

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO.41 OF 2017

DOUGLAS NYAKUNDI NYAKUNDI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Douglas Nyakundi Nyakundi made an application pursuant to the provisions of **Article 50(2)** of the **Constitution** seeking to have the criminal charges brought against him in **Nairobi Chief Magistrate's Court Criminal Case 1986 of 2016** terminated on the grounds that his constitutional rights were grossly violated. In particular, the Applicant states that his constitutional right to be brought to court within 24 hours of his arrest was infringed in that he was brought to court three days after his arrest. He further stated that his right to privacy and to communicate was infringed during the said detention. He further urged the court to take into consideration that at the time the police were investigating the case, he was not in his proper state of mind as he had allegedly been bewitched. In the premises therefore, he was of the view that on account of these gross violations of his constitutional rights, the criminal charges brought against him before the magistrate court should be terminated.

During the hearing of the application, this court heard oral rival submission made by the Applicant, who was acting in person and by Ms. Nyauncho for the State. The Applicant reiterated the contents of his application. He complained that he was arraigned in court three days after his arrest. He contended that this was in breach of his constitutional rights. While in police detention, he stated that his mobile phone was confiscated and therefore infringed his right to communicate while he was in custody. He stated that he was forced into signing a statement in which he allegedly incriminated himself. He explained that at the time of his arrest he was not in his proper state of mind as he had been drugged. He urged the court to terminate the charges brought against him, as in his view, the charges were fabricated.

Ms. Nyauncho for the State opposed the application. She submitted that the application was premature and an abuse of the due process of the court. The issues raised by the Applicant were issues which he could raise in his defence during trial. She stated that the court cannot terminate proceedings at this stage before the trial court has been given the opportunity to assess the evidence that will be adduced by prosecution witnesses. Learned counsel submitted that if the Applicant was aggrieved with the manner in which his statement was recorded, he was at liberty to challenge the same before the trial court. She urged the court to dismiss the application.

This court has carefully considered the issues raised in this application. It is the Applicant's contention that since his constitutional right as enshrined in **Article 49(1)(f)** of the **Constitution** was infringed, then the proceedings brought against him should be terminated. He further took issue with the manner in which the statement recorded from him by the police was taken. The Applicant argued that the statement was recorded while he was not in his proper state of mind. This was because, at the time, he had been drugged and was not in his normal cognitive senses. For these reasons, the Applicant urged the court to terminate the proceedings against him. The State is opposed to this application.

Upon evaluation of the facts of this case, this court formed the view that indeed it was premature for the Applicant to present this application before this court. I think it is now settled that where an accused person is taken to court beyond the constitutionally mandated period of 24 hours, such delay will not

result in automatic termination of criminal charges against such accused person but rather will form a basis upon which the accused may lodge a claim for compensation for unlawful detention. Further, the issues raised by the Applicant in this application are issues which will form the basis of his defence during trial before the magistrate's court. The Applicant is at liberty to challenge the production of the statement recorded from him by the police on account that the same was procured when he was not in his proper state of mind or when he was under the influence of drugs. He can also challenge the production of the statement if he contends, as he has stated in his affidavit, that the said statement may have been procured while he was under duress. He cannot use the allegation that the statement was unlawfully obtained from him as a basis for seeking to terminate the charges brought against him. The Applicant is at liberty to raise all these issues at the appropriate forum, which is the trial court.

For the above reasons, the application lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF JUNE 2017

L. KIMARU

JUDGE