



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**CRIMINAL REVISION NO. 55 OF 2017**

**BETWEEN**

**J A O.....APPLICANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being revision of the order of Hon.B. Kasavuli, RM dated 23<sup>rd</sup> November 2017*

*in Criminal Case No. 21 of 2017 (SOA) at the Resident Magistrates Court at Winam)*

**RULING**

1. This ruling is made under the supervisory jurisdiction of the High Court in criminal cases provided in **sections 362 to 366** of the *Criminal Procedure Code*. **Section 362** specifically provides that:

*362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.*

2. The applicant, **J A O**, moved this court through a letter by her husband, **S A M**, seeking to revise the order of the learned magistrate dated **23<sup>rd</sup> November 2017** where he ordered that:

***J A O and the accused herein Solomon Ooro Omollo to be remanded at Kondele Police Station for the CID to interrogate them with a view to finding out ----- the whereabouts of the minor one CAM.***

3. The case arises for a charge preferred against **SOLOMON OOKO OMOLLO** (“the accused”) for the offence of defilement. It was alleged that he defiled CAM, a child aged 16 years, on 1<sup>st</sup> September 2017 at [particulars withheld] in Kisumu County contrary to **section 8(1) and (3)** of the *Sexual Offences Act, 2006*.

4. The accused and **J A O**, who is the child’s guardian (“the guardian”), were remanded in police custody after the prosecutor informed the court that CAM had disappeared and that she suspected that the accused and her guardian were involved. The prosecutor requested the court to remand the accused and guardian in order to aid the police in investigations to locate the child.

5. Both the guardian and accused told the court that they did not know where she is. The guardian explained that the child had left home when the accused was released on bond and she came home briefly and disappeared again.

6. The detention of any person by the Court is limitation of the right to liberty guaranteed under the Constitution. In limiting such liberty, the court must take a course that ensures that the means so adopted to achieve the purpose of the limitation is least intrusive. In this case, purpose of the detention was on an allegation that the accused and guardian were involved in disappearance of the child. The statement made by the prosecutor was not given on oath and could not provide a reasonable basis for the court to conclude that the accused and guardian had been colluding to hide the child.

7. While the court was rightly concerned about the disappearance of the child and the prospect of collusion, the detention for one week for the purpose of interrogation was way out of proportion. As interrogation can be done on one day, it was not necessary, in these circumstances, to detain the accused and guardian for a week particularly where no basis had been established. In any case, if there was sufficient reason for the police to believe that the accused and guardian were involved in “disappearing” the child, they would have been charged with an array of offences available under our laws. The object of interrogation can be achieved by less intrusive orders directing the accused and guardian to aid in investigation.

8. For reasons I have stated, I revise and set aside the order of **23<sup>rd</sup> November 2017**. The accused, **SOLOMON OORO OMOLLO** and the guardian, **J A O**, are ordered released forthwith on condition that they shall attend Kondele Police Station on a date directed by the Investigating Officer pending mention of the matter on 30<sup>th</sup> November 2017 before the trial court.

**DATED and DELIVERED at KISUMU this 24<sup>th</sup> day of November 2017.**

**D.S. MAJANJA**

**JUDGE**