REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO 793 OF 2010

1. ABOUD ROGO MOHAMED .....1ST APPLICANT

2. ABUBAKAR SHARIF AHMED ABUBAKAR .....……2ND APPLICANT

VERSUS

REPUBLIC ……..…..... ….RESPONDENT

R U L I N G

The applicants, **ABOUD ROGO MOHAMED** and **ABUBAKAR SHARIF AHMED ABUBAKAR** have both been charged with the offence of Engaging in an organized criminal activity, contrary to **Section 3(3) as read with Section 4(1) of the Prevention of Organised Crimes Act, 2010.**

The particulars of the charges were that the applicants were found engaging in an organized criminal activity by being members of **AL-SHABAAB,** an outlawed organized criminal group as per Kenya Gazette Notice Vol. CX-11- No. 113 of 3rd November 2010.

Both applicants were arrested on 21st December, 2010. Thereafter, they were charged with the offence particularized above, on 22nd December, 2010.

Although the applicants have each been charged in a separate case, both the said cases were before Mrs. G.W. Ngenye Macharia, Principal Magistrate, Nairobi. The said learned magistrate presided over the taking of the pleas.

Both the applicants pleaded not guilty. Thereafter, each of the applicants made an application for bail pending trial.

After giving due consideration to the applications, the trial court rejected the same.

The applicants have now moved this court, in its original jurisdiction, for bail pending trial. In other words, the applicants have not invoked the appellate jurisdiction of the High Court. They are therefore not appealing against the decisions made by the trial court.

It was the applicants' contention that they were entitled to bail, as all offences in Kenya are now bailable.

As far as the applicants were concerned, everything on the charge sheets stood contested, as soon as they had pleaded not guilty. In effect, the applicants were contesting issues such as:

(i) The existence of Al-Shabbab;

(ii) The areas where the alleged Al-shabaab operate;

(iii) The name "Al-shabbab";

(iv) The fact of outlawing the "Al-Shabaab"; etc.

Secondly, the applicants emphasized that, in law, they are presumed innocent. I was therefore invited to trace the entitlement to bail, to the presumption of innocence.

In that regard, the applicants placed reliance upon **SYLVESTER MWAINGA TSUMA Vs REPUBLIC, MISC. CRIMINAL APPLICATION NO. 619 of 2003.**

However, Mr. Mbugua Mureithi, the learned advocate for the applicants, also submitted that the right to bail was separately anchored at **Article 49 (1) (h) of the Constitution of Kenya, 2010.**

To that extent, the applicants were making it clear that the presumption of innocence is cited as one of the many facets for the provision of a fair hearing, pursuant to **Article 50 of the Constitution;** whilst the right to bail is spelt out in **Article 49 (1) (h).**

The applicants pointed out that the right to bail is now even available to persons charged with capital offences. Two examples of cases in which bail was granted to persons charged with murder, were given by the applicants' as follows;

(i) REPUBLIC Vs DANSON MGUNYA & ANOTHER (MSA) H.C. CR. C. NO. 26 OF 2008; AND

(ii) REPUBLIC Vs OBY TYLENE OYUGI & 11 OTHERS (NYERI) H.C. CR. C. NO. 38 OF 2010.

In contrast to those cases, the applicants herein were not charged with any capital offence. The offence with which they had been charged carried a custodial sentence or a fine, if the accused were convicted. They therefore submitted that they were deserving bail pending trial.

When commenting on the Replying Affidavit sworn by Mr. Alfred Majimbo, a Superintendent of Police attached to the Anti-Terrorism Police Unit (ATPU), the applicants submitted that the contents thereof did not disclose any compelling reason to warrant their denial of bail.

In that regard, the 1st Applicant pointed out that he did not own any mobile phone. Therefore, the assertion that the number of his mobile phone was found in a notebook, that was recovered from an alleged suicide bomber, could not hold water.

In any event, the applicants suspect that the alleged notebook did not even exist, as it was not placed before this court.

The applicants hold the view that the assertion that there was a suicide bomber was nothing more than a casual statement. Their reason for saying so was that Mr. Majimbo had failed to provide the name of the alleged suicide bomber. Mr. Majimbo was also faulted for failing to demonstrate that there had been a report about the alleged suicide bomber.

The 1st Applicant indicated that the mobile phone number cited in Mr. Majimbo's affidavit, belonged to his wife.

Meanwhile, the 2nd Applicant conceded that the mobile phone number attributed to him was his.

However, the applicants insisted that the state should have found it very easy to verify the ownership of

the phone numbers allegedly found in the suicide bomber's notebook because everybody in Kenya is now required to register his mobile phones.

In any event, the applicants both denied any knowledge of the suicide bomber.

As far as they were concerned, it was tenuous and laughable to try and connect them to the alleged suicide bomber who allegedly carried out his actions elsewhere, other than at the coastal area of Kenya, where the applicants were arrested.

Furthermore, the applicants found it absurd that just because their alleged phone numbers were listed in some notebook, they were, without more, connected to an offence.

It was submitted that if the police were allowed to draw such conclusions', normal life, as we know it in Kenya, would end. The applicants opined that people would have to discard items such as diaries and mobile phones.

Meanwhile, the assertion that the applicants were members of Al-Shabaab, and that they were encouraging youths to train as jihadists, in Somalia, was also described by the applicants as being a casual statement.

The applicants made that submission because the police had not specified when or where exactly the applicants preached the sermons at which they encouraged the Kenyan Youth to go to Somalia, to train as jihadists.
In any event, the applicants believe that it was wrong of Mr. Majimbo to talk about Somalia as if it was an enemy country.
The applicants pointed out that Kenya and Somalia enjoyed diplomatic relations. Indeed, Kenyans flew to and from Somalia everyday.

Therefore, the applicants view the assertions made by Mr. Majimbo as nothing more than an attempt to demonise them before they are tried by the court.

The applicants submitted that the court cannot take judicial notice of Al-Shabaab beyond the proscription in the Gazette Notice.
The third point which the applicants took issue with is the contention that they were both in Somalia between November 2009 and May 2010. Both of them deny ever having gone to Somalia.

Had they gone to Somalia, the applicants believe that the state would have readily specified the dates of their said trips and the exact border location through which they passed.

In any event, the applicants hold the view that there was no problem in Kenyans visiting Somalia.

But if Kenyans went into Somalia through routes that were not official, the applicants believe that it would be Somalia that should then have taken offence. The applicants hold the view that every citizen of Kenya is currently at liberty to go to Somalia.

The applicants submitted that when Kenyans entered Kenya, they did not commit any crime, regardless of the means with which they made the said entry. As far as the applicants were concerned, a Kenyan had the right to return to Kenya anyhow, in assertion of his citizenship.
The other issue addressed by the applicants relates to their alleged training as militants at a place called Barawa Camp, in Somalia.

It was submitted that the said issue would be determined at the trial. Meanwhile, the police were faulted for failing to specify the date of the alleged training, the name of the trainers, and the nature of the specific training provided. For instance, the applicants would have liked the police to specify if they might have been trained on the use of sticks.

Meanwhile, if the applicants were in Somalia between November 2009 and May 2010, the applicants noted that the statute under which they have been charged was only enacted in August 2010.

In any event, as the applicants had not been charged with terrorism, they believe that the reference, by the police, to terrorism is intended to cause fear in the minds of the judicial officers.

It was submitted that the state had not asserted that the applicants would either abscond or interfere with witnesses. It was also submitted that the state did not assert that the applicants would commit offences, if released on bail.

The court was told that the only real contention was that the security of the state would be at risk. However, the applicants believe that the state had failed to provide any material to support the said contention.

Therefore, the applicants submitted that the state had failed to demonstrate any compelling reasons to warrant a denial of bail.
Finally, the court was reminded that the Constitutional requirement is that the court should lean towards granting, rather than towards derogating from the rights enshrined in the Bill of Rights.

In answer to the application, Mr. Obiri, the learned state counsel acting for the respondent, placed reliance upon the Replying Affidavit of Mr. Majimbo.

The respondent said that the intelligence information and preliminary investigations revealed that the applicants belonged to the proscribed group, Al-Shabaab.

It was the respondent's contention that the 1st applicant was involved in preaching to youths in Kenya, to go to Somalia where they would train as jihadists, alongside the Al-Shabaab.

It was the further contention of the respondent that the applicants had left Kenya, for Somalia in November 2009. The applicants are also said to have returned to Kenya in May 2010.
As far as the respondent was concerned, the applicants travelled to Somalia, and back to Kenya, through un-official routes.
Furthermore, when the applicants were still in Somalia, the respondents say, that they were spotted training, in Barawa Camp.

Because of the said reasons, the respondent urged this court to reject the application for bail. It was submitted that the reasons provided by the state were compelling.

And, in an endeavour to demonstrate how compelling the reasons were, the respondent pointed out that the mobile phone numbers of the applicants were found in a notebook that was recovered from a suicide bomber.

Even though there was a possibility that the police had not matched or linked the 1st Applicant to one of the two phone-numbers, the respondent believes that that alone could not weaken the prosecution's case.

As regards the freedom of Kenyans to travel to and from Somalia, the respondent conceded, but emphasized that the said trips ought to be made through official border-points.

Because the respondent has reason to insist that the applicants used un-official routes to and from Somalia, the respondent submitted that the applicants must have been up to no good.

The respondents submitted that the right to bail, as enshrined in **Article 49 (1) (h) of the Constitution** was not absolute in itself. The said right was subject to denial if there were compelling reasons for so doing.

As the applicants are said to have been using un-official routes to travel to and from Somalia, the

respondent believes that the applicants would continue to do so, if, they were granted bail.

I was also told that there was a very high likelihood of the applicants absconding.
In reply to the submissions of the respondent, the applicants pointed out that the respondent had not asserted, in the Replying Affidavit, that they (the applicants) were likely to abscond. I was therefore invited to ignore the submission alleging likelihood to abscond.

Secondly, although the respondent had emphasized the alleged risk to the security of the state, the applicants submitted that the respondent had failed to provide the court with cogent information, to back the contention.

By withholding information from the court, the respondent was alleged to be flouting **Article 35 of the Constitution**.
Having given due consideration to the submissions made by both sides, I now delve into the process of analysis and decision-making.
First and foremost, the provisions of **Article 49 (1)(h) of the Constitution** is found within **Chapter 4 of the Constitution of Kenya, 2010**. The said chapter is titled **"The Bill of Rights".**

Article 19 (3) (a) of the Constitution makes it abundantly clear that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State.

The said rights and fundamental freedoms are subject only to the limitations contemplated in the Constitution.
Article 49 (1) (h) stipulates the rights of persons who had been arrested, as follows;

"An arrested person has the right –

.....

.....

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

Therefore, all arrested persons are now entitled to seek their release on bond or bail, pending charge or trial. In effect, there is no offence that is now not bailable.

The applicants have each been charged with the offence of;

"Engaging in an organized criminal activity contrary to section 3(a) as read with section 4(1) of the Prevention of Organised Crimes Act, 2010"

The applicants are alleged to be members of an outlawed organized criminal group, named Al-Shabaab.

However, the applicants pleaded "Not Guilty", and they now assert that by so doing, they have contested everything which is on the charge-sheets.

Some of the information on the charge sheets include the names of the applicants; the fact that they were arrested on 21st December 2010 the fact that they were first taken to court on 22nd December 2010; the fact that they remain in custody todate; and the fact that they have been charged with the offence of engaging in an organized criminal activity.

Each of the applicants has confirmed, in their respective affidavits, that their names are accurate; and that they were arrested on 21st December 2010, and were thereafter taken to court on the next day.

The charge-sheets also make it clear that the group known as Al-Shabaab was outlawed through a notice published in the Kenya Gazette Vol. CXII –No. 113 of 3rd November 2010.

The law presumes that that which is published in the Kenya Gazette has been published to all persons in Kenya. And I have verified that Al-Shabaab was cited as being an outlawed organized criminal

group. Therefore, even though the applicants purport to contest the fact of that publication, the said contention appears to lack any foundation.

Similarly, the applicants have confirmed, on oath, that they are citizens of Kenya. By so doing, the applicants are confirming the accuracy of that bit of information, as contained in the charge sheets.

I therefore find that the contention that the applicants are contesting everything in the charge-sheets is without foundation.

By pleading "Not Guilty" the applicants were, in my understanding, denying the assertion that they were guilty of the offence with which they have been charged.

By dint of the provisions of **Article 50 (2) (a) of the Constitution**;

"Every accused person has the right to a fair trial,

which includes the right –

(a) to be presumed innocent until the contrary is proved."

In an endeavour to show how so very laid-back the prosecution was, the applicants pointed out that the alleged note-book, in which some mobile phone numbers were found was not produced before this court. If anything, even the alleged suicide bomber who is said to have had the note-book was not named.

Furthermore, the applicants faulted the prosecution for failing to specify the dates when they went to Somalia; the identity of their alleged trainers; the nature of the training they underwent; the exact point through which they entered Somalia or re-entered Kenya; or the date of their re-entry into Kenya.

It is true that the prosecution has not provided the particulars of the various issues highlighted by the applicants.
However, it is equally true that the applicants were not on trial before this court. Therefore, the prosecution could not have been reasonably expected to provide the said particulars before me. The said particulars will form an integral part of the evidence to be adduced before the trial court.

It will be for the trial court to determine whether or not the applicants had any connection with the suicide bomber. It will also be for the trial court to determine whether the presence of a mobile phone number associated with the applicants', in a note-book allegedly linked to the suicide bomber was sufficient to render the applicants criminally liable as charged.

It is premature for this court to be called upon to make any comments or draw any conclusions about the guilt or innocence of the applicants, when no evidence has been led before me.

To my understanding, the respondent has not sought to portray Somalia as an enemy state. It does appear that the only matters about which the respondent takes issue are as follows;

(a) That the applicants travelled to Somalia through un-official routes;

(b) That the applicants were at Barawa Camp, where they were trained as militants;

(c) That the applicants returned to Kenya through un-official routes.

At present, I have no idea whether or not the respondent will adduce sufficient evidence to prove the allegations against the applicant.
But, if they should later adduce evidence that was sufficient to result in a conviction, the applicants may be liable to fines not exceeding KShs.5,000,000/- or to imprisonment for not more than 15 years, or to both such fine and imprisonment.

For now, all I can say is that the law does not permit any Kenyan to travel to other countries or to travel back to Kenya, through any means or through any chosen point along the border. The law stipulates designated border crossing points as well as designated travel documents.

However, I do also appreciate that the applicants have not been charged with offences relating to immigration.

It was submitted by the applicants that the allegations that they had crossed into Somalia were meant to bolden the respondent's assertion that the applicants were members of Al-Shabaab. As far as the applicants were concerned, that assertion was not intended to demonstrate that they were a flight-risk.

But in the same vein, the applicants pointed out that between November 2009 and May 2010, the offence with which they have been charged, had not yet been enacted.

The **Prevention of Organized Crimes Act** is Act No. 5 of 2010. It was enacted in August 2010, and the President of the Republic of Kenya assented to it on 13th August, 2010.

Thereafter, through Legal Notice No. 162, the Minister of State for Provincial Administration and Internal Security, gave notice that the Act came into operation from 23rd September 2010.

As the statute was enacted, and came into operation after the applicants had returned to Kenya, (if the respondent is able to prove that the applicants were in Somalia at the alleged time), I cannot appreciate how the contention that the applicants had been in Somalia during that period, could be used to prove that the applicants were members of Al-Shabaab. I say so because, even if the prosecution was to prove that the applicants had visited Somalia between November 2009 and May 2010, they could not have been committing the offence they are charged with, because the offence did not then exist in our statute-books.

It would therefore appear, on a prima facie basis, that the assertions of the applicants crossing over into Somalia, and back into Kenya, through un-official routes, is intended to demonstrate how easy it was for the applicants to go outside the jurisdiction of the court.

The fact that the applicants believe that they can leave the country on re-enter it, through any means, is suggestive of a lack of regard for the law of this country.

However, I do remind myself that it is the obligation of the respondent to demonstrate that there are compelling reasons to warrant the rejection of the application for bail.

In the case of **EMMANUEL KARISA MAITHA Vs REPUBLIC, (MSA) H.C. MISC. CRIMINAL APPLICATION NO. 52 of 1997,** the applicant was arrested at the Provincial Police Headquarters, Kizingo in Mombasa. It was alleged, that he was found in possession of offensive weapons, and also that he was involved in preparations to commit a felony.

The applicants used this case as an authority to show that bail could even be granted in a case in which the accused was alleged to have been in possession of offensive weapons.
In contrast, they pointed out that the prosecution herein has not alluded to the presence of any weapons of any kind.

Whereas it is true that the prosecution herein has not made any claims linking the applicants to any weapons, the court holds the view that the absence of weapons would not, of itself, serve to denote that the offence with which the applicants have been charged is of any lesser seriousness than an offence involving weapons.

I take judicial notice of what transpired in Kenya after the Presidential and Parliamentary Elections in 2007. Although there was vicious physical assaults, looting, killings and ejection of people from their homes, the said actions have unanimously been blamed upon the manner in which various persons used their tongues. They are said to have used their oratory, to persuade other persons to carry out the heinous

crimes.
Therefore, a person may not be in possession of a machete, a firearm or any such other weapon. He may be armed with nothing more than his ability to influence and persuade other people. That might make him possibly even move dangerous than the person armed with a gun.

The strength of un-armed people was fully appreciated by Mahatma Gandhi, when he led the successful silent protest against the colonialists in India.

In equal measure, a man who defiles a young girl, may not have been armed with any gun or knife, but that does not diminish the seriousness with which the society perceives the offence of defilement.

In the case of **MAITHA Vs. REPUBLIC** (above-cited), the applicant was arrested at Kizingo, in Mombasa. He was arrested at the police Headquarters, whilst allegedly armed with offensive weapons.

When the court had heard his application for bail, the said court addressed itself as follows, when commenting on another incident;
"I must take judicial notice that a few weeks back there was a random attack that occurred in the Likoni area of Mombasa. This incident has caused alarm and insecurity. It seems that based on this incident the Applicant has been denied bail."
Nonetheless, the learned judge went on to hold that if the state wished to connect the applicant to that incident;
"specific charges should be brought against him on the same. Clear facts should be given to the court."

The court granted bail to the applicant because it held the view that the state had failed to connect the applicant to the incident which was said to have caused alarm and insecurity.

In contrast, the prosecution herein has sought to demonstrate the alleged connection between the applicants and the suicide bomber.

Although the applicants submitted that the court cannot take judicial notice of the alleged suicide bomber, I believe that the court is entitled to do so. I say so because, by dint of the provisions of section 60 (1) (o) of the Evidence Act;

> ***"The courts shall take judicial notice of the following facts –***
> ***.....***
> ***.....***
>
> ***(o) all matters of general or local notoriety."***

To my mind, it is definitely a matter of general notoriety in Kenya, that on 20th December 2010 there was a blast in a bus belonging to Kampala Coach Bus Service. The blast occurred at the Nairobi offices of the bus company, and it was generally attributed to the group known as Al-Shabaab.

Of course, I do not know whether or not the state will lead sufficient evidence at the trial, to prove the nexus, if any, between Al-Shabaab and the said blast, or the connection, if any, between the applicants and the alleged suicide bomber.

But I can and do take judicial notice of the blast.

I also take judicial notice of the existence of a group called Al-Shabaab. Once again, I take judicial notice of the said group's existence because that is a matter of general notoriety.

In **REPUBLIC Vs DANSON MGUNYA & ANOTHER (MSA) H.C. CR. CASE NO. 26 of 2008**, the learned Judge expressed the considered view that;

"... the strength of the evidence which supports the charge ought not to apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is statements that show that the accused was caught red-handed or where there is a lawfully admitted confession."

Therefore, the failure of the respondent to provide this court with evidence that would help to prove the guilt of the applicants, cannot, of itself, suggest that no such evidence exists.

However, I am not, at all, suggesting that the respondent will be able to adduce evidence to prove the guilt of the accused. For now, the court is obliged, by law, to presume that the applicants were innocent until the prosecution proves otherwise.

Is it thus not somewhat of a contradiction to deny bail to an accused, who is presumed to be innocent?

The Constitution itself makes it clear that notwithstanding the legal presumption of innocence, an accused person, though entitled to bail, may otherwise be denied bail, if there were compelling reasons for such denial.

I therefore have to ask myself whether or not the respondent herein has proved that there were compelling reasons to warrant the denial of bail.

In giving due consideration to that issue, I do derive some guidance from the following words of Ibrahim J., in the case of **REPUBLIC Vs DANSON MGUNYA (above-cited);**

*"**Liberty is precious and no one's liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted.***

..... We must interpret the Constitution in enhancing the rights and freedoms granted and enshrined, rather than in any manner that curtails them. Each case must be decided in its own circumstances touch and context."

Meanwhile, the court has to bear in mind the fact that;

"Unfortunately, in Kenya, there are no legislative guidelines on bail. The court is left with an unfettered discretion to determine the issue."

Those were the words of Sergon J. in the case of **REPUBLIC Vs OBY TYLENE OYUGI & 11 OTHERS (NYERI) H.C. CR. CASE NO. 38 of 2010.**

It is now well settled that the court's main consideration, when determining an application for bail pending trial is whether or not the accused person will voluntarily and readily present himself to the trial court.

If the court concludes that the accused would probably not present himself to the trial court voluntarily and readily, it would be imprudent to grant him bail.

In **REPUBLIC Vs MUNEER HARRON ISMAIL & 4 OTHERS, H.C. CRIMINAL REVISION NO. 51 OF 2009,** Warsame J. expressed himself thus;

"In deciding whether or not to grant bail, the basic factor or denominator is to secure the attendance of the accused person to answer the charges brought against him. The court has to take into consideration various factors and circumstances; and one paramount consideration is whether the release of the individual will endanger public security, safety and the overall interest of the wider public."

My learned brother went on to make it clear that there cannot be an inexorable formula in determining the issue of public security and safety.

He also stated that;

The facts and circumstances of each case will govern judicial discretion in granting or cancelling bond."

The reason for so holding was that national security and public safety is a fundamental issue, which requires extreme caution and dedication. To that end, the following words of the learned judge are illuminating;

" I agree that a single act terrorism could wipe out hundreds of thousands of people instantly, however, the mere existence of that probability is not sufficient to make the threat of terrorism a more significant threat than that posed by crime, disease and poverty."
To my mind, Lord Parker was right, to some degree, when he held as follows, in the **ZAMORA CASE [1916] 2 A.C. 77,** at Page 107;

"Those who are responsible for national security must be the sole judges of what national security requires. It will be obviously undesirable that such matters should be the subject of evidence in a court of law or otherwise discussed in public."

If matters are discussed openly, either at public forums or before a court of law, they could jeopardize the security of the state or public interest, if they were matters that ought to remain confidential. I believe that that is why the learned Judge held that it was undesirable to discuss publicly or to disclose in court, issues of state security.

However, if such matters were left completely to the persons responsible for national security, it may result in the state machinery hiding behind the cloak of confidentiality even when it was not authentic.

A possible solution could take the form of a procedure which enabled the court to peek, in private, at the material which the state was relying upon to formulate its contention that the grant of bail would give rise to a threat to national security or to public order.

That kind of procedure, if adopted, could give to the state the opportunity to demonstrate to the court, the danger posed by the grant of bail to any particular person, whilst simultaneously shielding the state from any danger that could arise if the information was disclosed publicly.

However, it must be borne in mind that whenever the court was giving its ruling, it is required to spell out the reasons for the said decision. Therefore, if the court was to remain true to the need to safeguard the confidentiality of the information that was looked at privately, it follows that the court would have to withhold a key component of the reasons for its decision.

In order to be able to hold back the exact reason why the court concluded that the grant of bail could result in the increase of the threat to national security or to public order, it would be necessary for the legislature to empower the court to do so. Unless that was done, there would be a danger that the court may be legitimately faulted for flouting section 169 of the Criminal Procedure Code, which requires the court to, inter alia, give reasons for the decision made.

For now, it is a matter of public notoriety that on 20th December 2010, a bomb or such other explosive devise exploded on a Kampala Coach bus, in Nairobi. I have already taken judicial notice of that fact.

The explosion is alleged to have been the work of a suicide bomber. And the state asserts that a notebook was recovered from the said suicide bomber.

Inside the notebook, which has not been made available to this court, it is said that there were found some mobile phone numbers. Those numbers are allegedly connected to the applicants herein.

Whether or not the state will be able to prove all the assertions it has made so far, I do not know. But, already, the 1st applicant has disclosed to this court that the phone number attributed to him, belongs to his wife. Meanwhile, the 2nd applicant has acknowledged that the phone number attributed to him, was actually his.

Although the presence of the said two mobile phone numbers, in the notebook allegedly recovered from the suicide bomber may not, of itself, constitute a criminal offence, I hold the view that there appears to be some tentative basis for the state's assertions.

In other words, the assertions made do not appear to be baseless.

Pursuant to the provisions of Article 24 (1) (d) of the Constitution;

"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 –

.....

.....

(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."

When it is borne in mind that a single explosion can result in multiple deaths, injuries and destruction to property, I hold the considered view that an open and democratic society would believe that any person who, if he was granted bail, may do something that would subject the said society to terror, should not be granted bail.

Am I staying that the applicants fall within that category of persons?

First, if the applicants were proved to be connected to the suicide bomber or to Al-Shabaab, there would be no doubt that it would be undesirable to grant them bail pending trial.

However, it is only at the trial that the prosecution will lead evidence to try and prove that the applicants were guilty.

For now, although the assertions of the state, that the applicants' had some connection with the suicide bomber are not baseless, the court is obliged, by Article 50 (2) (a), to uphold the legal presumption, that the applicants were innocent until the contrary was proved.

Therefore, because of the said legal presumption, it is not open to me to conclude, without the benefit of evidence, that the applicants had already been connected to Al-Shabaab. If I were to so conclude, the said conclusion would be inconsistent with the presumption of innocence.

And if the legal presumption was to have tangible meaning, at this stage, I must interpret the Constitution in such a manner as to enhance the rights and freedoms granted, rather than in a manner that curtails the said right.

In the result, I find that the respondent has not demonstrated any compelling reasons to warrant the denial of bail to the applicants herein. I do therefore allow the application.

However, the applicants will be required to strictly comply with the following conditions if they are to be released on bail pending trial, and if they are to continue enjoying freedom until their trial is concluded;

(a) Each Applicant shall sign a Bond for KShs.3,000,000/-

(b) Each Applicant shall provide two sureties for KShs.3,000,000/- each

(c) Each Applicant shall report to the OCS in-charge of the Police Station nearest his residence, every Tuesday. For the avoidance of any doubt, the 1st Applicant is deemed to be resident at Kanamai, in Kilifi, whilst the 2nd Applicant is deemed to be resident at Saba Saba Estate, Mombasa.

(d) Each Applicant must inform the OCS of his intention to travel outside the jurisdiction of the said OCS, before he travels. He will also provide the OCS with information of his mode of travel, his next destination, and the duration of his stay outside the jurisdiction of the OCS.

(e) If either of the Applicant wishes to travel outside Kenya, he must first seek and obtain an order of the High Court.

Dated, Signed and Delivered at Nairobi, this 2nd day of February, 2011.

.....
FRED A. OCHIENG
JUDGE