



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL REVISION NO. 11 OF 2013**

BARAKI LEAKY OYOO.....APPLICANT

**VERSUS**

REPUBLIC.....RESPONDENT

**REVISION**

This is a sad matter, the accused is charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006 (*No. 3 of 2006*).

The prosecution case alleges that the accused on the night of 9.09.2011 at Particulars with held in Naivasha Municipality within Nakuru County intentionally and unlawfully caused penetration of his genital organ, namely his penis to the genital organ, namely vagina, of E L W, a girl aged 14 years old.

So far three witnesses have testified, the 3rd witness having testified on 26/03/2013 when the hearing was adjourned to 28/05/2013. The accused dutifully attended court on that date, and the only witness present had already testified, and the case was adjourned for hearing on 18th June 2013.

Though the accused was present in court, the prosecution informed the trial court that the victim, E L W, was missing and accused the mother, E K K, of playing mischief in conjunction with the accused; and ordered the detention of the mother till the 21.06.2013 a period of 4 days, and also ordered the attendance of the father, and C in court on 21.06.2013.

On 21.06.2013, C, the victim's sister, attended court and informed the court that her sister was in Form 2, the record does not however show any inquiry as to what school, or where the victim was schooling, and now in Form 2. Instead the court observed that the child C had been coached, and that both the accused and the mother of the victim knew where the victim was, and did not want to avail her to court and thus defeated the cause of justice. The court directed the detention of both the accused and the mother of the victim for seven days (to 28/06/2013).

When the accused and the mother of the victim were produced in court on 28/06/2013 the trial court noted that both the accused and the mother were not cooperating with the court (*or the Prosecution*) to produce the victim. The court released the two, and fixed the matter for mention on 26/07/2013 and directed the mother of the victim and the accused to avail the victim on that date.

By a letter dated 24.06.2013, the firm of Macharia Kiruki & Co. Advocates wrote to this court and complained of the unusual and unlawful orders made by the trial court to detain the mother of the accused, and to cancel the bond of the accused without due process.

I agree with Counsel for the mother, and say that the procedure adopted by the trial court is

unusual. The zeal is understandable to ensure that ends of justice for the victim are not defeated. The procedure adopted is however contrary to law, courts do not order the detention of innocent people arbitrarily. There has to be due process.

In the cases of offences under the Sexual Offences Act, an inquiry could have been ordered under Section 37 thereof to ascertain whether either the accused or the mother, or both of them or any other member of the family was interfering with or intimidating the victim as a potential and key witness to the case.

Inquiry could also have been ordered under the Children Act, (*Cap. 141, Laws of Kenya*), as to parental responsibility and consequences thereof. The detention of the accused's mother was unlawful, and should never be done again without due process, to disclose the commission of an offence by her, subverting the cause of justice.

Similarly there is elaborate procedure under Section 123 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*) for cancellation of the accused's bond. The record discloses that the accused did not breach the terms of bond. The cancellation of the accused, by ordering his detention and subsequent release was unlawful. Those orders are hereby quashed.

I direct that the accused's bond terms be restored on the same terms as before his detention, and appropriate investigations be carried out as to the whereabouts of the victim. The Office of the County Director of the Children Department be involved, as they have the necessary expertise to locate and assist the child victim.

This file be returned forthwith to the Chief Magistrate with this Revision.

It is so ordered.

**Dated and signed at Nakuru this 15th day of August, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**