

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Criminal Appeal 94 of 2003

MARCLUS KINYUA MBITI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

This is an appeal against conviction on an offence of rape. The charge sheet is defective the word “*unlawful*” were not part of the particulars of the charge. Also the defence of Alibi was not considered and the evidence of complainant was not corroborated. The evidence of the examining clinical officer is not strong he only noted a torn pants and there was nothing in her genitalia. Report in P3 form is not conclusive that the complaint was raped at all.

Also the comment of Trial Magistrate on the giving of unsworn statement of appellant “*diminished the credibility and reliability of his evidence*” is prejudicial to the appellant. It is an accused right to give unsworn statement or even to keep silent but no adverse comments should be made by court on his doing so.

Also the Alibi which could have been true was rejected. The defence of alibi raises the question whether the same could be or not be believed. It is not for the accused to prove his alibi. There is no opposition to this appeal the same being conceded by state.

I allow the same and quash conviction and set aside sentence. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated this 1st day of March 2006.

J. N. KHAMINWA

JUDGE