REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 264 of 2008

DUNCAN KIBANYA KINYUA…….....…….....…APPELLANT

Versus

REPUBLIC ……..…….……..…..RESPONDENT

(Appeal arising from judgment of Senior Resident Magistrate's

Court at Karatina criminal Case No.106 of 2008)

JUDGMENT

The appellant Duncan Kibanya Kinyua was charged with the offence of rape contrary to section 3(1) (a) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on 27th February 2008 at R[...] Village in Nyeri District within Central province being a male person unlawfully and intentionally committed an act which caused penetration into the vagina of M W K without her consent.

He faced an alternative charge of indecent assault contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on 27th December 2008 at R[...] Village in Nyeri District within Central province unlawfully and indecently assaulted M W K by touching her private parts.

He was tried convicted and sentenced to serve 20 years imprisonment and being aggrieved by the same lodged this appeal.

When this appeal came up for hearing the appellant who was not represented filed an amended grounds of appeal together with his written submissions which he relied upon.

The appeal was opposed by the state through Miss Maundu .

For the purposes of this judgment the appellant's grounds of appeal can be summarized as follows:

0. ***He was convicted on the evidence of a single identify witness.***

1. ***Convicted on unproved medical evidence***
2. ***Prosecution witnesses did not support the prosecution case.***
3. ***His defence was rejected without giving reasons***.

I have looked at the proceedings before the trial court the submissions by the appellant and the state and note that the main issue for determination in this appeal is whether the evidence tendered by the prosecution supported the prosecution's case against the appellant and whether the appellant was properly recognized and identified as the person who had raped the complainant herein.

I have noted that the complainant under cross examination stated that the assailant who defiled her was tall. There was no evidence on record whether the appellant was tall.

P.W.2 in the evidence stated that she heard scream from the house of P.W.1 and that she rushed there but there was a fence so she peeped through the fence and saw the appellant sleeping on P.W.1 that his trouser was dropped upto his knees and his underwear was at the thighs. What is not clear to my mind was whether the alleged attack was in the house or in the open and whether the said witness was able to see what was happening through the fence.

I have also noted that whereas P.W.1 stated that she was unable to enter the compound of the complainant because of the fence she was able to gain entry thereafter in the presence of C. This to my mind raises a doubt on the testimony of this witnesses.

I have also noted that when the appellant was asked by P.W.4 if he had raped P.W.1 he denied the same.

I have also noted that the medical evidence tendered did not link the appellant with the commission of the offence and therefore this benefit of doubt should have been given to the appellant.

I find that the prosecution case against the appellant was not proved beyond reasonable doubt and this benefit should go to the appellant.

On these basis I allow the appeal herein and quash the conviction and set aside the sentence herein. I therefore order that the appellant be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 15th day of June 2012.

J. WAKIAGA
JUDGE