REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Revision 51 of 2009

REPUBLIC
…….APPLICANT

VERSUS
MUNEER HARRON ISMAIL
NAHID TABASUM SUMAR
JOSEPH MARITIM
JOHN WANDETO KIRAGU
DOMINIC ABISAI MUFUMU ……..…….RESPONDENTS

RULING

The 1st – 3rd respondents were charged in criminal case No.2217 of 2009 while the 4th and the 5th respondents were charged separately in criminal case No.2242 of 2009. The 1st – 3rd respondents were charged with four counts namely:

In Count 1 the 1st and 2nd respondents were charged with being in possession of Government stores contrary to section 324(3) of the Penal Code. The particulars are that on the 7th day of December 2009, at Embakasi village in Nairobi within Nairobi Province, jointly without lawful excuse had in your possession Four military Boots, One jungle jacket, two Military Solar Batteries and Two Military steel Jericans, the property of the Government of Kenya, such property being reasonably suspected of having been stolen or unlawfully obtained.

In count 2 the 1st and 2nd respondents were charged with being in possession of Government Stores contrary to section 324(3) of the Penal Code. The particulars are that on the 7th day of December 2009 at Egol enterprise limited along Nanyuki Road in Nairobi within Nairobi Province, jointly without lawful excuse had in your possession four military solar batteries and thirteen military steel jericans, the property of the government of Kenya, such property being reasonably suspected of having been stolen or unlawfully obtained.

In count 3 the 1st and 2nd respondents were charged with being in possession of government stores contrary to section 324(3) of the Penal Code the particulars being that on the 7th day of December 2009 at Oil Libya petrol Station in Narok township within rift valley province, jointly without lawful excuse had in your possession six jungle jackets six jungle trousers, three military overrolls, eleven ground sheets, Three jungle hats, five military boots, seven military mini sleeping bags, two jungle military spades, four solar batteries, ten military canvas chairs, four rolls of flanlets, ten tyres, three land rover turbo charges, two military water bags, twenty eight rifle oil tins, one jungle bed, two ear muff, ten military ration boxes, two military examine cooker, ten military grease containers and seventeen military steel Jeri cans the property of the government of Kenya, such property being reasonably suspected of having been stolen or unlawfully obtained.

In count 4 the 1st. 2nd and 3rd respondents were jointly charged with being in possession of ammunitions contrary to section 4(2) (a) of the firearms Act Cap 114 Laws of Kenya. The particulars are that between 7th and 8th day of December 2009 in Narok township within rift Valley

province, jointly were found in possession of fifty five thousand two hundred live ammunitions of caliber 9 mm, one thousand three hundred live ammunitions of caliber .38, one thousand two hundred live ammunitions of 7.62 calibre, six hundred forty live ammunitions of 308 calibre, ten thousand live ammunition of .22 calibre and three hundred forty nine live ammunitions of 12 gauge without a valid firearm certificate at the time.

As stated the 4th and 5th respondents were charged in criminal case No.2242 of 2009 and faced the following charges:

In count 1 the 4th and 5th respondents were jointly charged with being in possession of Government stores contrary to section 324(3) of the Penal Code. The particulars are that between the 7th and 11th days of December 2009, at Nanyuki Township in Rift Valley Province jointly with others before court without lawful excuse had in your possession Four pairs of military Boots, one jungle jacket, two military solar batteries and two military steel jericans, the property of the Government of Kenya, such property being reasonably suspected of having been stolen or unlawfully obtained.

In count 2 the 4th and the 5th respondents were jointly charged with being in possession of Government stores contrary to section 324(3) of the Penal Code the particulars being that between the 7th and 11th days of December 2009 at Nanyuki Township within Rift Valley province, jointly with others before court without lawful excuse had in your possession four military solar batteries and thirteen military steel Jericans, the property of the Government of Kenya, such property being reasonably suspected of having been stolen or unlawfully obtained.

In count 3 the 4th and 5th respondents were jointly charged with being in possession of Government stores contrary to section 324(3) of the Penal Code. The particulars are that between the 7th and 9th days of December 2009 at Oil Libya petrol Station in Narok township within Rift valley Province, jointly with others before court without lawful excuse had in your possession six jungle jackets, six jungle trousers, three military overalls, eleven ground sheets, three jungle hats, five military boots, seven military mini sleeping bags, two jungle military spades, four solar batteries, ten military canvas chairs, four rolls of flanlets, ten tyres, three land rover turbo charges, two military water bags, twenty eight rifle oil tins, lone jungle bed, two ear muff, ten military ration boxes, two military examine cooker, ten military grease containers and seventeen military steel Jericans the property of the government of Kenya, such property being reasonably suspected of having been stolen or unlawfully obtained.

The respondents were arrested between 7th December and 11th December 2009 and taken to court on the dates stated in the charges hereinabove. After they were taken to court, the prosecution made an application that they should not be released on bail on the grounds that:

(1) That they are dangerous and believed to be operating within criminal gangs.

(2) That the police were at an advanced stage of breaking the syndicate and establishing the source of the deadly ammunitions and the persons involved.

(3) That the issues and the crimes that were alleged committed by the respondents directly touches on National security, public order and tranquility.

(4) That the investigations were at a critical stage and needed to be safeguarded.

(5) That there is a real risk that the suspect were likely to interfere with the investigations.

(6) That there is a very real prospect that the respondents will be charged with more serious offences.

(7) That there is a real danger that the respondents were a flight risk given the gravity of the matter and the sentence the offence attracts.

From the record the trial court rejected the respondents' plea to be released on bail on two occasions. However, on 22nd December 2009 the matter appeared before the Chief Magistrate the Hon. Mr. Mutembei and the prosecution demanded that the respondents be kept in custody on the grounds that the investigations were incomplete and that they needed further time to ensure that proper investigations were carried out. The trial court after hearing the arguments of both sides, granted the respondents their plea for bail on the grounds that the prosecution ample time to complete investigations.

The 1st – 3rd respondents were released on a cash bail of 1 million and were ordered to deposit their passports in court, while the 4th and 5th respondents were released on a cash bail of Kshs.200,000/= each. The State was aggrieved by the decision of the lower court. In quick and swift manner the State

through Mr. Wohoro wrote a letter dated 22nd December 2009 seeking the High Court to revise the decision given by the trial court on 22nd December 2009. It was the case of the State that the decision to release the respondents was founded on wrong principles of law and the trial court failed to take cognizance of the fact that the case touches on National security. The State then applied that the respondents be remanded in custody pending the hearing and determination of their respective cases. On the same day the file was placed before Wendoh J in order to address the prayers that were sought by the State. Mr. Wohoro learned State counsel appeared before Wendoh J in order to present the case of the State. It suffices to say that Mr. Wohoro appeared before the Honourable Lady Justice Wendoh *exparte* and argued his application on the grounds that the release of the respondents by the trial court was founded on wrong principles of law. Mr. Wohoro contended that the respondents were likely to prejudice the investigations which involved a huge cache of ammunitions. He also stated that it is in the interest of the people of the Republic of Kenya to ensure that the respondents are kept in custody pending the hearing and determination of their case. After considering the arguments of the learned State counsel *exparte* held as follows:

"I have considered the application for revision of the Chief magistrate's orders of 22.12.2009 requiring that the accused persons be kept in remand pending completion of their investigations. It is true that this is a bailable offence and ordinarily bail would be given as a matter of right. However, the court should have taken into account the nature of the offence, the large cache of ammunition involved and the fact that the source is not yet established. The security forces have found that it cannot be traced to Eldoret which should have been the source of Kenyan ammunition. It cannot be denied that the alleged offence is indeed a threat to security and the Kenyan Public at large and there is need for the security personnel to establish the source, who are involved before the issue of bail can be considered. I therefore allow the AG's application to revise the order of the Chief Magistrate dated 22.12.09 and direct that the accused be detained in remand for a further 14 days to allow for completion of investigations. Any cash bail paid is hereby suspended."

The State then extracted an order in the following terms:

"It is hereby ordered as follows:

1. I therefore allow the Attorney General's application to reverse the orders of the Chief Magistrate dated 22nd December 2009.

2. That the accused persons be detained in remand for a further 14 days to allow the completion of investigations.

3. That the cash bail paid is hereby suspended.

The order was issued on 23rd December 2009 and signed by the Senior Principal Deputy Registrar High Court of Kenya Nairobi. It is important to state that at the time the order was granted, all the respondents had fulfilled the conditions set by the lower court and were already out on bond. It is alleged that on hearing the orders issued by the High Court, the applicant presented themselves before police and were immediately taken back into prison custody. It is also alleged that the respondents learnt of the High Court's order in criminal revision No.51 of 2009 through the press, in particular the Daily Nation Newspaper of 24th December 2009.

On 28th December 2009 the advocates for the respondents appeared before the trial court and informed the said court that the respondents had voluntarily surrendered to the police pursuant to the press report. And that the decision of the lower court was revised by the High Court. Again on 8th January 2010, the matter was mentioned before the trial court to seek the reinstatement of the cash bail since the orders that were issued on 22nd December 2009 had a lifespan of 14 days. The application for reinstatement of the cash bail by the respondents was based on the pretext that the orders that were issued on 23rd December 2009 suspending the cash bail and remanding the respondents for a further 14 days stood spent by eflluxion of time.

The application was then opposed by Mr. Wohoro the learned state counsel on grounds that the orders by the High Court had completely reversed the decision of the trial court. The trial court then reserved its ruling for 12th January 2009.

The issue for determination in that ruling was how to interpret the orders that were issued on 23rd December 2009. As regards interpretation of the orders, the advocates for the respondents were of the

view that the High Court only ordered the remand of and the suspension of the accused persons' bail for only 14 days and that since the 14 days had ran out, they should be released forthwith. They also argued that the application to the High court was for revision of and not reversal of the lower court's orders. It was the argument of the advocates appearing for the respondents that the orders that were issued by the lower court on 22nd December 2009 were still valid and had the full force of law after the lapse of 14 days. The trial court after hearing the arguments of both sides held as follows:-

"Whatever the application to the High Court might have been, the High Court in its wisdom gave an order reversing this court's orders of 22nd December 2009. It also gave an order suspending the cash bail paid by the accused persons. It did not specify the period it had suspended the cash bail. The orders granted by the High Court are distinct. It behooves this court to take them as they are. Any person wishing to have them interpreted should move to the High Court. In the meantime this court takes it that the order releasing accused persons on bail was reversed by the High Court. They will therefore remain in custody."

As a result of that decision, the advocates appearing for the respondents took several routes in order to address the grievances and the rights of their clients. The 1st respondentr filed High Court Miscellaneous criminal application No.11 of 2010 and filed a Notice of Motion expressed under section 60(1) of the Constitution of Kenya and section 123(3), section 125(1) and (2) of Criminal Procedure. In that applications the applicants sought;

"That this court be pleased to reinstate the cash bail granted to the applicant on 22nd December 2009 by the trial court in Nairobi Chief magistrate's criminal case No. 2217 of 2009 and be pleased to direct that the applicants to pay under section 123(3) of the Criminal Procedure Code on such terms as may be reasonable. "

The 2nd respondent filed a similar application in Miscellaneous criminal application No.10 of 2010 seeking to be released or granted bail pending the hearing and determination of an appeal against the decision made by the trial court on 12th January 2010. On the other hand the 3rd, 4th and 5th respondents wrote the letter to the Deputy Registrar Criminal Division High court of Kenya Nairobi seeking that the file be placed before the High Court to determine and/or to interpret the orders that was made by Wendoh J on 22nd December 2009 which had suspended the bail terms of their clients.

All the files were then listed before me and the advocates appearing for the respondents and the learned State counsel requested this court to give direction as to the matters in dispute or contest. On 21st January 2010, after studying all the issues raised by the respondents, I made the following orders:-

"I direct/order that miscellaneous criminal application Nos. 10 and 11 of 2010 be and are hereby consolidated into criminal revision No.51 of 2009. The lead file shall be criminal revision No. 51 of 2009."

The issue for determination/in contest is the letter dated 22nd December 2009 by the Attorney General's Office to the Deputy Registrar High Court of Kenya which resulted in criminal revision NO.51 of 2009 and ultimately the order or ruling by Lady Justice Wendoh given on 22nd December 2009 but which was issued on 23rd December 2009 and the decision of the Chief Magistrate dated 12th January 2010 arising from the order by Wendoh J given on 22nd January 2009.

Mr. Pravin Bowry learned counsel for the 1st respondent was the first to address me in respect of the orders granted on 22nd December 2009 but issued on 23rd December 2009. He stated that the whole order made by Wendoh J was a collective order and the learned Judge was clear in her decision that the accused person be retained for a period of 14 days, no more no less. He also submitted that the suspension of the cash bail related to the period of 14 days and that it was not a general suspension, it was not a perpetual suspension. He stated that the factual position was that the cash bail has already been paid and having paid the cash bail, the respondents were entitled to bail after 14 days. It was the position of Mr. Pravin Bowry advocate that the court did not order that the cash bail be returned to the accused persons and bail being a fundamental right, the prosecution can be seen to be applying for suspension of the cash bail perpetually. He stated that the prosecution was given 14 days to complete the investigations because they were not satisfied with the earlier decision of the trial court.

Mr. Amolo appearing for the 2nd respondent agreed with the sentiments expressed by Mr. Bowry and added that the letter dated 22nd December 2009 by the learned state counsel Mr. Wohoro was only seeking revision of the decision of the trial court. In the opinion of Mr. Amolo Advocate words must be given their ordinary plain meaning and that nowhere did the AG's office ask for reversal of the decision

of the trial court. He contended that the Attorney General asked for revision and the Judge did not use the word reverse but revise in her decision/ruling. Mr. Amolo submitted that reverse means *'uprooting an entire set of existing circumstances or situations'* so that they did not exist anymore while revise means '*the situation is modified'*. He contended that if it was the intention of the judge to cancel bail she would have said so and if the intention was to sustain completely she would also have expressed herself along those lines. He stated that the learned judge gave the prosecution 14 days for purpose of allowing completion of investigations. The judge suspended the bail terms granted by the trial court for a period of 14 days only. Mr. Amolo advocate contended that it could be absurd for the cash bail to be retained and at the same time bail no longer obtains.

Mr. Wandugi learned counsel for the 3rd respondent contended that the purpose of appearing before the lower court was for the release of the respondents after the 14 days had lapsed. He contended that as at 12th January 2010, the respondents ought to have been released automatically in the absence of an extension of the orders by Wendoh J which was granted on 22nd December 2009 and issued on 23rd December 2009. He also submitted that there is absolutely no legal reason for the continued detention of his client and that the State by refusing to accede to the request of his client after the lapse of 14 days was causing grave injustice and prejudice. He submitted that his client is entitled to his freedom and that the issue of National security should not be used as a blanket to violate the rights and the liberty of his client.

Mr. Njanja learned counsel for the 4th respondent contended as follows: That a miscarriage of justice was occasioned by the order which was extracted by the State. That there is no room for confusion and no mention of cancellation of the cash bail that was granted by the lower court. The cash bail was suspended for 14 days and after the lapse of 14 days the law deems that the cash bail reinstates automatically. He also contended that the judge knew the existence of the cash bail and that he was alive to the cash bail before she suspended it for 14 days.

Mr. Maina learned counsel for 5th respondent associated himself with the sentiments expressed by the other counsels appearing in this matter.

Mr. Wohoro learned State counsel contended that the letter dated 22nd December 2009 is very clear as the State applied for the revision of the cash bail given by the trial court on the grounds that the case/charges against the respondents touched on National security. He stated that the State applied for revision of the decision of the trial court pending the hearing and determination of the lower court's case. He stated that the aim of the State was to seek for an order to revise the lower court's decision of 22nd December 2009 pending the hearing and determination of the lower court's matter. And that the judge was dissatisfied with the decision and rendered it ineffectual. The bond terms were of no effect and that the lower court's order was completely set aside. He also contended that the matter concerns national security and that it would be dangerous to allow the respondents to be released on bail pending the hearing and determination of their matters. He therefore urged me to ensure that the respondents are not released as they pose risk to National security.

Now it is important for me to determine the issues as was rightly presented by the advocates and as I see it fit in the interest of justice. First and foremost I wish to address the issue of bail and the concerns raised by the State that the respondents pose risk to national security and interest. Let me say that the mandate given to the High Court by our constitution is to ensure the existence of a society where justice, fairness, equality and equity is the foundation and hallmark of our daily lifves. This hopes and aspirations is the minimum needs and expectation of every citizen of this country. Section 72(5) of our Constitution states as follows:

"if a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

The law is that a person who is arrested or detained upon reasonable suspicion of having committed or being about to commit a criminal offence and there being nil chances of having his case determined within reasonable period, is entitled to be set free on reasonable bail conditions. Bail is a vital aspect of every criminal justice system. Any person who is held in custody pending trial suffers the same dent on his liberty as one serving a sentence of imprisonment after conviction. By keeping an accused person in custody until tried, convicted and sentenced, bail protects against the dilution of the presumption of innocence. This presumption encapsulates against detention before lawful conviction. The recognition of

the inherent dignity and of the equal and inalienable rights of all members of the human family is paramount and is the foundation of freedom justice and peace in the world.
It is also important to understand that no one has the ability to identify offenders unerringly, thus justice requires an impartial mind to consider whether the suspicion of the detaining authority carries a high degree of reliability such that pre-trial detention should be ordered. Pre-trial detention is an assault to the liberty of an accused person, in circumstances where the evidence available calls that he or she be released on bail pending the hearing and determination of his case. It is important to note that liberty of a citizen is a cherished right, it is inalienable, it is indefeasible, it is incorrigible, and it should not be curtailed ordinarily except on consideration of public interest.
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. That is a factor which has been heavily relied upon by the State in this matter.
Let me say that there cannot be an inexorable formula in determining the issue of public security and safety. The facts and circumstances of each case will govern judicial discretion in granting or cancelling bond. Mr. Wohoro learned State counsel contended that the present case is not fit for grant of bail not only because of the seriousness and gravity of the offences which concerns security of State but also of the real likelihood of the applicants exerting influence and tampering with evidence. He also contended that merely because the lower court granted bail, did not imply this court is in any manner compelled or obliged to give similar reliefs.
In my humble opinion the issue of national security and interest is a fundamental issue which requires extreme caution and dedication. The issue of national interest is a paramount factor which can heavily weigh in the mind of any judicial officer who is confronted with sufficient evidence. The issue of national security and interest is not a casual business, its magnitude, seriousness, its gravity and implication must be brought to the attention of the court in order to make an informed and fair decision. In making allegations on matters concerning national security, the prosecution must be possessed of or have information which is definite and which clearly shows that there is a foreseeable risk to the interest of the public or that a cognizable offence is likely to be committed if the accused person is released on bail. There must be legitimate information to support the allegations that the accused persons are likely to prejudice or jeopardize the interest of the public.
I reckon that reasonable suspicion must be founded on reasonable grounds, mere suspicion cannot be a basis to indict an individual that he is likely to compromise national security. In my mind specific events and facts must be disclosed to court to enable the judge to judge the genuineness and reasonableness of the allegations. It is important to note that reasonable suspicion must not be illusion, fantasy or fanciful in imagination.
The law is that reasonable suspicion would deprive an individual of his personal liberty, however, evidence is required to support existence of the said suspicion. Reasonable suspicion is not a matter to be left at the imagination, assumption, conception and/or personal whims of an individual, it must be particularized, and it must be objective, specific and precise.
In objecting to bail before the lower court, the prosecution relied on the affidavit sworn by Mr. Richard Katola Ag. ACP who is in charge of Special Crime Prevention Unit. In paragraph 6 he stated that the cases under investigation touch directly in matters of national security, security of members of the public, public order and tranquility. He also contended that the investigations were at the time at crucial stage and are needed to be safeguarded. He also stated that there is a real risk that the suspects may interfere with the investigations. He further alleged that there is a very real prospect that the accused persons will be charged with more serious offences. That affidavit was filed in court on 16th December 2009 and from that time the prosecution had ample time to any investigation that was necessary and to prefer any or further charges against the accused persons.
As regards the contention of national security, public order and tranquility, no specific facts or circumstances was brought by the State to the attention of the trial court and to the High Court. There is no demonstration that in a particular instance or in a particular way, the accused persons are likely to compromise the security of this country. In determining or assessing what amounts to a security risk, it is incumbent upon the prosecution to place evidence to demonstrate that the release of the accused persons would endanger the security of this country. It is important to appreciate that absolute security is impossible. However, there are numerous ways in which national security and individual security can be

threatened. The HIV/Aids epidemic threatens not only millions of individual lives but the very existence of some nations. Just as there are many different threats to individual and nations, there are many different means for countering those threats. Countering or responding, monitoring with efficient and prompt techniques/ways is an essential element in safeguarding public interest. I agree that a single act of terrorism could wipe out hundreds of thousands of people instantly, however, the mere existence of that probability is sufficient to make the threat of terrorism a more significant than the threat posed by crime, disease and poverty. **David Balwing in his book *The Concept of Security*** defined security as follows:

"The actor whose values are to be secured, the values concerned, the degree of security, the kinds of threats, the needs of coping with such threats, the costs of doing so and the relevant time period."

The question is whether by merely claiming that the respondents are security threats because they were allegedly found in possession of the weapons mentioned in the charge sheet is a factor that can lead to the refusal of bail. What is the yardstick in determining the assessment of national security in a matter like the one before this court. In fact the State is obliged to state the extent of the past, present and future threat posed by respondents to national security. The assessment of national security is a fundamental issue that has to be weighed with caution but fear or expression of fear cannot be a basis to determine or to assess the risk posed by the respondents. Can fear be a reason for modifying or suspending a civil right. The fear has to be accompanied by a well formed belief that modification, suspension and/or refusal of a right would actually make a difference to the prospect that we fear. In **R v Secretary of State for Home Department** *exparte* **Rudock [1987] 1WLR 1482** it was observed:

"It was said that credible evidence was required in support of a plea of national security before judicial investigation on a factual issue is precluded. Taylor J accepted that in an extreme case where cogent, very strong and specific evidence of potential damage to national security flowing from the trial of issues, a court ought to decline to try factual issues."

The point is that there must be cogent, very strong and specific evidence showing the existence of potential damage to national security that is posed by the respondents. I agree that it is wrong to discuss factual issues which concerns national security in public but nevertheless there must be some semblance of what can be regarded as strong and specific evidence which shows a likelihood of danger to national security. That evidence can only come from the person who is alleging that the accused persons are likely to compromise national security. I do not find it necessary for the State to provide a comprehensive list or instances of what constitutes national security but I believe it may be necessary for the State to cite and/or list some of the situations that may be relevant to such an appraisal for the court to determine the intensity and the seriousness of the danger posed. Where safety and national security is an issue, both the magnitude of the risk and the identity of those responsible are relevant considerations. In my view the correct approach to assess national security is by way of evidential proof and the conduct of the accused persons in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly dangerous and reprehensible to public good. The law recognizes an accused person to bring himself to the expectation of a civilized and acceptable behavior that can meet the satisfaction of the court. In **Zamora case [1916] 2AC 77at page 107 Lord Parker** held;

"Those who are responsible for national security must be the sole judges of what the 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."

I am not in any way proposing that security issues and matters which concern national security should be discussed in public but where that is put as a justification to deny a person his liberty, it is important to give information and provide facts in order to demonstrate the gravity and the seriousness of the danger that is likely to be caused by the individual who would be denied the right to enjoy his liberty. There has to be a reason or evidence to show that our national security would be enhanced by refusal of bond or bail to the respondents. The crucial dilemma revolves around what amounts to national security and what is the threat that is likely to endanger our national security. The court as the guardian of individual liberty has to be given appropriate facts and evidence to demonstrate that the release would endanger national security.

Traditionally the courts will not allow and has never allowed any individual to be deprived, the right to his freedom and liberty, unless every form and every step in the process is followed with extreme care and precision. The issue of national security and threat posed by respondents was canvassed before the learned Chief magistrate Mr. Mutembei who after giving due consideration to the issues raised by the State was of the view that there was sufficient reasons to persuade him to grant bail notwithstanding the

fears and apprehensions expressed by the State. Whilst security considerations, make the granting of bail most unattractive, unlikely and unfavourable, nevertheless the courts must be allowed to fulfill its traditional function of balancing the interest of State and those of individual. I think, it needs brave men and women to say no to the State when the circumstances and facts dictate otherwise. We cannot shy away, we cannot hide, we cannot be cosmetic and we cannot give a favourable answer when the answer available to him is NO.

Let me also add that it is quite unrealistic for a State to fear that the court would disregard national interest in the determination of a dispute between the State and an individual. The court is a component and is the foundation that upholds national security. It is a pillar that holds a society together by ensuring fairness and justice in all transactions between individuals and between individuals and State. We do not provide hard balls or soft balls to an individual or to the State simply because the dispute involves issues of national security. We are guided by evidence and we must always observe out duty which is fidelity to the law. We must remember that at all times the court is charged with the duty to be independent, impartial and to give a fair hearing within reasonable time for all matters and to all parties who bring their complaints, cause of action and grievances before court. We cannot afford to abdicate and/or abrogate that responsibility simply because there is an allegation that a party is likely to endanger national security. The party seeking to benefit from the power of the court is encumbered and/or obliged to supply documentary information and evidence to sustain the story he has put forward before court. The court relies on the strength of the evidence by the party seeking to benefit from its decision and it is important to support allegations with documentary evidence. The court does not act on abstract or on allegations but it is guided by sustainable evidence which can withstand legal scrutiny. The court has to weigh the interest of both sides in order to arrive at a just and fair decision.

The point I am making is that it is utterly repugnant to justice and fairness for one party in a dispute to arrogate himself so much power that he is able to deprive the other of his liberty merely on allegations of national security. If that were to prevail the courts would be rendered powerless, toothless, mindless, it would be dumb, it will have no mind and it will be useless to say ***justice be our shield and defender***. Essentially it is the responsibility of the party who wants the court to rule in its favour to support his contention or allegations with reasonable and sustainable documentary evidence which even an ordinary man would say the person has a point and that his right must be observed and protected. What that means is that a heavy responsibility revolves on the court to see that no person makes or attempts to endanger national security in a manner likely to prejudice the wider interest of the public. However, we cannot elevate a right of the State to enhance and preserve national security over the right of an individual unless the evidence available supports the contention by the State. It is deeply wrong and only serves to evoke in the minds of the citizens that the State is a classified litigant when a dispute arises involving the State and an individual. Perhaps it is important to restate that it is a legitimate aspiration of every individual for dignity opportunity and equality before the corridors of justice. One may say that may not be so in the corridors of power.

The question for my determination is whether there is sufficient evidence to sustain the contention by the State that the release of the respondents would be an affront to national security. As stated we cannot allow an individual or an entity to interfere and/or compromise with the national security or the greater interest of our Nation. However, when such circumstance arise, the court must be equipped properly so that the conflict as to the right of an individual vice versa that of the wider public can be adequately addressed. We must remember that human history has often been a record of men and women failing to respect and observe the rules of engagement. By that I mean, that men who commit transgressions by violating the laws of the land, I cannot therefore ignore that the law would be broken covertly and overtly but the persons employed to detect crime must not be left in the development of techniques employed by criminals. We must face the situation squarely and adequately. We must speak clearly and plainly on specific issues which we confront in our daily duties. The point I am making is that the fact that the respondents were found in possession of Government stores and ammunitions, cannot be a basis to say that they are likely to compromise national security if released on bail. Section 72 (1) (e) of the Constitution states;

“No person shall be deprived of his personal liberty save as may be by law in any of the following cases;

(e) Upon reasonable suspicion of having committed or being about to commit a criminal offence.”

The question that arises is whether the respondents can be denied or deprived of their personal liberties on

mere suspicion. As stated earlier suspicion, however strong, unless supported by cogent and credible evidence cannot be a basis to say that it is a ground to deny an individual of his personal liberty. I therefore find neither a single fact nor a reason which can explain why the State should insist of the detention of the respondents on flimsy and flippant contention of endangering national security. It is my decision that there is a serious problem with the claim that one is justified in undermining civil liberties to prevent the release of an individual simply because they were allegedly found with weapons likely to compromise our national security. As stated the existence of fear and anxiety because the respondents were found with the weapons mentioned in the charge sheet cannot be a yardstick to measure the degree of the danger they pose to national security.

We cannot subscribe to the views expressed by the learned State counsel that the respondents must be retained on mere allegation of national security. That would render obsolete the privileges and the rights enjoyed by the respondents under our Constitution. Perhaps to agree with the State would radically change the rights enshrined our Constitution and would turn this country into the concept proposed and expressed by **Mr. Alberto Gonzales** which is based on fear and anxiety. Definitely that kind of attitude would destroy the democratic gains and the legal jurisprudence that mitigates against trampling of individual rights mainly because of fear and phobia. We cannot afford to go into that direction for that would be retrogressive and reactionary attitude which would destroy the gains which we made in the enhancement of civil liberties. I therefore see that there is no legitimate reason to make me believe that the respondents are likely to interfere with our national security. And on the same breadth there is no evidence to show that they are likely to interfere with the investigation that is being carried out by the prosecution. For those reason I do not think that there is any basis to sustain the fear expressed by the learned State counsel Mr. Wohoro that the respondents are likely to interfere and/or compromise our national security.

The other issue for my determination is the orders issued by the Lady Justice Wendoh on 22nd December 2009 and issued on 23rd December 2009. It is important to appreciate that the AG's application was to revise the order of the Chief Magistrate dated 22nd December 2009 on the grounds that investigations had not been completed and that the respondents were likely to compromise national security. What the learned Judge did was to revise the order of the Chief Magistrate as prayed by the learned State counsel Mr. Wohoro.

After the learned Judge issued the orders, it is clear the order was extracted as follows:-

1. I therefore allow the Attorney General's application to reverse the orders of the Chief Magistrate dated 22nd December 2009.

2. That the accused persons be detained in remand for a further 14 days to allow the completion of investigations.

3. That the cash bail paid is hereby suspended.

The first question is whether the order as extracted is a true representation of the orders granted by the High Court. I must say that the order extracted is a clear departure from the orders granted by the Honourable Judge. In the first order as extracted, the State used the word ***'to reverse'*** which was not used by the Honourable Judge. It is clear that Lady Justice Wendoh did not in any way or anywhere use the word 'reverse' in her ruling. The word used by the Judge was to **'revise the orders of the Chief Magistrate dated 22nd December 2009'**. The Judge also directed that the respondents be detained in remand for a further 14 days to allow for completion of investigations. Thirdly the Judge also suspended the cash bail.

In interpreting the orders, the court has to consider the letter which started the whole process and which was written by the Attorney General's office to the Deputy Registrar High Court Criminal Division. The said letter was very specific and categorical in that the State was seeking for revision of the decision of the Chief Magistrate dated 22nd December 2009. If it was the intention of the State to reverse the whole orders as issued by the Chief Magistrate, then they were required to make it clear and beyond doubt to the learned Judge. A pertinent question that arises is whether a court can disregard the rules of natural justice and condemn a party without giving him an opportunity to be heard on his case. In my understanding the law does not envisage a situation where a party is condemned without a hearing and to give orders detrimental to his interests and rights. That is completely an affront to our justice system which requires that fundamental issues that affect the rights and interests of an individual ought to be

given a hearing so that all the issues and grievances are brought before court for judicial scrutiny and arbitration.

Our judicial system is based on adversarial system which means each party has to be heard on his case unless it is not necessary. Absolutely it was necessary for the respondents to be heard in a matter which clearly destroyed or deprived them a right which was pronounced in the presence of all parties and after due consideration to all the factual issues and the law applicable. I therefore think that the law does not permit a party to obtain orders exparte which clearly was obtained in contravention of the principles of natural justice. That being the guiding factor, what is the interpretation of the orders that were issued by Wendoh J on 22nd/23rd December 2009.

As stated the orders of the Judge must be construed and interpreted in a way they were granted. No doubt it is the State which introduced the word 'reverse' into the decision of the trial Judge. By extracting orders in a manner which contravenes the ruling is in my views an attempt to abuse the judicial process. The words 'revise' and 'reverse' are totally different. I agree with Mr. Amolo advocate that reverse means ***uprooting an entire set of circumstances or situations so that they do not exist anymore*** while revise means ***the situation is modified*****.** Revise is the re-examination or careful review for correction or improvement because of an existing improper and inconsistent matter in the situation being revised. In my mind a revision will only occur if it would not materially prejudice an accused person.

The question is what was the intention of the learned Judge in granting the orders of 22nd/23rd December 2009. If it was the intention of the Judge to cancel bail, she would have made it clear and plain and if it was the intention to suspend as the case here, she did it for 14 days. The 14 days was for purposes of allowing completion of investigations. In my mind the orders of the learned Chief Magistrate was suspended for a period of 14 days only. I therefore think that there exists no room for confusion in the way the orders were sought by the State and granted by the learned Judge. After 14 days, the law deems that the cash bail paid reinstates automatically. In my mind therefore the Judge was alive and aware of the existing circumstances and her decision was to suspend the situation obtaining before the Chief Magistrate's court for a period of 14 days. That is why the Judge made an order that the respondents be detained in remand for a further 14 days in order to allow completion of investigations. If it was the intention of the Judge to set aside the orders of the Chief magistrate she had the ability, capacity and the knowledge to express herself and no doubt in my mind that the judge intended to give the State a temporary reprieve for a period of 14 days. I therefore think that it was wrong for the learned State counsel to say that the orders by the learned Judge were permanent until the hearing and determination of the lower court matter.

I also think it was wrong for the learned State counsel to extract an order which was incomplete departure of the orders given by the learned Judge. By doing so, the State transgressed on an area which is dangerous and which is likely to attract civil and penal consequences. I do not think that it was right for the State to extract an order that was not given/granted by the learned Judge. It was wrong to include the word ***'reverse'*** in the place of the word ***'revise'*** as used by the learned judge. That must have created an impression in the minds of the learned State counsel that the Judge radically and materially altered the situation.

In conclusion I make a determination that the ruling of the learned Judge was clear and had no room for confusion and interpretation. However, having been given the task to interpret the plain and clear decision of the Judge, I make a finding that the learned Judge was clear that the accused persons be detained for a period of 14 days. The suspension of the cash bail only related to the period of 14 days and it was wrong on the part of the learned State counsel to say that the suspension was a general suspension. That is why the learned Judge did not order that the cash be returned to the respondents. In short the prosecution was given 14 days and that period having lapsed, I am obliged to restore the liberties of the respondents with some modifications.

I will not conclude this decision without commenting on certain issues which are pertinent to the issues that were set for my determination and the charges against the respondents. First and foremost I sincerely think that this case is a serious indictment against the Ministry of Internal Security and the personnel in-charge of our security. It shows that there was a lapse or compromise that may have occurred in the way our national security organs are managed by Kenya Police, National Security Intelligence Service, the Administration Police and the Provincial Administration.

In a civilized society the security organs are empowered and/or invested with the powers of detection and investigation of crimes to secure punishment for individuals who may have committed offences likely to compromise national security. No doubt it is the interest of the society that the security agents must act

honestly and fairly in the detection and securing of intelligence information so that the commission of crime is minimized. In a case where an individual or group of individuals are allegedly found in possession of a large cache of arms and ammunitions is a clear demonstration that there is something wrong with the Ministry of Internal Security. It is either Intelligence is lacking or it is not properly and efficiently used. The discovery of large weapons can shake the confidence the common man in the Ministry of Internal Security and the personnel who work in that Ministry. I am not in way saying that the accused persons are guilty or they were found with the weapons mentioned in the charge sheet, but what I am saying is that the mere existence of the weapons and items mentioned in the charge sheets outside our armories is a clear demonstration/manifestation/testimony that there is something wrong with the Ministry of Internal security and the personnel who are drawing huge salaries from the public coffers. Section 14 of the Police Act Cap 84 shows that police officers are employed for the maintenance of law and order, the preservation of peace, protection of lives and property, detection of crime and apprehension of offenders. In performing that task the police heavily rely on intelligence information gathered by the personnel who work at Criminal Investigation Department and National Security Intelligence Service. The provincial Administration also exists in every corner of this country and it is their mandate that nobody endangers national security by storing or amassing large cache of ammunitions and weapons. In short there appears to be some abrogation of duties or abdication of responsibility that may have occurred within the Ministry of Internal Security. The answer can only be given by the relevant authority so that public confidence and tranquility is not eroded. Legal liability/responsibility go hand in hand with political responsibility.

In conclusion it is my determination that the respondents are entitled to be released on bail so that their liberty is restored in absence of any evidential proof that they are likely to endanger our national security. In my view detention of an individual before trial and conviction destroys the rights of an individual to be released on bail unless the circumstances and facts dictates otherwise. The point I am making is that incarceration before conviction, violently destroys the prisoner's private life effectively threatening his job, his family and domestic arrangements thus, judicial determination of bail mitigates against arbitrary arrest and detention on framed up charges and protects the rights of the accused by ensuring an independent assessment of the question of his release on favourable bail terms pending the hearing and determination of the charges against him.

Having taken into consideration all the circumstances in this matter, I think the best and most suitable order to give is as follows:

(1) The 1st respondent **MUNEER HARRON ISMAIL** appears to be the main and central player in the charges that were leveled against the 2nd and 3rd respondents in this matter. I therefore think that I should impose some stringent and strict conditions for his release. In the premises, I further direct that he should provide a further security in view of the charges that are leveled against him. I direct or order that in addition to the cash bail already deposited, he shall be released on two sureties of Kshs.3 million each, to be approved by the Deputy Registrar of the High Court Criminal Division.

(2) The 2nd respondent **NAHID TABASUM SUMAR** shall be entitled to be released immediately and automatically on her cash bail which she had paid.

(3) The 3rd respondent **JOSEPH MARITIM** shall in addition to the cash bail also be released on two sureties of Kshs.500,000/= each to be approved by the Deputy Registrar of the High Court Criminal Division.

(4) The 4th respondent **JOHN WANDETO KIRAGU** and the 5th respondent **DOMINIC ABISAI MUFUMU** shall in addition to the cash bail already paid be released on two sureties of Kshs.200,000/= each to be approved by the Deputy Registrar High Court.

Orders accordingly**.**

Dated and delivered on this 28th day of January, 2010.

M. WARSAME
JUDGE