1. RANDU NZAI RUWA

2. ROBERT CHARO TUKWATUKWA

3. NYAE NGAO..PETITIONERS

VERSUS

1. THE INTERNAL SECURITY MINISTER

2. THE ATTORNEY GENERAL..RESPONDENTS

Coram:

Mwera J.
Kasango J.
Tuiyott J.

Steve Kithi for Petitioners

Njoroge, Bitta for Respondents

JUDGMENT

1. The question raised by this petition is simply whether or not the action of the Government of Kenya in proscribing a group known as Mombasa Republican Council (MRC) vide Gazette Notice No. 12585 is unconstitutional. A substantial question that arises from this is whether the Kenyan nation, striving to be open and democratic, should accept the ban as reasonable and justifiable.

2. The three petitioners bring this action on behalf and on authority of members of a group of persons who have associated and branded themselves MRC. The respondents are named as the Internal Security Minister and the Attorney General.

3. This petition attracted some public attention and the court admitted the participation of Katiba Institute as *amicus curiae*. We admitted the Institute into the proceedings in the spirit of Article 22 (3) (e) of the Constitution as we were persuaded that due to their expertise and knowledge in constitutional matters, this petition would benefit from their participation.

The Petition

4. The originating motion of 24th November, 2010 has asked this court to declare that the issuing of the Gazette Notice wherein several groups and or private associations *inter alia*, the MRC were proscribed, contravenes the provisions of Articles 36, 37, 38, 40 and 47 of the Constitution 2010. The ban was made pursuant to section 22 of the Prevention of Organized Crime Act (Act No. 6 of 2010) (hereinafter POCA).

Those articles guarantee the freedom of association, the freedom of assembly and peaceful demonstration, fair administrative action, political rights and fair hearing.

5. Auxiliary to this, the applicants have asked this court to issue such writs and directions as it deems appropriate to:

· prohibit the Minister for Internal Security from interfering with the lawful activities carried out by the petitioners.

· enforce and or secure the proper administration of justice by the respondents having regard to all circumstances.

6. In the course of the proceedings, the petition mutated from these very clear issues raised into a much broader debate. This decision, perhaps to the disappointment to the parties, will only focus on the arguments relevant to the issues we were asked to settle.

Facts presented:

7. The evidence in support of the application was a short eight paragraph affidavit sworn by Randu Nzai Ruwa on 24th November, 2010. Mr. Ruwa is said to be the former secretary- general of MRC and authorized by the members of the group to represent them at the hearing.

8. We think it is important to recite in full the speaking part of Mr. Ruwa's testimony.

"2. That on or about the 18thday of October, 2010 the Internal Security Minister did issue a Gazette Notice Number 12585 wherein he purported to ban inter-alia Mombasa Republican Council, the Applicants' group herein amongst other groups, in the exercise of his powers conferred by section 22 of the Prevention of Organized Crimes act, 2010.

Annexed hereto, marked "RNR-3" is a copy of the Gazette Notice.

3. That we are a peace initiated group aimed at attaining our rights on matters of land, natural resource, economic & political freedom and advancement of the indigenous coastal people.

4. That we have been holding peaceful public meetings in particular we had a meeting on 26th August, 2010 at the Tononoka Social Hall, on 17th September, 2010 at the CDF Hall at Likoni on 10th October, 2010 at the Vikwatani P.E.T. Church, Mombasa and on 31st October, 2010 at Amukeni Nursery School.

Annexed hereto, marked "RNR-4", copies of receipts in payment of hiring the halls.

5. That on the 21st day of October, 2010 we read in the Daily newspaper that our group had been banned."

9. In answer to this, the respondent filed two affidavits. The affidavit of Francis Kimemia, the then Permanent Secretary in charge of Provincial Administration and Internal Security, sworn on 10th May, 2011 raises the following:

· According to intelligence reports MRC is an active arm of the Republican Revolutionary Council (RRC).

· MRC is neither a registered society nor a political party.

· The aim of RRC is to disenfranchise upcountry people and to subsequently reclaim their land and that the 2006/2007 post-election violence is testimony to this.

· Police and intelligence reports revealed that MRC was engaged in oathing and training of militia and was a threat to peace.

· That those intelligence reports also revealed that RRC were intent on having Coast Province declared a republic.

· That arising from violence perpetrated by members of MRC, the Government has been sued in civil claims for failing to act in the face of the threats and to protect its citizens.

· MRC advocates secession and discriminates against members of other communities.

· Members of MRC are engaged in criminal activities as evidenced by copies of charge sheets in Mombasa Criminal Cases Nos. 1050/2010, 1947/2010, 24/2011, 33/2011 and 343/2011.

In a further affidavit sworn on 12th April, 2012 by Mr. Mutea Iringo, the successor of Mr. Kimemia, the court is told that MRC has continued to engage in criminal activities even after the filing of these proceedings. Annexed to his affidavit are copies of various press reports.

Petitioners' submissions.

10. We are told that it is trite, and also a constitutional requirement, that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society.

11. The court is asked to give regard to Article 7 (1) of the 6th schedule of the Constitution in construing the provisions of the POCA. That Article provides as follows:

"All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution."

12. It is argued by the petitioners that the gazette notice did not set out which of the fifteen types of organized criminal activities defined by section 3 of the Act MRC members are accused of.

13. It was vigorously submitted that MRC is not engaged in any of the criminal activities set out in section 3 of POCA and that it is a peace-initiated group aimed at attaining rights on matters of land, natural resources, economic and political freedom and advancement of indigenous coastal people.

14. We are asked to find that the ban curtails the rights of the members of MRC to express themselves freely and to associate. In addition, that the Government has violated the petitioners' political rights, fair administrative action and fair hearing. It is said the breaches of Articles 47 and 50 were committed because the Government never gave the MRC a hearing and also because the notice did not give written reasons why it was necessary for the Government to adversely affect the fundamental rights and freedom of its members (Article 47 (2)).

15. It is said for the petitioners that they have without any difficulty shown that the ban limited their fundamental rights and the onus shifted to the respondents to demonstrate that the limitation was in accordance with the Article 24 of the Constitution.

16. It was then suggested that the court applies the following three tests in assessing whether the State has discharged its burden:

· Is the restriction a means of Government effecting a substantial or pressing Government objective?

· Was the restriction designed to impair the right in question as little as is possible?

· Does the restriction impose costs on the group which are not reasonably proportionate to the express objective?

The petitioners hoped to persuade us that the respondent had failed this test. The reasons are abbreviated as follows:

· The Government has not proved the link between MRC and RRC.

· The Government has not demonstrated that members of MRC are engaged in criminal activities or in activities that threaten state security.

· The Government's attempt to use post ban criminal charges against persons said to be MRC members is a *mala fide* way of justifying the ban.

· The secessionist debate, admitted to be a central talking point for MRC, is neither criminal nor unconstitutional.

· The ban has eviscerated any content to the rights. It is therefore a draconian measure.

· That if indeed there was a threat to national security, there were other effective means of addressing that objective.

17. The petitioners will notice that although they expended considerable enterprise, on questioning the constitutionality of POCA, we have not highlighted any of those arguments. This is because the constitutionality of that statute is not an issue raised in the Originating Summons for our determination.

The position of the *amicus curiae*

18. The *amicus curiae* were overtly in support of the petition and supplemented the arguments by the petitioners. The *amicus curiae* made contribution on administrative action. It was argued that for administrative action to be fair, it must entail giving of:

(a) adequate notice of the nature and purpose of the proposed administrative action.

(b) reasonable opportunity for affected persons to make representation.

(c) a clear statement of the administrative action.

(d) adequate notice of any right of review or internal appeal.

(e) adequate notice of the right to request for reasons.

The response

19. The respondents were of the view that the petition is belated and an attempt to circumvent the time bar imposed by section 22 (2) of POCA. That section provides a right to any person aggrieved by the decision of the Minister declaring a specified group as an organized criminal group, to apply to the High Court for redress within twenty one (21) days from the date of publishing the decision. For this reason, these proceedings are statute- barred.

20. The respondents thought that the petitioners' failure to expressly controvert the averments in Mr. Kimemia's and Mr. Iringo's affidavits is an admission to the truth of what is stated therein. That this amounts to an admission *inter alia*, that MRC has links with RRC, is involved in criminal activities and participated in post-election violence. Also, that MRC advocates secession by violent means and is a threat to peace.

21. The respondents placed great emphasis on the preamble to the Constitution which proclaims Kenya as one indivisible sovereign state. In addition, that patriotism and national unity are national values under Article 10 of the Constitution which binds all Kenyans. For that reason, it is argued, secession is not available in Kenya and that MRC's call for secession is a threat to the territorial integrity and national security of the country. It is further argued that International Law recognizes the right to secede only for people who have not exercised their right to self-determination.

22. Connected with the above, it was submitted that the Constitution attempts to address the grievances of land, poverty and marginalization through Article 56 on the rights of minority and marginalized persons and Article 60 on the principles of land policy. That these provisions, in conjunction with Chapter 11 (which entrenches the system of Devolved Government) provides a framework for resolving the grievances raised by MRC. That therefore to resort to secession and violence is wholly unnecessary.

23. The court was asked to find that the Minister's action was proportionate in view of the existing constitutional, statutory and institutional framework that facilitates and enables freedom of expression, freedom of association and political rights. The respondents drew our attention to Article 36 of the Constitution, the Societies Act (chapter 108) and the Political Parties Acts (both Act No. 10 of 2007 (Repealed) and Act 11 of 2011). That these provided MRC with adequate recourse to lawfully associate and express themselves.

24. The respondents were of the firm conviction that the Minister discharged not only a statutory but constitutional obligation when he banned MRC. That his action was informed by credible reports and that there was reasonable apprehension that MRC was a threat to national security. That there can be no bigger public interest than national security as no other right can be enjoyed without it.

25. The respondents also saw a fatal flaw in the application. It is said that the application did not, with specificity, cite the freedoms that were allegedly infringed and how they had been infringed. Secondly, the application as framed seeks to have the entire gazette notice declared unconstitutional. If the application were to be granted as framed, it would have the effect of lifting the ban on 32 other groups who had not sought the court's intervention.

Matters of Interpretation

26. A Hallmark of the Constitution 2010 is that it has elaborate instructions on how it is to be construed. Article 259 (1) provides:

"(1) This Constitution shall be interpreted in a manner that –

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance. (*Our emphasis)*"

27. In applying a provision of the Bill of Rights, a court will develop the law so as to give effect to the right or fundamental freedom and adopt an interpretation that favours the enforcement of a right or fundamental freedom. This court is also enjoined by the provisions of Article 20 (4) to promote:

"(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights."

28. The court will, as is required by these provisions, take a generous and purposive approach to the Interpretation of the Rights and Freedoms guaranteed by the Constitution.

Issues for determination

29. They are in our view two broad sets of issues to be decided. The preliminary issues are:

· Is the petition an attempt to circumvent the provisions of section 22 (2) of POCA?

· Is the petition fatally defective for lack of specificity?

30. The substantive issues would be:

· Did the proscription restrict or limit the Fundamental Rights and Freedoms of the petitioners?

· If so, does the Restriction or Limitation comply with the provisions of the Constitution?

The Court's Determination:

31. The provisions dealing with the declaration of an organized criminal group are found in section 22 of POCA. Section 22 (2) gives a right of redress as follows:

"(2) Any person aggrieved by the decision of the Minister under this section may apply to the High Court for redress within twenty one days from the date of the publishing the order."

32. The order was published on 18th October, 2010 and these proceedings commenced 36 days later on the 24th November, 2010. Undoubtedly they were brought outside the 21 days limit provided in section 22 (2) of POCA.

33. Yet this application is not an application under section 22 of POCA but a constitutional petition in which the petitioners claim that some rights or fundamental freedoms in the Bill of Rights have been violated. The right to institute proceedings to enforce the Bill of Rights is itself guaranteed by the Constitution in Article 22 (1):

"22 (1) Every person has the right to institute court proceedings claiming that a right of fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

34. This right of enforcement cannot be taken away merely because there was an alternative remedy available to the petitioners. Discussing section 84 of the former Constitution, which had a similar provision, the court in **Nairobi HCC 264/2003 Milimani Labh Sons Limited vs. Manula Hauliers (trading as Tausi Travellers)** held that the right to apply to the High Court under section 84 was in itself a fundamental right and it could not be stifled, clogged or fettered except where the petition violates fundamental principles of the law.

35. In our view, a party seeking to enforce the Bill of Rights should be able to approach a court with the confidence that she/he will not be turned away without a hearing unless the approach itself defiles the law.

36. It is a fundamental principle of the law that proceedings to question administrative or quasi-judicial action of a public officer must be brought promptly. Our view is that in commencing these proceedings, 36 days after the ban, the petitioners' moved without undue delay. For this reason, we do not find merit in the respondents' submissions.

37. Turning to the pleadings, the respondents argue that they are not specific enough. In **John Kimani**

Mwani vs. Town Clerk Kangema (Nairobi Petition 1039 of 2007) the court said this about the requirement of specificity:

"1. Our courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights, they must state the provision of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement. The cases of *Anarita K. Njeru vs. R (No. 1) (1979) KLR 154* and *Cyprian Kubai vs. Stanley Kanyonga Mwenda Nairobi HC Misc. No. 612 of 2002 (unreported).*

2. The reason for this requirement is twofold; first the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by* section 84 *of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the Constitution. It is not sufficient to rely on a broad notion of unconstitutionality but rather point to a specific provision of the Constitution that has been abridged."

38. From the body of the application, it is clear that the petitioners allege infringement of their rights under Articles 36, 37, 38, 47 and 50 of the Constitution. The grounds to the application set out the manner, nature and extent of infringement. We reproduce it in full:-

"(a) The banning of the Applicants activities contravenes Section (sic) 36(1) of the Constitution of Kenya, which guarantees freedom of association, which includes the right to form, join or participate in the activities of an association of any kind;

(b) The banning of the group and terming it as an organized gang contravenes section (sic) 38 of the Constitution of Kenya in that the Applicants have deprived of their political rights without any legal authority BECAUSE no grounds exist upon which a reasonable suspicion that the Applicants had committed any criminal offense;

(c) The said action by the Defendant contravenes section 47(2) of the Constitution of Kenya as the Applicants were not given any written reason for the action that was taken against them nor disclose any acts and/or omissions committed by the applicants and which disclose any offence under any law of Kenya which the Applicants committed.

(d) the said action was made with no basis at all as to the activities that were carried out by the Applicants were lawful were not in contravening any law And the Applicants affirm that they are ready and willing to stand trial in the event they are found to have committed any criminal offence But in the absence of such findings, that they should be at liberty to enjoy their Constitutionally protected rights *in toto*."

39. Although we think the petition could have been more elaborate and elegant, it is clear enough to enable the respondents know the case to be met. As was evident from the affidavits and submissions presented in response, the respondents were under no illusion as to the nature of the petitioners claim.

40. That does it for the prefatory issues.

41. The freedom of association, the freedom of assembly and peaceful demonstration, and that of political rights are interdependent. Article 36 (1) expresses the freedom of association as follows:

"Every person has the right to freedom of association which includes the right to form, join or participate in the activities of an association of any kind."

Article 37 is on assembly:

"Every person has the right, peaceably and unarmed to assemble, to demonstrate, to picket, and to

present petitions to public authorities."

Article 38 (1) on political rights reads:

"Every citizen is free to make political choice, which includes the right:

(a) to form, or participate in forming a political party.

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause."

42. A political party is a special form of association and political activities necessarily include people assembling. Political rights cannot be fully realized in the absence of the freedom to associate and assemble. For the fact that they are not dissimilar it is convenient to consider them together in this petition.

43. Although these freedoms enjoy broad constitutional protection, they are not unbounded. Article 24 (1) allows for the limitations of certain rights and fundamental freedoms in the manner provided thereunder. Rights under Articles 36, 37 and 38 can be limited and are not amongst the absolute freedoms set out in Article 25 of the constitution.

Article 24 (1) provides as follows:

"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

44. Certain freedoms have a content-based restriction. The freedom of expression is the best example. Article 33 (2) provides that the right does not extend to:

(a) Propaganda for war;

(b) Incitement to violence;

(c) Hate speech;

(d) Advocacy of hatred that;

(i) Constitutes ethnic incitement, vilification of others in incitement to cause harm; or

(ii) Is based on any ground of discrimination specified or contemplated in Article 27 (4).

In addition Article 33 (3) provides that:

"In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others."

45. To some extent, Article 37 provides an internal content related restriction. We reproduce it again so as to illustrate this;

"Every person has the right, <u>peaceably and unarmed</u> to assemble, to demonstrate, to picket, and to present petitions to public authorities." *(our emphasis)*

So the right to assemble is assured only when exercised peacefully and without arms.

46. Although not relevant to this petition, but for purposes of completing the discussion on limitation of fundamental rights. Those rights may be derogated from in a state of emergency but in the very restricted way provided in Article 58 (6).

47. It is not disputed that the effect of the Gazette Notice was to substantially limit or restrict the petitioners' fundamental rights of association (Article 36), rights of assembly (Article 37) and political rights (Article 38). Infact, in respect to their participation in the activities of MRC it had the effect of completely negating those rights.

48. The Minister acted pursuant to the provisions of a statute (POCA) whose constitutionality has not been questioned by this petition. What this court must do is to test whether the action of the Minister conforms with the limitation clause (Article 24). Our reading of Article 24 (1) is that not only must the law limiting a right or fundamental freedom pass constitutional muster but also the manner in which the law is effected or imposed. So both the law prescribing the limitation and the manner in which it is acted upon must satisfy the requirement of Article 24.

49. Under Article 24 (3) the state would have to bear the burden of justifying that the restriction imposed on MRC is in harmony with the limitation clause. That burden is expressed as follows:

"The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirement of this Article has been satisfied."

50. There are arguments made as to why it makes sense to rest the burden with the state. One is that:

"By placing the burden of proof on the Government we simply recognize the Government's unmatched power to shape, manipulate and determine the content of our lives, and require it to justify the use of its power in areas in which the Constitution tells us we are notionally free." *(Extract fromconstitutional Law of South Africa Revision Service 5 of 1999).*

We are in complete agreement with this reasoning.

51. The limitation clause (Article 24 (1)) itself provides the test for determining the viability of the justification;

"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between eh limitation and its purpose and whether there are less restrictive means to achieve the purpose."

52. The Constitutional Court of South Africa has had an opportunity to discuss how this test should be applied. In discussing section 36 (1) of the South African Constitution whose provisions are similar to our Article 24 (1), the Constitutional Court in **Samuel Manamela & Another vs. The Director-General of Justice CCT 25/99** had this to say:

"It should be noted that the five factors expressly itemized in section 36 are not presented as an exhaustive list. <u>They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list.</u> As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.

……………………….Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of this legislative and social setting."

Simply put the court must carry out an overall assessment and this will vary from case to case. We are persuaded that this is the approach to take.

53. The position of the State is that it invoked the provisions of POCA in the interest of national security. It is appreciated that the executive arm of the Government is charged with the responsibility of ensuring national security (Chapter 14 of the Constitution). That arm of Government is therefore the best suited to make decisions in respect of matters of national security. What it says about national security must ordinarily be believed. And in these matters it must be given some margin of appreciation. Where, however, there is a complaint raised as in this petition, that national security has been wrongfully invoked to take away a fundamental right the court needs to be judicially satisfied that the action of the State is reasonable and justifiable. If these were not so, then the State could make any decision or take any action in the name of national security with the comfort that it will never be required to account for that action. The State could be tempted to use the blank cheque to overdraw! (We have paraphrased the words of **H.W.R Wade** and **C.F. Forsyth** used in another context). The need for the State to demonstrate satisfaction of the limitation clause is therefore not only constitutional but in line with public policy.

54. This also appears consistent with the right to apply to the High Court provided by section 22 (2) of POCA. Implicit in that right, we think, is the duty of the Minister to demonstrate that his action is justified and in accordance with the Constitution and the Act.

55. Although the State is not required to give a detailed account of its action it must do more than to merely assert that the action has met the threshold set by the Constitution. It must place some evidence before court that will enable the court make a judicial assessment. If that evidence is classified or sensitive then it can be received behind closed doors. The European Court of Human Rights, sitting as a Grand Chamber in the case of **Socialist Party and others –vs- Turkey** (case No. 20/1997/804/1007) said this about the manner a court should carry out such a scrutiny:

"With regard to the first issue the Court reiterates that when it carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review

under Article 11 the decisions they delivered in the exercise of their discretion. In so doing, the Court has to satisfy itself that the national authorities based their decisions on an <u>acceptable assessment of the relevant facts</u>." *(our emphasis)*

56. It is within the above parameters that we now embark to assess the explanation and evidence offered by the State.

57. Mr. Kimemia disposes that according to intelligence reports, MRC is an active arm of RRC and that MRC is neither registered as a society nor a political party. He says that the minister acted on recommendation of the Commissioner of Police and intelligence reports that MRC was involved in oathing and training of militia. Save for the fact that the Minister is said to have relied on the advice of the police and intelligence reports, no evidence was presented to court that **prior to the ban** the State had arrested or charged members of MRC who we are told had been involved in criminal activities. Is it possible then that apart from the ban the authorities never took any other action to contain what it considered a serious threat to peace?

58. The State has relied on the report of the Commission of Inquiry into Post Election Violence (famously called the **Waki Report**) to corroborate its allegations against MRC. We have acquainted ourselves with the part of the Waki report that touches on violence in the Coast Province. We have read each of the pages from page 218 to 233 of that report. Nowhere in this report is MRC mentioned. However, on page 222 the report says this about RRC:

"Finally, intelligence was furnished by NSIS regarding the activities of an outfit by the name Revolutionary Republic Council (RRC) that was reportedly training its militia within Mwagulu forest of Kwale District with the help of ex-military service men allegedly with the aim to disenfranchise upcountry people and later reclaim land owned by the perceived outsiders…….

Indeed, the Coast PPO did confirm the existence of RRC ……….accordingly, the authorities had neutralized the group by the time of elections."

The intelligence report made to the Waki Commission did not mention MRC. The State tells this court that MRC is an active arm of RRC. The question to be asked is whether this important detail would have escaped the NSIS report to the **Waki Commission**. We think that the State should have placed some evidence before this court to demonstrate the link between RRC and MRC.

59. There is then the criminal cases brought against persons said to be followers of MRC. Copies of charge sheets in the following cases were shown to this court.

Case Number	Date of alleged offence	Nature of charge
Mbsa 1050/2010	1) 2nd December, 2010 2) 2nd December, 2010	1) Engaging in organized criminal activities. 2) Taking part in an unlawful assembly.
Mbsa 1947/2010	1) 26th December, 2010 2) 26th December, 2010	1) Taking part in unlawful assembly. 2) Allowing excessive vibrations.
Mbsa 33/2011	9th January, 2011	Engaging in organized criminal activities.
Mbsa 34/2011	1) 9th January, 2011	1) Engaging in organized criminal

		activities.
	2) 9th January, 2011	2) Taking part in an unlawful assembly.
?	2nd February 2011	Engaging in organized criminal activities.
Mbsa 343/2011	15th March, 2011	Engaging in organized criminal activities.

In all, copies of six (6) charge sheets were exhibited. Charges ranged from taking part in unlawful assembly, allowing excessive vibrations, engaging in organized criminal activity. They fell under the Penal Code, the Environmental Management Act, and POCA.

60. Common to these cases is that the charges are in respect to offences that are said to have been **committed after** the publication of the Gazette notice proscribing MRC. Surely, these charges that post-date the Gazette could not have been the basis of the Minister reaching a decision to ban the group. We agree that it may be evidence that the group engages in criminal activities but it does nothing to support the ban if there is no evidence of criminal activity **predating the** ban.

61. In addition, we have noted that the contents of paragraph 33 of the affidavit of Mr. Kimemia may not be entirely accurate.

"33. <u>That</u> I am aware that the Applicants and their counsel had knowledge even at the time of filing this application that criminal proceedings are pending in Mombasa Chief Magistrate's Court regarding the Applicants, in which they are suspected of taking part in the proscribed group's activities; I therefore believe that the case that has been filed in this Originating Notice of Motion is mischievous in that it is apparently meant to prejudice the hearing of those cases."

62. The Permanent Secretary is suggesting that the originating notice of motion was a ploy by the petitioners to prejudice the hearing of those cases. It is however not lost on the court that all these cases are in respect of incidences said to have occurred **after** December 2010, on dates **after** the filing of this originating summons on 24th November, 2010.

63. Mr. Iringo who succeeded Mr. Kimemia swore an affidavit on 12th April, 2012. Attached to his affidavit are newspaper cuttings which are intended to prove that MRC has continued to take part in serious crime. In respect to an attack on some administration police officers, **The Standard** newspaper of 2nd March, 2012 reported:

"Two administration police officers are fighting for their lives after a gang suspected to be members of the outlawed MRC attacked them in Chanagande area of Kilifi county."

It further reports:

"If it is proven that MRC was indeed behind the attack, it would mark an escalation of the activities. <u>They have in the past largely restricted themselves to meetings and issuing statements on their demands</u>." *(our emphasis)*

64. On an attack on a mock polling station set up by IEBC, the **Sunday Nation** of 25th March, 2012 reports:

"…………the attack was linked to MRC which is agitating for cessation (sic) of Coast Province. When contacted, the council distanced itself claiming it was a government instigated plan to discredit them."

65. Contained in these press reports are suspicions of MRC's participation in criminal activities. Yet the

very same reports contain rebuttals by the group denying involvement. What the State has not told us is whether there were any arrests or prosecutions subsequent to these serious incidences. Further, apart from the newspaper reports, the State has made no effort to show a link between MRC and these incidences. With tremendous respect to the Attorney General, these media reports, taken alone, are of little probative value. We very much doubt that this is a fair effort by the public defender to demonstrate that the State is justified in limiting the fundamental rights of its citizens.

66. What is conceded by the petitioners is that they are engaged in the secession debate. Paragraphs 23, 29 and 31 of the affidavit of Mr. Kimemia also touches on this. The position of the State is that the push for secession is a threat to peace, to national security, and has the potential of dismembering the country.

67. We do agree with the argument of the State Counsel that Kenya is one indivisible sovereign state. This is expressly proclaimed in the preamble of the Constitution and national unity entrenched by Article 10 of the Constitution as a national value. On our part, we take the view that the Constitution does not contemplate secession. If the people of Kenya would have wished otherwise, then they would have expressly said so in the Constitution that they very recently gave to themselves. The Constitution is an exceptionally elaborate and detailed document. In it, the people of Kenya chose to emphasize the indivisibility and unity of the nation.

68. We think that we may be right in our view because where nations contemplate secession, they expressly declare so. For example, the people of Ethiopia through Article 39 of their Constitution have made the following unequivocal declaration:

“Every nation, nationality and people in Ethiopia has an unconditional right to self determination, including the right to secession.”

69. It was the view of the petitioners, as we understood them, that the Constitution envisaged that secession could be achieved by an amendment to the clause defining the territory of Kenya. Article 5 of the Constitution provides:

“Kenya consists of a territory and territorial waters comprising Kenya on the effective date, and any other additional territory and territorial waters, as defined by an Act of Parliament.”

A reading of this Article is that Kenyans can themselves determine the territory of Kenya and, importantly, the Article provides that more territory can be added or included to what currently comprises Kenya. The Article does not suggest that Kenya can lose or cede any part of its territory. What is more fundamental in our view is that the Article is simply a provision about the physical size and delimitation of the territory of Kenya and how it shall be determined. It has nothing to do with issues of sovereignty or self- determination.

70. In arriving at that conclusion, we consulted an explanation of the final report of the Committee of Experts on Constitutional Review. The report explains the final wording of that Article as follows:

“Consequentially (sic) minor amendments have been made by the COE to address the PAC’s concern that Kenya determine its own territory, but also ensuring that whist doing so, all current parts of the Republic are recognized.”

71. As we have said, we are of the firm view that the Constitution does not contemplate or allow for secession. It is hardly surprising therefore that many Kenyans, who overwhelmingly endorsed a unitary state, would be shocked and disturbed by the secession agenda of MRC. But democracy is not without a price. And as noted by the European Court of Human Rights in the case of **United Communists Party of Turkey & Others vs. Turkey** *(case No. 133/1996/752/951).*

“………There can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but

also those that offend shock or disturb."

So in a free and democratic society, we are expected to put up with some defiance, dissent and controversy.

72. What would be of great concern to this court is that the agitation for secession must be expressed as a fair and acceptable democratic discourse. The agitation should not offend Article 33 of the Constitution and should not be:

(a) Propaganda for war

(b) Incitement to violence

(c) Hate speech

(d) Advocacy for hatred.

Any debate or agitation that crosses that line would not only be unconstitutional but also criminal.

73. Although it is the respondents' case that MRC advocates secession by violent means, the court, examining the affidavits of the respondents' witnesses, is unable to find any evidence that supports that assessment. None of the criminal cases referred to in the affidavits involve offences connected to propaganda for war, incitement to violence, violence itself, hate speech or advocacy of hatred.

74. When the State proscribed MRC it imposed a total ban on its members to associate and assemble as MRC. The State used the most restrictive means available under the law. In considering whether or not a limitation to the fundamental freedom is reasonable, the court has to take into account, *inter alia*,Article 24 (1) (e):

" (e) the relation between the limitation and its purpose and whether there is a less restrictive means to achieve the purpose."

75. It was incumbent upon the State to demonstrate that in the circumstances, the ban, though the most extreme of measures was reasonable and justifiable. The respondents ought to have satisfied the court that less restrictive means would not have been efficacious to deal with the perceived challenges posed by MRC. For instance, was it open to the State to invoke the criminal justice system against errant members of the group instead of slapping a total ban on the whole group? Did the State first issue warnings to the group to abide by the law? If the State was concerned that the group was opaque and amorphous, did it require the group to apply for formal registration as a society or political party before imposing the harshest possible measure? These are some of the questions that this court expected the State to answer in discharging the onus imposed on it by Article 24 (3).

76. The State Counsel thought that the action of the Minister was proportionate given that members of MRC have other legitimate avenues of expressing and associating themselves. He made the point that MRC should have sought to register itself as a society or a political party. This we agree. It is our view, however, that the State should have given MRC an opportunity to take that route before imposing a total ban. In matters of fundamental rights, the State should give its citizen as much latitude as is possible. The State may have shut the door too quickly on MRC!

77. On our assessment we have reached the conclusion that the State has not satisfactorily demonstrated that the proscription was justifiable or proportionate. It is not therefore necessary to make a determination on the alleged violations to Article 47 and Article 50.

78. That conclusion aside, certain other concerns raised by the respondents calls for our attention.

79. The State Counsel forcefully argued that there exists a rich constitutional and legislative framework

that allows and promotes political participation. Political rights under Article 38 of the Constitution are extensive. The Political Parties Act itself enables and gives effect to some of those rights. It seems illogical, it was argued, that, MRC has chosen to operate as an amorphous, informal and underground movement. That this may be a pointer that the activities and motives of the group are unlawful.

80. On our part, we have looked at the evidence presented by the parties before us and have come to a conclusion that MRC is a political movement. On their own admission the petitioners in paragraph 3 of Mr. Ruwa's affidavit state:

"We are a peace initiated group aimed at attaining our rights on matters of land, natural resources, economic and political freedom and advancement of the indigenous coastal people."

When making his submissions, the petitioner's counsel told court that MRC had over 30,000 committed followers. Accepted by both sides is that central to its objective is secession. Secession is a political agenda. MRC is certainly not a trade union, welfare society or a debating society. It has all the attributes of a political movement.

81. We do accept that there would be legitimate concerns and apprehension if a movement of that size and agitating a controversial agenda was to operate as an informal and undefinedorganization. Democracy is not a licence to disorder or lawlessness. For this reason the court will give the petitioners an opportunity to fully enjoy their rights but they must do so in a context that is formal, orderly and permitted by law. A sure way, perhaps the only, is to have themselves organized and registered as a political party.

82. If MRC regards this decision as a *carte blance* to disorder or lawlessness, then they are on their own! The court cannot mute the respondents from exercising their constitutionally ordained obligation of ensuring security for all Kenyans. Should MRC cross the line, then the State, as always, can invoke the law, including POCA.

83. There will be Kenyans who will be disenchanted by our decision. Some will see it as an endorsement to secession and dismemberment of this country. To them we say this: Secession can only be achieved by far reaching amendments to the Constitution. All Kenyans will decide this by a referendum (Article 255 of the Constitution). Any secession must be freely given by all Kenyans, if cannot be forced on them!

84. As we conclude we emphasize that this decision is specific to the ban on MRC. It is a decision on whether or not the proscription on MRC is constitutional, it is not a general discussion about the entire Gazette Notice which outlaws 32 other groups.

Our Orders and Conclusion:

85. Ultimately, this court does hereby declare that the declaration published in Gazette Notice No. 12585 by the Minister of State for Provincial Administration and Internal Security that Mombasa Republican Council is an organized criminal group is unconstitutional and is hereby lifted.

86. Each party will bear its own costs.

87. We are indebted to all counsel who addressed us for their incisive and well researched submissions. Thank you.

Dated and delivered on 25th July, 2012.

J. W. MWERA **M. KASANGO** **F. TUIYOTT**
JUDGE **JUDGE** **JUDGE**