Republic v Odero (Miscellaneous Criminal Application E075 of 2023) [2023] KEMC 9 (KLR) (2 May 2023) (Ruling)

Neutral citation: [2023] KEMC 9 (KLR)

REPUBLIC OF KENYA

IN THE SHANZU LAW COURTS

MISCELLANEOUS CRIMINAL APPLICATION E075 OF 2023

JM OMIDO, SPM

MAY 2, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

EZEKIEL OMBOK ODERO ..... RESPONDENT

RULING

A. Introduction.

1. The Respondent herein, Ezekiel Ombok Odero was arrested on 27th April, 2023 and was presented before this court on the morning of 28th April, 2023 in line with Article 49(1)(f) of the *Constitution* of Kenya which provides that an arrested person has the right to be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested; or if the twenty-four hours end outside court hours, or on a day that is not an ordinary court day, the end of the next court day.

2. The Respondent is now faced with the Applicant's Notice of Motion dated 28th April, 2023 which is expressed to be brought under Article 49(1)(f) and (g) of the *Constitution* of Kenya, Section 123A of the *Criminal Procedure Code* Chapter 75 Laws of Kenya, *Persons Deprived of Liberty Act* No. 23 of 2014, Section 33 of the *Prevention of Terrorism Act* No. 30 of 2012 and all other enabling provisions of the law and which seeks the following orders:

    a. That the Respondent be detained at Makupa Police Station for a period of thirty (30) days so as to enable the investigation team to complete investigations and submit the police file to the Director of Public Prosecutions for Review.

    b. That the Honourable Court makes any orders that it may deem fit for the proper, fair and effective administration of Justice

3. The Applicant ("the State") has on the face of the application listed fourteen grounds upon which the application is premised which in precis are as follows:

   a. That the Applicant is undertaking investigations relating to serious crimes that the Respondent is jointly and by conspiracy suspected to have committed including but not limited to the felony of Murder; Aiding Suicide; Abduction; Radicalization; Genocide; Crimes Against Humanity; Child Cruelty, Fraud and Money Laundering and for being accessories before or after the fact.

   b. That preliminary investigations show that these offences are in violation of various statutes including but not limited to the *Children Act* of 2022, the *Penal Code* Cap 63, the *Prevention of Terrorism Act* No 30 of 2012, the Prevention Act of Crime Act no 6 of 2010, the *International Crimes Act* 16 of 2008, the *Proceeds of Crime and Anti-Money Laundering Act* No. 9 of 2009, *Basic Education Act* No 14 of 2013 among others.

   c. That the curtailment of his liberty and detention beyond 24 hours by the orders of the court is necessary. There exist compelling reasons to remand him pending conclusion of investigations for reasons herein below listed.

   d. That the Respondent is a founder and preacher of the New Life Prayer Center situate at Mavueni Township within Kilifi County that offers other social amenities including international schools, petrol station, hotel and accommodation for the staff.

   e. That he also runs a Television Station namely Times TV that investigations reveal he paid KShs. 500,000/= as part payment for its purchase from Mr. Paul Mackenzie who is currently under police investigations in matters connected to the Shakahola massacre of innocent and vulnerable Kenyans.

   f. That there is credible intelligence linking the bodies exhumed from the 800 acre piece of land situate in Shakahola (associated with Paul Mackenzie) with several innocent and vulnerable followers of his ministry believed to have met their death in their quest for divine intervention from the Respondent which intelligence has triggered police investigations.

   g. That following this intelligence information, the police have established that several deaths in fact occurred within the precincts of New Life Ministry at Mavueni and were reported at Kilifi Police Station between the year 2022 and 2023 vide the following OB NO'S; 59/07/05/2022, 88/16/09/2022,105`/04/11/2022, 68/17/11/2022, 81/06/12/2022, 31/07/12/2022, 43/17/12/2022, 106/03/01/2023, 62/04/01/2023, 25/25/01/2023, 64/02/02/2023, 90/10/02/2023, 15/12/02/2023, 07/04/03/2023, 45/18/3/2023, 43/07/02/2023 and 82/10/02/2023 therefore giving credence to the intelligence information of the deaths at the said Church precincts.

   h. That police have now collected several burial permits that were issued to several individuals whose names and telephone numbers have been disclosed in those records. However, the investigators hold reasonable apprehension that the Respondent may interfere with the individuals now regarded as potential witnesses before getting to the bottom of the question whether the dead bodies were indeed released to kin for interment or buried at Shakahola under suspicious circumstances.

   i. That the intelligence information further reveals that upon the demise of the innocent and vulnerable followers of the Respondent, their bodies were preserved at a privately-run morgue

in Kilifi before being transported and interred in the Shakahola Forest. This information is the subject of ongoing investigations.

j. That the Respondent and Paul Mackenzie share a history of business investments in particular the TV the station which was used in passing radicalized messages to believers with an intention of recruiting those followers, some of whom it is believed are amongst the hundreds of bodies so far exhumed at the Shakahola land.

k. That in respect of the investigation against Paul Mackenzie, there are allegations under investigations that followers would dispose of all their earthly possessions and surrender the proceeds to him as part of the preparations to meet their maker and it is now necessary to establish whether there are any other dealings between the Respondent and the said Mackenzie bordering on money laundering.

l. That these offences as orchestrated depict an organized criminal group as defined under the Prevention of Organised Crime Act (i.e "committing one or more serious crimes, or committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit, other advantage for the organized criminal group or any of the members of organized criminal group...".).

m. That the crimes under investigations by nature, gravity and seriousness; are complex by nature and constitute a compelling ground to deny bail at this juncture and supports continued detention of the Respondent.

n. That this being a public interest matter and given the nature of offences committed it is in the interest of the Respondent to remain in custody pending completion of investigations for his own safety and security.

4. The State's Motion is supported by the affidavit sworn on 28th April, 2023 by No. 235041, Mr. George Muriuki (ASP), a senior police officer who describes himself in the affidavit as one of the investigating officers currently deployed at DCI Mombasa Urban and undertaking investigations relating to serious crimes that the Respondent is jointly and by conspiracy suspected to have committed including but not limited to the felony of Murder; Aiding Suicide; Abduction; Radicalization; Genocide; Crimes Against Humanity; Child Cruelty, Fraud and Money Laundering and for being accessories before or after the fact. The said deponent has restated and expounded on the above grounds.

5. The application proceeded by way of oral submissions whereby the State was represented by Messrs Kiprop and Jami, both Prosecution Counsel, while the Respondent's case was urged by Mr. Magolo, Advocate.

B. The State's Submissions.

6. Through the two learned Prosecution Counsel, the State sought for the court's discretionary orders that the Respondent be detained at Makupa Police Station in Mombasa County for a period of thirty (30) days to allow the completion of investigations.

7. It was the case of the Applicant that the investigation to be undertaken in respect of the Respondent is connected to what is currently widely referred to the Shakahola Massacre, at the centre of which one Paul Mackenzie is widely mentioned and whose activities are suspected by the authorities to be of a criminal nature and to have led to the deaths of at least one hundred (100) people.

8. The State submitted that the offences that the Respondent is suspected to have committed and for which he is being investigated include the felonies of Murder; Aiding Suicide; Abduction;

Radicalization; Genocide; Crimes Against Humanity; Child Cruelty, Fraud and Money Laundering and for being accessories before or after the fact.

9. It was further submitted that the Respondent and the New Life Prayer Church, Mavueni, which the Respondent founded have been linked to several Occurrence Book (O.B.) reports of several deaths that occurred between 2022 and 2023 within the church precincts, where the Respondent presides over as a preacher and/or pastor. Counsel for the State invited the court to peruse and consider seventeen (17) O.B. reports of such deaths, photostat copies of which were annexed to the affidavit in support of the application, which the State urges give credence to the intelligence information of the deaths at the said church precincts.

10. The State, it was argued, has credible intelligence and/or information which revealed that some of the persons who met their demise within the New Life Prayer Church precincts in Mavueni may have been interred at Shakahola Forest, currently a secured crime scene. That upon the demise of the "innocent and vulnerable followers" of the Respondent, their bodies were preserved at a privately-run morgue in Kilifi before being transported and interred on Paul Mackenzie's land in the Shakahola Forest and could well be among the bodies that have been retrieved from the property, in an ongoing search and exhumation exercise and thence the connection between the Respondent, Paul Mackenzie and the Shakahola Massacre. It was submitted that the number of bodies being exhumed continued to increase exponentially.

11. Learned Prosecution Counsel told the court that the police were in possession of a number of burial permits that were issued to several individuals whose names and contacts appear in the said documents and were within the reach of the Respondent as they were believed to be the Respondent's "followers or strong believers" and the investigators therefore held reasonable apprehension that the Respondent was likely to interfere with the individuals, whom the State now regarded as potential witnesses. Besides, the investigators' suspicion was that the bodies of those who died at New Life Prayer Centre may not have been released to their kin for interment but may have been buried at Shakahola under "mysterious circumstances".

12. The Court was told that although the investigators were in possession of copies of the burial permits, the same were deliberately not annexed to the affidavit in support of the motion as the deponent thereof had the apprehension that annexing the documents was likely to endanger the potential witnesses. The State however explained that the same were available and would be provided to the court if the court so required.

13. Further apprehension on possible interference of witnesses by the Respondent was expressed by the State on the basis that there may be witnesses who are yet to be identified.

14. The State told the Court that the other connection between the Respondent and Paul Mackenzie was that the investigators had established that there had been a commercial transaction between the two, whereby the former had paid the latter Ksh.500,000/= being deposit for the purchase of a television station – Times TV, operated by Paul Mackenzie, the entire transaction amount being Ksh.3,000,000/=.

15. In urging the application, the State relied on the authority of *R v Gibson Kiplangat Bett* [2022] eKLR in which the High Court (Gikonyo, J), stated as follows:

> Interference with witnesses

(17) The prosecution alleges likelihood of interference with prosecution witnesses. On this ground the court in *R. v Jaktan Mayende & 3 others*, stated that:

> " - In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the *Constitution* of Kenya 2010.....Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice...if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused."

(18) See also *R. v Patius Gichobi* that proven interference with witnesses was an affront to the administration of justice and therefore a compelling reason contemplated by Article 49 (i) (h) of the *Constitution*. Accordingly, the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence in support thereof as to persuade the court to deny the accused bond on this ground. More jurisprudence on the point is found in *R. v Dwight Sagaray & 4 others*, 2013 eKLR, where the court stated that: -

> "For the prosecution to succeed in persuading the court on these criteria, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect, incriminating communication between the accused and witnesses; close familiar relationship between the accused and witnesses among others."

(19) The arguments presented on interference with witnesses remind of two pertinent matters. One, protection of witnesses and victims of crime. And, protection of the integrity of the trial and criminal justice process.

Protection of victims

(20) Under the law, the court has a duty to give effect to the rights of victims expressed in Section 10 of the *Victim Protection Act* No. 17 of 2014, as follows: -

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(1) a victim has a right to: -

(a) Be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;

(b) Have their safety and that of their family considered in determining the conditions of bail and release of the offender; and

(c) Have their property protected.

Protection of trial

(21) Interference with witnesses undermines the criminal justice system and dents the integrity of the criminal process; in turn interference with the administration of justice, and prejudice to the trial. Thus, it is the duty of the court to preserve the integrity of the trial. In this regard, I am persuaded by the reasoning of Lesiit J in *R. v Fredrick Ole Leliman & 4 Others*, Nairobi Criminal Case No. 57 of 2016 [2016] eKLR where she succinctly stated that: -

> "Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instance where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention."

(22) In the present case the prosecution stated in the affidavit in objection of bond the accused is likely to interfere with vulnerable witnesses; the minor who witnessed the brutal murder and his mother. Also, there are two crucial witnesses who are his neighbours. It is more likely that the vulnerable witnesses may be scared stiffly by the presence of the accused amongst them.

(23) See *Republic v Fredrick Ole Leliman & 4 others* [2016] eKLR, where the Court expressed basis of fear upon witnesses, that: -

> "In my view, the above fears are not mere whims on the part of the prosecution. I am persuaded that because of the volatility of the situation on the ground, the temptation to jump bail is heightened to such an extent that this court cannot overlook it. It is not in dispute that all the accused persons hail from the same locality as the potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the ghastly death of the deceased persons is a real possibility. In addition, the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses

and corner them into resigning not to appear in court during the hearing of the case even if the accused persons turn up. In a nutshell there will be no witnesses to testify. As Makhandia J (as he then was) said in the Kiteme Maangi case (above), Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety."

(24) The court must therefore, strike a perfect balance which ensures that the trial is not impeded by acts of interference with witnesses, but at the same time, upholding the rights of the accused to fair trial (*K K K v Republic* [2017] eKLR).

(25) The circumstances of this case are; that one of the witnesses is a minor and his mother, and two others are neighbours who live close to the home of the accused. It is stated that the heinous act of murder happened in the presence, inter alia of the minor and the mother. In these circumstances, likelihood of interference of witnesses, directly or indirectly, is not far-fetched. The minor, who is a witness in this case would be intimidated by the presence of the Accused.

16. The State supposed that the standard of proof as to what amounts to a compelling reason is that of proof on a balance of probabilities, unlike the standard required in proving a criminal charge, which is that of proof beyond reasonable doubt.

C. The Respondent's Submissions.

17. The Respondent opposed the State's application for the orders sought of pre-trial detention or detention before a charge for thirty (30) days. In his view, Mr. Magolo, learned Counsel for the Respondent stated that what the Court was being asked to do was to suspend the right to liberty, which is protected under the Bill of Rights yet no reasons had been placed before the court to warrant such curtailment of the Respondent's liberty.

18. Mr. Magolo took the view that the instant application was presented before this court as a desperate measure by the State and the Prosecution to be seen to act, in a situation of embarrassment, after the nation dawned to the unfortunate events dubbed the Shakahola Massacre, which Counsel stated was exclusively connected to Paul Mackenzie, and not the Respondent herein. Counsel stated that the desperation arose from the fact that the State failed in terms of security and intelligence and that his client – the Respondent – is a scape goat in the attempt by the State to be seen to be decisive following the deaths. Counsel rhetorically posed the question: "Where were they when people were being killed and buried in Shakahola?"

19. While admitting that the Respondent transacted with Paul Mackenzie, whereby the former paid a deposit towards the purchase of Times TV Station from the latter, Counsel for the Respondent stated that a mere commercial activity such as the purchase of the TV Station cannot amount to a compelling

reason, or a reason at all, to warrant the Respondent to be detained for the period that the State seeks. Counsel added that such detention can only be allowed under Article 49(1)(h) of the *Constitution* where the State provides compelling reasons that would warrant the same.

20. In further opposition to the State's application, the Respondent's Counsel submitted that the mere fact that the witnesses the State was referring to were said to be members of New Life Prayer Centre and followers of the Respondent could not possibly be construed to a likelihood of the Respondent interfering with the said witnesses, who in any event remained unnamed. He referred the court to the authority of *Gibson Kiplangat Bett* (*supra*) in which the court stated that the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail of evidence in support thereof as to persuade the court to deny a person bond on that ground.

21. Counsel for the Respondent submitted that New Life Prayer Centre had followers/members in the thousands and that it was therefore not possible that the Respondent would have control or influence over them, let alone know them all. In this case, counsel stated, the State did not show which particular witness(es) the Respondent would influence or interfere with, and as such, the State had not demonstrated that there would be such influence or interference perpetuated by the Respondent.

22. In his further submissions, Mr. Magolo told the court that deaths may have occurred at the church premises but attributed the same to natural causes, adding that it was not unusual for very ill people to be taken to a church for prayers, reminiscent of the biblical woman who had been suffering from haemorrhages for twelve years and had spent all she had on physicians who were unable to treat her, who then went to Jesus, touched the fringe of his clothes and was healed. Counsel stated that in the event of the death of such ailing people who seek healing intervention in church, it would be outrageous to blame the administration of the particular church for the deaths.

23. In support of the Respondent's position, reliance was placed in the High Court authority of *Betty Jemutai Kimeiywa v Republic* [2018] eKLR (Muriithi, J) and Counsel stated that the State is in such proceedings required to properly indicate to the Respondent the likely charges that he will face, the basis for the investigations, in the form of a draft charge sheet annexed to the affidavit in support of the motion.

24. From the authority of *Betty Jemutai Kimeiywa* (supra), the court was invited to consider the view the High Court had when it expressed itself as follows, while citing the High Court decision of *Michael Rotich v Republic* [2016] eKLR, (Kimaru, J. as he then was):

> 5. The applicant relied on the persuasive decision of the High Court in *Michael Rotich v Republic* [2016] eKLR, Kimaru, J. considered the provision for 24 hour rule and held as follows:
>
> > "In compliance with Article 49(1)(f)(i) of the *Constitution*, the Applicant was brought before the court within 24 hours of his arrest. However, contrary to Article 49(g) of the *Constitution*, the Applicant was neither charged nor informed of the reasons for his continued detention. As stated earlier in this Ruling, the recent trend where a person is arrested and arraigned in court within 24 hours specifically for the prosecution to seek extension of time to continue to detain such person, without any charge or holding charge being preferred against such person is unconstitutional. The police have no authority in law to arrest and detain any person without sufficient grounds. Those grounds can only be sufficient if the police have prima facie evidence which can enable such person to be charged with a disclosed offence.

> The fact that the prosecution has a prima facie evidence of a disclosed offence can be presented in court in form of a holding charge setting out the particular offence. Such holding charge will enable an accused person to know of the reason for his arrest as provided under Article 49(1)(a) of the *Constitution*. It will not do for the prosecution to present a person who has been arrested in court and seek his continued detention without a charge or a holding charge being lodged in court. It is unlawful for the police to seek to have a person who has been arrested to continue to remain in its custody without a formal charge being laid in court. If this trend continues, it would erode all the gains made in the advancement of human rights and fundamental freedoms as provided in the Bill of Rights since the *Constitution* was promulgated in August 2010. A person's right to liberty should be respected at all times unless there are legal reasons for such person to be deprived of his liberty. The police should only arrest a person when they have prima facie evidence that an offence has been disclosed which can result in such person being charged with a disclosed offence or a holding charge of the likely offence being presented in court. The police should do this because of only one reason: the *Constitution* says so."

6. With respect, while I agree with the need to respect the right to liberty of suspects, I am unable to agree that the police can only produce a suspect before the court when the investigations into the offence are complete and or when they present a holding charge awaiting a full charge when investigations are complete. A holding charge, which need not be accurate in its particulars as the investigations would be ongoing may indeed offend the very foundational principle of certainty of a charge which requires that a charge gives reasonable information on the offence charged under section 134 of the Criminal Procedure Code as follows:

> "134. Offence to be specified in charge or information with necessary particulars
>
> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

7. The provision bringing the accused before the court within 24 hours is not an either or else position where the prosecution is validated or invalidated by such presentation. Article 49 (1) (g) and (h) itself gives four scenarios on presentation of an arrested person before the court, namely, that the arrested person may-

   i. "be charged"

   ii. "be informed of the reason for the detention continuing";

   iii. "be released"; and

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

   So that upon being brought before the court, an arrested person may be charged; or he may be informed of the reasons for detention being continued say to facilitate completion of investigations or his presentation for assessment of fitness to plead before plea is taken; or he may be released if the court for example found no reasonable grounds for his continued detention; or he may be released on bond pending formal charge and or trial. the *Constitution* does not say that the police may only arrest a person when there is prima facie evidence of an

offence. It must, of course, require a probable cause for an arrest but not prima facie case in its technical acceptation of evidence upon which a court may convict, if no evidence is given on behalf of an accused person. See *Ramanlal Trambaklal Bhatt v R* [1957] EA 332, where it was held that a prima facie case is 'one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence'. A police officer cannot be required to make a sort of judicial determination of existence of prima facie case. That is the province of the trial court at the stage of consideration whether a case to answer is established against the accused. A reasonable suspicion of commission of the offence based on the available evidence would suffice to give a probable cause for an arrest.

Conclusion

8. There is no paradox or absurdity in the requirement of the 24 hour rule and the need for conclusive investigations into crime for the prosecution to obtain evidence to support the charge. The requirement is not calculated to defeat the Prosecution's ability to investigate and prosecute cases. The object of the 24 hour rule is to obviate prospects of extra-judicial, pre-trial detention by police authorities in contravention of the cardinal principles of the criminal process of fair trial and innocent-until-proven-guilty.

9. Of course, the circumstances in which a crime has been committed may require immediate arrest of the suspect to prevent further crime, to prevent her escape or to protect the evidence or witnesses, and the nature of a serious crime, such as murder, may reasonably require more time to investigate. In the face of the 24 hour rule/requirement, the prudent thing to do is to delay the arrest until the investigations are complete and all prosecution evidence has been collected, except where the suspect is a flight risk or likely to escape, or other risk to the successful prosecution of the offence such as interference with the evidence or witnesses exists.

10. The Police have the constitutional and statutory power under Articles 243-245 of the *Constitution* and section 58 of the *National Police Service Act* to arrest a person reasonably suspected of having committed a crime. Section 58 is in the following terms:

> "58. Power to arrest without a warrant
>
> Subject to Article 49 of the *Constitution*, a police officer may without a warrant, arrest a person—
>
> (a) who is accused by another person of committing an aggravated assault in any case in which the police officer believes upon reasonable ground that such assault has been committed;
>
> (b) who obstructs a police officer while in the execution of duty, or who has escaped or attempts to escape from lawful custody;
>
> (c) whom the police officer suspects on reasonable grounds of having committed a cognizable offence;
>
> (d) who commits a breach of the peace in the presence of the police officer; (e) in whose possession is found anything which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing;
>
> (f) whom the police officer suspects upon reasonable grounds of being a deserter from the armed forces or any other disciplined service;

(g) whom the police officer suspects upon reasonable grounds of having committed or being about to commit a felony; or

(h) whom the police officer has reasonable cause to believe a warrant of arrest has been issued."

11. The powers of arrest are expressly made subject to Article 49 of the *Constitution* regarding the rights of an arrested person and, therefore, upon arrest, the person may be dealt with in accordance with the provisions of Article 49 (1) (g) and (h) by charging, detention, release and release on bond as discussed above.

12. Ultimately, the test for validity of arrest is the reasonable grounds for suspicion; not "prima facie" evidence test of judicial inquiry.

The right to bail

13. Accordingly, when the Prosecution presents a suspect for purposes of seeking her holding in custody to facilitate conclusion of the investigations, the Prosecution must demonstrate in their application to court that, in accordance with the Article 49 (1) (g) and (h) of the *Constitution*, there is justifiable reasons for continued detention of the arrested person and that there are compelling reasons for refusal of bail.

14. I do not find that the Police offered good reasons for the continued detention of the arrested person because the matters they used to justify the detention being aspects of the investigations by taking witness statements, obtaining call data on the applicant's cell phone, and securing a forensic report on cyber crime aspects of the case are all things that could have been accomplished even with the person all being out of custody.

15. The Prosecution therefore, needed to demonstrate compelling reasons for refusal of pending charge before the court and in this case offered the following reasons for holding the applicant in an Affidavit sworn by the Investigating Officer in support of the application before the Magistrate's Court:

25. In conclusion, learned Counsel for the Respondent stated that there had not been demonstrated by the State that that the Respondent is likely to interfere with witnesses, abscond or otherwise bring his trial to disrepute, noting that none of the O.B. reports referred to the Respondent. In addition, Counsel stated that while the Respondent is not opposed to investigations being conducted, he should not be detained in police custody as he was ready to cooperate with the investigators and abide by and comply with any orders that this court may issue.

D. The State's Response.

26. In rejoinder to the submissions by the Respondent's Counsel, the Mr. Kiprop urged that sufficient grounds had been presented to the court through the supporting affidavit and a case for the detention of the Respondent made.

27. Mr. Jami submitted that the decision of *Betty Jemutai* (*supra*) was per incuriam in so far as it referred to and addressed the issue of a holding charge sheet as the same did not consider or take the cue from the earlier authority of *Samuel Cheruiyot arap Lang'at v Republic* [1982] eKLR, in which the High Court (Chesoni, J. as he then was) was of the finding that a holding charge sheet did not exist in law.

E. Issues for Determination.

28. From the record, it is instructive that the State seeks orders to detain the Respondent at Makupa Police Station in Mombasa County for a period of thirty (30) days so as to enable the investigation team to complete investigations and submit the police file to the Director of Public Prosecutions for review. The grounds that have been proffered by the State as constituting "compelling reasons" to detain the Respondent are discernible as follows:

    a. The investigating team is undertaking investigations relating to serious crimes that the Respondent is jointly and by conspiracy suspected to have committed including but not limited to the felony of Murder; Aiding Suicide; Abduction; Radicalization; Genocide; Crimes Against Humanity; Child Cruelty, Fraud and Money Laundering and for being accessories before or after the fact and that the crimes under investigations by nature, gravity and seriousness are complex and constitute a compelling ground to deny bail.

    b. The Respondent may influence or interfere with witnesses, and that constitutes a compelling reason for his detention pending investigations.

    c. That the fact that the Shakahola Massacre has received public notoriety renders the investigations into the same to be of great public interest, hence sufficiently compelling to warrant the detention of the Respondent.

29. The issue for determination is whether the three grounds above constitute compelling grounds and subject thereto, whether there has been provided sufficient material to establish their existence.

F. Analysis and Findings.

30. Bail is a constitutional right as enshrined in Article 49(1)(h) of the *Constitution* of Kenya. A Person who has been arrested on suspicion of committing a criminal offence can only be denied bail if there are compelling reasons. Thus then, the Constitutional standard for denying bail to an arrested person who has been presented before court is the "compelling reasons" test.

31. As properly submitted by Mr. Magolo, the burden to demonstrate that the reasons for denial of bail lies on the Prosecution to establish the existence of the compelling reasons. (See *Republic v Richard Itweka Wahiti* [2016] eKLR).

32. I am also in agreement with Mr. Kiprop and Mr. Jami that the standard of proof required to prove that the reasons for denial of bond meet the "compelling reasons test" is on a balance of probabilities (See *Republic v Muema Mutia* [2017] eKLR, *Republic v Mbiti Munguti* [2020] eKLR and *Republic v Benson Muchiri Guchue* [2019] eKLR. There is no requirement under the law that the Prosecution proves the compelling reasons beyond reasonable doubt. Indeed, such a standard would be impossible to meet at this point. (See the Bail and Bond Policy Guidelines at page 19).

33. On the above basis, it is clear that the order sought for detention of the Respondent is a discretionary one. A discretionary order may be issued in a case where the court has considered the material placed before it, provided the discretion is exercised judiciously. (See *R v Milton Kabulit & 60 others* [2012] eKLR).

34. In the case of *Republic v Danfornd Kabage Mwangi* [2016] eKLR, Mativo J. (as he then was) observed as follows:

> There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the *Constitution* and courts. Nonetheless, such a protection cannot be absolute

in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.

Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive.

The general rule in my view is for the courts to try to strike a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary detention of an accused before conviction, and the need to bear in mind the circumstances surrounding each case. Thus in determining bail public good as well the rights of the accused should be kept in mind.

The principle of the right to bail is more poignantly described in *Republic v Ahmed Mohamed Omar & 6 others* where Ochieng J agreed with the assertion that 'compelling reasons' are a qualification to the right to bail.

When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have well-articulated in several court decisions. Such criteria include, among others, the following:-

i. The nature of the charges.

ii. The strength of the evidence.

iii. The gravity of the punishment in the event of conviction.

iv The previous criminal record of the accused, if any.

v The probability that the accused may not surrender himself for trial.

vi. The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.

vii. The likelihood of further charges being brought against the accused.

viii. Detention for the protection of the accused.

The Supreme Court of Malawi in *M. Lunguzi v Republic* stated that another ground of refusal is where the court "is satisfied that the interests of justice so require."

I hold the view that after considering the circumstances of each case, the court has discretion to grant or refuse bail provided that the discretion is exercised judicially. In *Republic v Milton Kabulit & 60 Others* Justice Emukule in a well-reasoned decision said:-

> "My understanding of Section (sic) 49 (1) (g) (h) is firstly, that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application. Secondly, the only accused entitled to a right to an automatic bond or bail are those charged with offences (which

> maybe referred to as “petty offences”) the punishment of which {if found guilty and convicted) is either a fine only, or imprisonment for a term of less than six months”.

Though the list may not be exhaustive and each case depends on its own merits, the compelling reasons may include the likelihood of failing to attend court, the character of the accused, the possibility of interfering with witnesses, the interests of justice and even the nature of the offence. Possible rejection of the accused by the community or family may also be a relevant factor.

In *Hassan Mahat Omar & Another v Republic*, the court rendered itself thus:-

> "What amounts to compelling reasons as envisaged in Article 49(1) (h) of the *Constitution* is a matter of judicial discretion. Kenya does not have statutory guidelines to govern the granting of bail. However, a glimpse at pertinent laws of other common law countries such as the Bail Act of England and Section 60(4) of the Criminal Procedure Code of South Africa, gives us examples of issues to consider in determining whether or not compelling reasons exist in a given case."

Where the accused applies for bail, the Judge, who is independent and impartial, will make his/ her decision in accordance with the law having considered all the relevant information placed before the Court. The Judge will, amongst other things, analyse all the relevant factors relating to both the individual circumstances of the offence with which the accused is charged (e.g. the seriousness of the offence) and the individual circumstances of the accused (e.g. whether they have previous convictions). This means that each application for bail is unique; even where two people have been charged with an offence together (“co-accused”) their individual bail applications will be unique because their personal circumstances will differ (e.g. one co-accused may have previous convictions for similar offences whereas the other co-accused has not).

The “relevant and sufficient” reasons which may permit the accused to be remanded in custody rather than being granted bail (also known as the “grounds for refusing bail”) are limited to: Risk that the accused will fail to appear for trial if they are released on bail;

i. Risk that the accused will interfere with the course of justice while on bail (e.g. that he will destroy evidence that could be used against them at their trial or that they could interfere with witnesses who are due to give evidence at their trial);

ii. Risk that the accused will commit further offences while on bail;

iii. The accused would be at risk of harm (from himself/herself or from others) against which they would be inadequately protected if released on bail; or

iv Risk to the preservation of public order if the accused is released on bail.

At least one or more of the above grounds ought to be proved to the satisfaction of the court. Mere allegations or possibility is not enough. Bail cannot be refused simply because the accused has been charged with a very serious offence; but the seriousness of the offence can be taken into consideration as a factor in determining if one of the grounds for refusing bail exists (e.g. the seriousness of the offence may increase the risk that the accused will fail to appear for their trial).

> The burden of proving to the court that one or more of the above grounds for refusing bail exists rests on the prosecution. If the prosecution fails to do so, then the presumption in favour of bail prevails and the court will admit the accused on bail.
>
> (Underlined emphasis mine).

35. The jurisprudence that emerges from the authorities above is in part that the seriousness in nature of the offences that are under investigation, the likelihood that the accused person may interfere with witnesses or may suppress any evidence that may incriminate him and the interest of the public, if the same outweighs the right to liberty of the Respondent, if proved on a balance of probabilities, are compelling reasons for denial of bond.

36. I will now turn to the issue whether on a balance of probabilities, the State has proved the three compelling reasons above.

37. The State made allegations against the Respondent that he is suspected to have committed criminal offences, or otherwise connected to Paul Mackenzie and/or the Shakahola Massacre, which the Respondent, through his counsel vehemently denied. It is to be remembered that this court is not at this stage conducting a trial to determine whether the Respondent committed the alleged offences or has connections with Paul Mackenzie and the Shakahola Massacre. That will be for the trial court, should the position of the investigations get to that point.

38. No doubt, the mass media including newspapers, radio, television and the internet have recently been and continue to be awash with news on the still unfolding, most unfortunate events of the Massacre at Shakahola Forest and the public is generally alarmed at the discovery of bodies reported to have been buried in mass graves, pointing to possible complex criminal acts which are said to have resulted in at least one hundred (100) people being killed or starved to death over a substantial period of time. The collective interest of the public, no doubt, is that those involved in the criminal activities leading to the loss of lives of that magnitude, in the unprecedented Shakahola Massacre, be brought to book. The public remains anxious.

39. Further, it goes without saying that as a preacher and admittedly the strength behind the New Life Prayer Centre, the Respondent wields immense influence over his followers/congregants. This perhaps is best portrayed by the mammoth attendances that he attracts in the church services events that he holds, as has been seen in the past from media reports. It is pursuant to that that I am persuaded by the State that although the affidavit in support of the application talks of interference of witnesses who are not named but only referred to as the Respondent's followers or church members, the Respondent indeed has influence over persons whom he may not himself know as the names have been withheld but who may be witnesses, more so considering the fact that the State has expressed fears that such witnesses may be interfered with in the event that their details are disclosed.

40. The matter concerning the Shakahola Massacre, as stated above is one of great public interest. The State urged that the Respondent may be linked to the same and having found that it has been proved on a balance of probabilities that there is a possibility that the Respondent may interfere with witnesses, a good case has been made for the Respondent to be detained – on the three compelling reasons of the possibility of interference with witnesses, the interest of the public and the seriousness in nature of the offences under investigation. We have seen from case law above that any of the three grounds when proved to the required standard meet the compelling reasons test.

41. But then, the specifics of investigations the State wishes to complete as per the submissions of the State are not disclosed, save for the intention to record the statements of the witnesses. That being the case, this court will in the premises take it that the time sought is for purposes of recording witness

statements. In my view, thirty (30) days as sought for that exercise would be manifestly excessive. I opine that it would be sufficient for the investigators to carry out the exercise in a much shorter period of time, considering that the same goes to the very root of a constitutional right – the right to liberty.

42. As regards the submission by the Respondent's Counsel that failure by the Deponent to the affidavit in support of the application to annex a holding or draft charge sheet renders the application insufficient and defective, I note that whereas that was the holding of Kimaru, J. (as he then was) that indeed that such an application should fail, I appreciate the decision of Chesoni, J. (as he then was) in the authority of *Samuel Cheruiyot arap Lang'at* (*supra*) that such a document does not exist in law. It is further instructive that from all the other decisions cited above that the courts did not refer to the document known as a draft or holding charge.

43. Of course, a challenge is posed to this court when two conflicting authorities are presented before it but it would obviously not be in the place of this court to declare or make a finding that the decision of *Betty Jemutai Kimeiywa* is per incuriam, as suggested Mr. Jami for not considering the position that Chesoni, J. took on the matter in *Samuel Cheruiyot arap Lang'at*. A decision of the court is per incuriam, in my understanding, if it is made through lack of regard to the law or the facts. Doing what Mr. Jami suggests would be stepping outside the limits of my jurisdiction, more so considering that the two decisions were by two superior courts of concurrent jurisdiction.

44. In my view, it is adequate that the Respondent has been informed, through the instant application and supporting affidavit, the reason for his detention in line with Article 49(1)(g) of the *Constitution*, having been brought before this court within 24 hours of his apprehension.

45. In the result, being of the foregoing inclination, and being of the belief that the State has continued to make good use of the period of about five days during which the Respondent has been in police custody at the Makupa and Port Police Stations in Mombasa, I will allow the State's Motion dated 28th April, 2023 in the following terms:

    a. That the Respondent shall be detained at Port Police Station, Mombasa for a period of seven (7) days, which period shall run from 27th April, 2023, being the date that he was arrested and placed in police custody. For avoidance of doubt, the detention period shall lapse on 4th May, 2023 at 0900 hours.

    b. That this matter shall be mentioned on 4th May, 2023 at 0900 hours for the State to appraise the court on the status of the investigations and for further orders.

    c. Parties to be at liberty to apply for any other appropriate and/or relevant and/or desired orders on 4th May, 2023.

    d. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 2ND DAY OF MAY, 2023.

OMIDO, J.M.

SENIOR PRINCIPAL MAGISTRATE

*Mr. Kiprop, Mr. Jami & Mr. Simbi,** Prosecution Counsel, instructed by the Applicant/State.

*Mr. Magolo, Mr. Ombeta, Mr. Omari, Mr. Egesa, Mr. Osoro, Mr. Kai, Mr. Okoko, Mr. Wambui & Mr. Yose**, Advocates, instructed by the Respondent.

*Mr. Theuri, Mr. Aboubakar,** Advocates, instructed by the families of the Shakahola Massacre victims.

*Mr. Magiya & Mr. Mageta,** Advocates, instructed by the Community.

*Ms. Chepkurui,** Court Assistant.