

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 61 OF 2019

ANTONY MJAKA KADU.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT, MILIMANI.....2ND RESPONDENT

RULING

The Applicant, Antony Mjaka Kadu was arrested by the Anti-Terrorism Police Unit (ATPU), arraigned in court on 31st January 2019 with a view to taking plea on charges that were to be preferred against him on terrorism related charges. The plea was however not taken. Instead, the police filed an application to have the Applicant detained for a period of thirty (30) days to enable them complete investigations. The Application was granted at the Chief Magistrate's Court. The Applicant was aggrieved by this decision. He filed an application before this court under **Section 362** of the **Criminal Procedure Code** and the fair trial articles of **Constitution**. In essence, the Applicant contends that there was no basis for his continued detention if the police cannot bring criminal charges against him. He laments that the constitutionally sanctioned right that he is presumed innocent until proven guilty has been trampled by his continued detention by the police without any justifiable reason. In the circumstances therefore, he pleads with the police to either release or charge him. If he is charged, he will be able to invoke the constitutional provisions that relate to his release on bail pending trial.

The Application is opposed. Inspector Monica Githaiga of the Anti-Terrorism Police Unit swore a replying affidavit in opposition to the application. She deposed that the Applicant was a suspect in connection with the Dusit terror attack. The investigations were ongoing. She stated that there was need for the continued detention of the Applicant so that he can assist the police with investigations. In particular, he is to assist the police with investigations concerning the issuance of number plates that were on the vehicles used by the terror suspects. It is on this basis, that the investigator pleaded with the court to allow the Applicant to be detained for a period of thirty (30) days.

During the hearing of the application, this court heard oral rival submission made by Mr. Odegi for the Applicant and by Mr. Kadebe for the State. This court has carefully considered the said submission. It was evident from the submission that the police has so far not made a decision on whether or not to charge the Applicant, even after holding him in their custody for twenty-five (25) days. On 12th February 2019, Mr. Ondimu for the State requested the court to mention the matter on 20th February 2019. He undertook to inform the court on the way forward on that day. On this day, it was apparent that the police had not made a decision whether or not to charge the Applicant. The court indulged the police for a further two (2) days when the matter was mentioned on 21st and 22nd February 2019.

Again, no information was forthcoming regarding to the action the police intended to take.

This court ordered the application to proceed to hearing. Upon conclusion of the hearing, with a view to giving the police ample time to make a decision, the court directed that the matter be mentioned today on 25th February 2019. The police through Ms. Sigei requested the court to further detain the Applicant until the 28th February 2019. It was clear to this court that unless compelled, the police will continue to detain the Applicant without reason or justification. **Articles 49** and **50** of the **Constitution** guarantees the Applicant's rights as a detained person and as an accused, once he is brought to court to plead to charges preferred against him. In the present case, the Applicant has not been charged. This court has given the police more than sufficient opportunity to conclude its investigations. The court noted that no holding charge has been filed to court. This is an omission that puts the court in the dark in regard to the charges that the Applicant is or may likely to face.

This court agrees with the Applicant that his continued detention by the police is in contravention of his constitutional rights to liberty and freedom of movement as enshrined in **Articles 29** of the **Constitution**. In the premises therefore, the order issued by the trial court on 1st February 2019 directing that the Applicant be detained by the police for a period of thirty (30) days is hereby ordered set aside and substituted by an order of this court directing the police to either charge or release the Applicant by 10.00 a.m. on 26th February 2019. For the purpose of securing compliance with the orders of this court, the police are directed to produce the Applicant before this court at 9.00 a.m. on 26th February 2019. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE