, in the instant case it would seem that the word '*vagina*' or '*genital organ*' of the victim, Djh was erroneously omitted from the charge sheet and so to bring the offence within the remit of the Act, reference to the genital organs also required to be made.

In determining whether the failure to include the victim's genital organs in the charge sheet rendered it defective, ***section 134*** of the ***Criminal Procedure Code,*** which deals with the framing of charges**,** states

that**,**

> ***"Every charge …shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*** **[**Emphasis ours**].**

In the instant case, the charge sheet was proper since the offence of an indecent act contrary to ***section 11 (1)*** of the ***Sexual Offences Act*** was properly specified, and the particulars sufficiently communicated the nature of the offence which was that the appellant engaged in the indecent act of touching the complainant's thighs, save that it should also have specified that contact was made with her vagina or genital organs as well. Nonetheless, such omission was curable under the ***section 382*** of the ***Criminal Procedure Code***, and we consider that its inclusion would not in any way prejudice or occasion a miscarriage of justice upon the appellant.

This being the position, was the offence proved? In this regard, the ingredients to be proved are whether the act was indecent, intentional and unlawful, having regard to the time, place and the circumstances.

According to DJh the act took place at 8.00pm whilst she was returning home from work. The appellant came up behind her, dragged her into a nearby bathroom, and locked the door. He then removed his trousers and her underpants, and tried to insert his penis into her vagina.

DJH testified;

> ***"The person who covered my mouth pushed me to the bathroom and tried to insert his penis in my vagina is before the court".***

When PW 2 and PW 3 entered the bathroom they could hear someone crying. PW3 stated that she heard a young girl say, **"Wanyoike leave me you are hurting me".** The appellant emerged soon after from the locked bathroom while the two witnesses were present with his trousers unzipped.DJH followed shortly thereafter. Both persons were known to the two witnesses.

From this evidence we are satisfied that the circumstances in which the appellant and DJH were found pointed to the occurrence of an indecent act. In addition, DJH steadfastly maintained that the appellant tried to penetrate her vagina with his penis.

When the evidence is considered in its totality, like the courts below, we find that the appellant subjected the complainant to an indecent act of touching her vagina with his penis whilst attempting to defile her, and in so doing, contact would also have been made with her thighs being that part of the human anatomy located closest to the genital organs. We have said enough to show that the offence was proved beyond doubt and we find it unnecessary to interfere with the concurrent findings of the courts below. This ground therefore fails.

To address, the complaint that the sentence of 20 years was unlawful, we set out the ***section 11 (1)*** of the Act which provides;

> ***"A person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to a term of not less than ten years."***

The connotation here is that conviction for the offence of an indecent act calls for a sentence of ten years or more. The appellant was sentenced to twenty years imprisonment. That being a period of more than ten years, we find the sentence to be lawful and as provided by the Act. We, however, agree with the appellant that the period of 9 months that he had been in custody should have been taken into account. Save for that the ground on the sentence imposed lacks merit, and must therefore fail.

In sum, we find that the appellant's appeal is without merit, and we order that the same be and is hereby dismissed save that the sentence of twenty years imprisonment be reduced by the period equivalent to the

9 months already served in custody.

It is so ordered.

DATED and delivered at Eldoret this 29th day of April, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR