DICKSON WERE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Butali in Criminal Case No. 525of 2000

[S. N. ABUYA, SRM])

JUDGMENT

The appellant, **D.W** was charged and convicted of the offence of defilement of a girl contrary to Section 145 (1) of the Penal Code.

The particulars of the offence are that on unknown date of the month of April 2006 at Ichina village, in North Kabras District within Western Province, had a carnal knowledge of LSM a girl under the age of fourteen years.

The appellant pleaded not guilty before the lower court. After a full trial, the appellant was found guilty, convicted and sentenced to three years probation period.

The appellant was aggrieved by the conviction and sentence and he appealed to this court.

The appellant raised the following grounds of appeal:-

"1. The learned trial magistrate erred in law and fact in finding the accused guilty as charged.

2. The learned trial magistrate erred in law and fact in convicting the appellant on evidence which was contradictory.

3. The learned trial magistrate erred in law and fact in convicting the appellant on evidence that was not supported by the charges facing the appellant.

4. The learned trial magistrate erred in law and fact in convicting the appellant on a defective charge sheet.

5. The learned trial magistrate erred in law and fact in disregarding the defence of the appellant when it was clear and outright.

6. The learned trial magistrate erred in law and fact in disregarding the documentary evidence by the appellant.

7. The learned trial magistrate erred in law and fact in shifting the burden of proof to the appellant.

8. The learned trial magistrate erred in law and fact in convicting the appellant guilty without giving reasons for her findings."

The prosecution case was that the complainant, **LSM**, who was then a 14 year old primary school girl became lovers with the appellant who was a neighbour and also a primary school boy. According to the complainant, the two used to make love twice a week. In January, 2008 the complainant discovered that she ws pregnant. The complainant informed her mother about the matter. A report was made to the Assistant Chief. The appellant denied any responsibility. The appellant was arrested and subsequently charged with the present offence.

The appellant in his defence denied the charge. According to the appellant, one Peter and one Collins who were workers at the complainant's home were the culprits but the complainant was beaten by her father and named him as the one responsible for the pregnancy.

This being a first appellate court, I have considered and re-evaluated the evidence. I have also considered the submissions made by M/S Muleshe for the appellant. Mr. Limo, the State Counsel did not make any submissions.

It is clear from the record that the complainant was 14 years at the material time. Her birth certificate (Exh. 2) shows that she ws born on 1.4.92. It is also not in dispute that the complainant was defiled. The birth notification for the complainant's son shows that the child was born on 17.8.2008 when the complainant was about 16 years old.

The question is who defiled the complainant? According to the complainant she was lovers with the appellant. According to the appellant the people responsible for the pregnancy were either Peter or Collins who were workers at the complainant's home. It is noteworthy that the complainant in her evidence during cross-examination stated that her father had beaten her in April 2007 after he caught her and Peter making love. The complainant's evidence is therefore inconsistent because in the same breath she denied having made love with either Peter or Collins. Although a child was born, no DNA tests were carried out. According to the Investigating Officer, PW2, **P.C. ALI MASOUD** the fee for DNA test was prohibitive.

The evidence on record therefore boils down to the word of the complainant and that of the appellant. What comes out clearly from the record is that both the complainant and the appellant were both primary school children who were under 14 years of age. The question that begs for answers is who defiled who in the circumstances? Assuming the two had sex, it was discriminatory for the prosecution to charge the appellant who was also a child.

The conviction was not based on sound evidence. The conviction is quashed and the sentence set aside. The appellant is at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 11th day of July, 2012

B. THURANIRA JADEN
JUDGE