



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**Criminal Appeal 124 of 2007**  
**ANDALINE WANJIRA GATHUYA.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The Appellant herein has appealed against the conviction and sentence of the **Resident Magistrate Gichugu in Criminal Case No. 562 of 2006**. He was tried and convicted for the offence of attempted Rape though originally charged with the offence of rape contrary to Section 140 of the Penal Code. According to the learned trial magistrate, the appellant was convicted under Section 388 of the Criminal Procedure Code. Indeed one of the grounds of Appeal is that the appellant was convicted under a non existent provision of the law. Learned state counsel conceded this appeal and confirmed that the Appellant was convicted under Section 388 of the Criminal Procedure Code which has no relevance whatsoever in the rape charge. The Section deals with public inquests. My assumption is that the magistrate intended to invoke the provisions of Section 388(1) of the penal code. The magistrate is equipped with a Greybook which is the basic tool for any Judicial officer. He should have made use of the same and counterchecked the provisions he wanted to rely on before convicting. That is an exercise that would have taken minimal time and effort. The error is not one that can be cured under Section 382 of the C.P.C. I must therefore allow this Appeal but on that ground alone. On the issue of dates, I note that only the complainant said the offence happened on 16.04.06. The other witnesses were unanimous that it was on 26<sup>th</sup> April. Even the P3 form on page 1 clearly shows that the offence was reported to the police on 26.04.06. There was a similar slip in PW5's evidence where he said that he completed the P3 form on 25.04.06 yet the P3 clearly shows that he completed the same on 28<sup>th</sup> of April 2006. It appears to me that the learned trial magistrate was not quite attentive when taking the proceedings otherwise he ought to have noticed the discrepancies and confirmed the dates with the witnesses. The concession of this Appeal by the state is merited. I allow this Appeal and quash the conviction and set aside the sentence of 3 years imprisonment imposed by the learned trial magistrate. The Appellant will be set at liberty unless he is otherwise lawfully held.

**W. KARANJA**  
**JUDGE**

Delivered, dated and signed at Embu this 15<sup>th</sup> day of July 2010.

**In presence of:- Appellant in person and Ms. Matiru for the  
state.**