**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT BUNGOMA**

**Criminal Appeal 84 of 2008**

***(Appeal arising from BGM CM CR. NO.1267 of 2004)***

**CALEB OWARE MAENDE :::::::::::::::::::: APPELLANT**

**~VRS~**

**REPUBLIC :::::::::::::::::::: RESPONDENT**

**JUDGMENT**

The Appellant Caleb Oware Maende was convicted by Bungoma Principal Magistrate of the offence of indecent assault contrary to section 144 (1) of the Penal Code and sentenced to serve ten (10) years in jail. This appeal was lodged against conviction and sentence.

Mr. Kakoi of Khakula & Co. Advocates argued the grounds of appeal. Precisely, he submitted that the conviction was founded on non-existent law since section 144 (1) of the Penal Code had been repealed. Secondly, that there was no sufficient evidence to sustain a conviction. Thirdly, that the sentence was illegal and excessive with no basis in law. Although the issue of charge did not feature in the petition of appeal, Mr. Kakoi submitted that the word ***"unlawfully"*** was omitted which rendered the charge defective.

The appeal was opposed by the state as regards conviction on grounds that the case was proved as required and that the charge was in order. Mrs. Leting conceded to the ground that the ten (10) year imprisonment sentence was illegal.

On perusal of the charge, it is evident that the main charge was defective in that the word ***"unlawfully"*** was not included in order to disclose an offence under section 145 (1) of the Penal Code. The provisions of the law condemn unlawful carnal knowledge of a girl under the age of fourteen (14) years. The proviso to the section provides for two defences either of which the accused may elect to use. The omission of the word ***"unlawful"*** results in a defective charge.

However at the end of the trial the Appellant was convicted with indecent assault under section 144 (1) of the Penal Code which charge was correctly framed. There was no miscarriage of justice caused by the main charge being

defective. The Appellant however, argues that section 144 (1) was non-existent since it was repealed when the Sexual Offences Act came into force. The prosecution initially charged the Appellant with the offence of defilement. On 2/7/2007, the charge was substituted with the same offence of defilement as the main charge and that of indecent assault was added as an alternative charge. The dates of the two offences were indicated as 2/5/2004. This was before the Sexual Offences Act came into force. Any offence committed prior to July 2006 when the new Act came into force fell under the provisions of the Penal Code. The sections were repealed only to the extent of offences committed after the effective date of operation of the new law. The substitution of the charge with offences under the Penal Code was proper and in compliance with the relevant transitional provisions and the law relating to amendment of charges.

It was argued that the evidence of the complainant was not corroborated. The complainant was a minor who gave an unsworn statement. She narrated how the Appellant lured her to the scene of crime where he attempted to strangle her before committing the offence. PW1 saw the Appellant carrying the child with him heading to an unknown destination. About three hours later, the child was seen having been sexually assaulted and injured. PW3 the mother of the complainant found her at home in the sorry state after the commission of the offence. PW3 testified on the bruises the girl had sustained on her private parts and neck. The evidence of these two witnesses corroborated that of the minor. The Clinical Officer, PW4 confirmed that the girl had bruises on the neck and in her private parts. This was evidence of forced but unsuccessful penetration. The court correctly found that PW2's evidence was well corroborated. It stopped short of convicting the Appellant of defilement for want of further medical evidence. This means that the court found that there was no penetration thus dislodging the main charge.

The magistrate considered the alibi defence of the Appellant and rejected it in view of the overwhelming evidence of the prosecution. The Appellant had been identified by the complainant and other witnesses who knew him well. PW1 said she had known the Appellant for about twenty (20) years. The incident took place during the day and the conditions were conducive for positive identification. Although the complainant was a child of tender years, she gave comprehensive evidence on what the Appellant did to her.

The issue of failure to assess age of the complainant was raised by the Appellant. The Appellant was convicted of the offence of indecent assault contrary to section 144 (1) of the Penal Code which reads:

> ***"144 (1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment for five (5) years with had labour."***

The section does not call for age assessment since it is not an ingredient of the offence of indecent assault. The victims are named as ***"woman or girl"*** and the age is therefore immaterial.

I was referred to a recent decision of this court ***SAMUEL LIMARENG SHAKAMER -VRS- R. BUNGOMA HIGH COURT CR. APPEAL NO.141 of 2009*** where it was held in the appeal against conviction of an offence of rape contrary to section 140 of the Penal Code that the age of the complainant ought to have been established. The decision is

not relevant in this appeal since this court is not dealing with the offence of rape.

The failure to call the Investigating Officer is not fatal to the prosecution's case and it has been so held in several decisions of the Court of Appeal. The decision of ***MWANGI –VRS- REPUBLIC COURT OF APPEAL CR. APP. NO.100 of 1984 K.L.R*** to which I was referred to has been overruled by another Court of Appeal recent decision. This was in the case of **COLUMBUS DINDI OKOTH _VRS- REPUBLIC, COURT OF APPEAL NAIROBI CRIMINAL APPEAL NO.287 OF 2005** where it was held that it is not always the case that a witness who has not been called to testify would have given adverse evidence. In the appeal before me, the evidence of the witnesses who testified left no doubt that the Appellant committed the offence.

I find no merit in the grounds against conviction and I uphold it accordingly. On the issue of sentence, I agree with the Appellant and the state that it was illegal. Section 144 provides for five (5) years imprisonment with hard labour. It is noted that the court omitted to impose hard labour herein. The accused was a first offender but the offence was of very grave nature. The child of tender age was seriously assaulted in the course of committing the offence that she was admitted in hospital for four (4) days. The trauma that the child suffered cannot be underestimated. I hereby set aside the ten (10) year imprisonment sentence and substitute it with five (5) years imprisonment with hard labour to run from 18/9/2008 when he was convicted. The appeal succeeds only to that extent.

**F. N. MUCHEMI**
**JUDGE**

Judgment dated and delivered on the 17th day of June, 2010 in the presence of the Appellant and the State Counsel Mrs. Leting.

**F. N. MUCHEMI**
**JUDGE**