Republic through DCI v Mackenzie & 17 others (Criminal Miscellaneous Application E077 of 2023) [2023] KEMC 10 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEMC 10 (KLR)

REPUBLIC OF KENYA

IN THE SHANZU LAW COURTS

CRIMINAL MISCELLANEOUS APPLICATION E077 OF 2023

YA SHIKANDA, SPM

MAY 10, 2023

BETWEEN

REPUBLIC THROUGH DCI ..... APPLICANT

AND

PAUL NTHENGE MACKENZIE ..... 1ST RESPONDENT

ROBERT KAHINDI KATANA ..... 2ND RESPONDENT

ALFRED ASENA ..... 3RD RESPONDENT

SANGA STEPHEN MUYE ..... 4TH RESPONDENT

GEDION MBITHI KIKO ..... 5TH RESPONDENT

JOSEPH KENGA MBOGOLI ..... 6TH RESPONDENT

STEPHEN OMINDE LWANGU ..... 7TH RESPONDENT

SMART MWAKALAMA ..... 8TH RESPONDENT

LUCAS OWINO ..... 9TH RESPONDENT

ZABLON ATANDA ALIAS ZABLON MWANA WA YESU .... 10TH RESPONDENT

DANIEL MAKORI ALIAS MTEULE WA YESU ..... 11TH RESPONDENT

JOHN MARK KIARA ..... 12TH RESPONDENT

FREDRICK KARIMI ..... 13TH RESPONDENT

COLLINS KABAE ..... 14TH RESPONDENT

DAVID AMBWAYA ..... 15TH RESPONDENT

EMMANUEL AMANI CHILUME ..... 16TH RESPONDENT

ENOS NGALA AMANI ..... 17TH RESPONDENT

RHODA MUMBUA MAWEU ..... 18TH RESPONDENT

RULING

Background

1. Prior to March, 2023 the name Shakahola was unknown to many. For those who knew it, Shakahola was just a forest area within the larger Chakama Ranch in Kilifi County. In mid- March, 2023 the Media was awash with news that two boys had starved to death in Kilifi County after their parents locked them in a room to fast, supposedly saving them from an imminent painful death of children in the world. Investigations were launched and the bodies of the two minors were exhumed. Shortly thereafter, there were reports of discovery of several mass graves within Shakahola forest area. This was reported by both national and international media and within a few days, Shakahola gained national and international infamy.

2. The happenings at Shakahola have given rise to what is now popularly known as The Shakahola Massacre. The Respondents herein were arrested following investigations into the discoveries at Shakahola forest. The Respondents were presented before this court on 2/5/2023 before my learned senior brother Hon. Omido SPM. My brother had just delivered a ruling in a similar and related application involving a different respondent. The record indicates that he had previously handled an application involving some of the respondents herein. In his wisdom and rightly so, Hon. Omido SPM directed that the instant application be canvassed before and be determined by this particular court.

The Application

3. Before me is an application by way of Notice of motion dated 2/5/2023 brought by the Director of Public Prosecutions pursuant to the provisions of Article 49(1)(f) and (g) of the *Constitution*, sections 74 and 123A of the *Criminal Procedure Code*, the *Persons Deprived of Liberty Act*, sections 4 and 9 of the *Victim Protection Act* and section 33 of the *Prevention of Terrorism Act*. The application seeks the following orders:

    1. That the respondents be informed of the reasons for their continuing detention;

    2. That the respondents be detained at Malindi police station, Marereni police station, Watamu police station, Mtwapa police station and Bamburi police station for a cumulative period of ninety (90) days as may be determined appropriate by the investigator;

    3. That the Honourable court be pleased to make any other orders that it may deem fit for the proper, fair and effective administration of justice.

4. The application is supported by an affidavit sworn by one No. 237715 Inspector Raphael Wanjohi and is premised several grounds as appears on the face of the application.

Main issue for Determination

5. The main issue for determination is whether the state has established a case to warrant denial of bond and allow for detention of the respondents in police custody for 90 days or any period pending charge.

Submissions by the State

6. The State was represented by an eloquence of four Prosecution Counsel but the submissions were made by three of them. Mr. Jami, learned Prosecution Counsel led off the submissions. Counsel

relied on the application and affidavit in support thereof and submitted that the Prosecution was aware that the court may not make an order for detention of the respondents for 90 days in a single sitting and urged the court to grant the orders for a period of 30 days in the first instance. The prosecution submitted that at the end of the period granted, they would indicate to court the status of the investigations and line of inquiries remaining as well as any pending issues. That the evolving nature of the investigations justifies the application.

7. The prosecution revealed that they were initially granted 14 days to hold the 1st respondent by a Malindi court but at the time of making the instant application, over 100 bodies had been retrieved and the number was still growing. That the respondents are members or adherents of Good News International Church which holds extreme religious beliefs and that some of their family members were missing. It is believed that the missing family members could have been starved to death as a consequence of the extreme ideology. The prosecution submitted that they were not sure of some of the identities of the respondents and relied on the names given to them by the said respondents. This is because part of their ideology is to cut links with the Government such that any identification documents issued by the Government was destroyed. That there is need for finger printing and DNA sampling for purposes of identifying them and establishing whether some of the deceased are their spouses or children. The prosecution argued that it was not possible for DNA profiling of all the respondents to be done until the last body was exhumed.

8. Mr. Jami submitted that there was need to consider the plight of the victims. That the victims needed trauma care and that at the moment, it was not possible to record statements from them for purposes of investigations. Counsel further submitted that the victims needed to be restored to a stage where there would be productive engagement for purposes of recording statements from them. That they were malnourished and not in the right state of mind. It was submitted on the part of the prosecution that there was reasonable apprehension that should the respondents be released, there may be secondary victimization. The prosecution relied on section 4 of the *Victim Protection Act*. According to the State, there is a connection between the respondents and the victims. That the 2nd to 17th respondents were said to have been guarding the forest where the victims were fasting, an indication that the fasting may not have been voluntary. There are reports that some victims were strangled and others smothered.

9. The prosecution submitted that the respondents ought to be held in custody for their own protection. That some families were mourning and others confused and the society was not ready to receive the respondents. The prosecution appreciated the fact that the state had a duty to provide security to its citizens but with the limited resources, it may not be possible to provide each of the respondents with body guards. That it would be safe to keep the respondents in custody. The prosecution argued that if the respondents were to be released, there was no guarantee that they will not go to finish what they started. The prosecution indicated that there was need to conduct identification parades after restoration of the victims and the process would take time. The prosecution further argued that the instant application was not an indication of dissatisfaction with the orders that were given by the Malindi court. That the application was necessitated by the evolving nature of the matter which constitutes a change of circumstances. The prosecution submitted that the 1st respondent has a previous conviction and what is currently under investigation involves similar offences.

10. Mr. Simbi, learned prosecution counsel relied on section 10 of the *Victim Protection Act*. Counsel submitted that the court ought to consider the huge public interest that this matter has elicited. That Kenyans were angry at what is happening are Shakahola and it was important that the rage be cushioned by detaining the respondents. Further, detaining them would also be in their best interest. The prosecution admitted that it was the duty of the State to provide security to every citizen but there are circumstances that may overwhelm the police. It was submitted that there was a high likelihood of

witness interference. Mr. Simbi argued that if an individual can convince another to starve to death, then chances are that such an individual if released, will have influence over the victim and can convince the victim not to talk to the police or give falsified information. It was further submitted tat potential witnesses may not be comfortable seeing the respondents walking around knowing that their evidence is crucial. The witnesses will have genuine fear if the respondents are released. Mr. Simbi highlighted and relied on the following authorities:

a. *Republic v David Ochieng Ajwang alias Daudi and 11 Others* [2013] eKLR;

b. *Republic v Gibson Kiplangat Bett* [2022] eKLR; and

c. *Republic v Benard Kipasi Moyongo & Another* [2021] eKLR.

11. Ms. Ogega, Learned Prosecution Counsel emphasized the ground that a change of circumstances would amount to a compelling reason to deny or revoke bond. That if there is a change of circumstances, the court reserves the power to revisit the issue of bond in the interest of justice. Counsel further submitted that justice was not just for the respondents but for the victims and society as well. In a bid to highlight the change of circumstances, Ms. Ogega submitted that the number of retrieved bodies had increased to over 100 bodies and it was believed that the number would still go up. That the number of rescued victims had also increased. The prosecution submitted that the nature of the investigations had also changed based on the results of the post-mortems that had so far been conducted. That some victims are said to have died of strangulation and smothering and more time was needed to conduct investigations. Counsel relied on the authority of *Republic v Diana Suleiman Said & Another* [2014] eKLR.

Submissions on Behalf of the Victims

12. Mr. Ole Kina, learned counsel relied on section 4 of the *Victim Protection Act* and submitted that the victims herein were many. That they involved children, men and women. Counsel submitted that it was common knowledge that a lot of people were rescued from the 1st respondent's property and others were found buried. Counsel submitted that the process of exhumation of bodies was not complete and the investigations were at a very early stage. That the victims had been brain-washed and there was need for time to allow the victims gain their composure and be able to think on their own so as to give statements. It was submitted that there was no desire to punish the respondents by denying them their constitutional rights and freedoms. Mr. Ole Kina supported the notion that releasing the respondents would endanger the victims as some appear to be suffering from the Stockholm syndrome.

13. Counsel submitted that after the earlier release of the 1st respondent from custody, his motor vehicle was seen at the scene and there were investigations to establish who was relocated and where to. That there was a likelihood of recidivism and witness interference and intimidation thereby jeopardizing the investigations. Counsel urged the court to consider the gravity of the likely charges which are all very serious. It was argued that with the knowledge of the existence of the evidence already out, the respondents are likely to disappear and by so doing, justice will not be served for both the victims and respondents.

14. That the evidence collected so far points to a reasonable suspicion that the respondents may have committed the offences alleged. Counsel urged the court to allow the application as prayed for by the State.

Submissions on behalf of Haki Africa for the victims

15. Mr. Aboubakar, learned counsel appearing on behalf of Haki Africa and in support of the victims associated himself with the submissions of the State and Mr. Ole Kina. Counsel urged the court to take judicial notice of the seriousness of the matter. That the presence of the media coverage showed the public and international interest in the matter. Counsel urged the court to allow the application in the interest of the victims and so as to allow for proper investigations. That the victims were indoctrinated and stupefied and were currently undergoing counselling. It was argued that if the respondents are released, they are likely to interfere with the counselling process.

16. That the search and rescue operation was still underway and there were may families within and outside the country who were searching for their kin said to have gone to Shakahola. Releasing them would interfere with the search and rescue operation. Counsel pointed out that it was in the media that members of the public and invaded and damaged the 1st respondent's property. That if the respondents are released, the public may attack them as the State may not have the resources to protect them. It was contended that for their own safety, it was wise to place the respondents in custody. That the primary objective of the proceedings was justice and not victimisation or punishment. Justice involves proper investigations. Counsel urged the court to allow the application as presented by the state.

The respondents' submissions

17. Mr. Komora, learned counsel for the respondents submitted that the application was proof that the State was dissatisfied with the orders that were granted by the Malindi court. That the 1st to 7th respondents were detained for 14 days, the 8th to 14th respondents were detained for 7 days and the court ordered for their counselling. That after the lapse of the 7 days, the 14th and 15th respondents were detained, instead of being released. Mr. Komora submitted that the 14 days granted by the Malindi court lapsed on 2/5/2023 whereupon the State informed the court that they were closing the miscellaneous file to paving way for the charging of the accused persons before a specialized court. However, instead of charging the respondents, the State has filed an application for their continued detention.

18. It was submitted that the 8th respondent was detained for three days by order of the Malindi court and when the days lapsed, he was not produced before the Malindi court but was driven all the way to Shanzu court. There was a miscellaneous application filed at Shanzu court in which the State sought to detain the 8th respondent for 15 days but were granted 5 days which lapsed on 2/5/2023. Counsel argued that there was no coincidence as the State had already planned that once at Shanzu, a file would be opened to include all the respondents. That with the conditions given by the Malindi court, the State was sure that any application for further detention of the respondents would be denied.

19. Mr. Komora submitted that the respondents were being denied food while in custody and some of them had been battered. That the 18th respondent who was arrested with a child had to use her own money to buy food for the child. Counsel argued that the State could not claim that they did not know where the respondents stayed yet they obtained search warrants to conduct searches at the respondents' residences. Counsel made an interesting argument that if the State were to be granted 90 days to detain the respondents, justice for the victims would be delayed and thus denied. It was further argued that the prosecution had not demonstrated the extent of their investigations and what was remaining. That the State was merely speculating without considering the rights of the suspects who have already been detained by court orders and without court orders. Further, that the State was out to do an injustice to the suspects.

20. The respondents submitted that the State was out to frustrate the defence team. That the 1st respondent was being detained and transferred to different police stations without informing his counsel thereby denying him legal counsel. Mr. Komora urged the court to consider the period that the respondents have already served in custody owing to previous court orders. Counsel argued that the respondents were mere suspects and therefore presumed innocent until proven guilty by a court of competent jurisdiction. The respondents objected to the granting of 90 days and submitted that if any custodial orders were to be granted, they should be limited to 7 days or the respondents be granted bond.

21. Mr. Kariuki submitted that they were representing the respondents on *Pro bono* basis and contended that the rights of the respondents ought not be abused by the police in frustrating their counsel. Counsel submitted that the State had not complied with the orders that were issued earlier herein and it had made it difficult for counsel to discharge their duties. That the respondents did not file replying affidavits as their counsel were denied access to them. Mr. Kariuki admitted that indeed the matter was of great public interest. Counsel further admitted that investigations were ongoing but contended that it was possible that the investigations could implicate other persons other than the respondents herein. Counsel emphasized that the application was based on speculation of what is likely to happen without considering that the respondents might not do what the State is afraid of.

22. It was argued that there was no guarantee that the respondents would interfere with the investigations. That detention for 90 days would be a gross abuse of the court process as the State exhausted the time given by the Malindi court and instead of seeking extension before the said court, the State closed the matter. Counsel submitted that they prayed for release of the respondents on bond but the prosecution insisted on closing the matter. It was argued that it was premature to say that the prosecution was approaching a specialized court. That extension of time did not require a specialized court as that could have been done in Malindi. Mr. Kariuki argued that having the respondents released and immediately arrested while still in the cells was a mockery of justice as there was no release but continued detention contrary to the orders of the court.

23. The respondents submitted that the State was hiding material information touching on the investigations. That the fact that bodies had been exhumed could not be ignored and everyone ought to be collectively concerned. Counsel urged the court to take judicial notice that Shakahola region was under curfew and as such, the fear of interfering with the crime scene had been taken care of. It was argued that there were no annexures to support the averments in the affidavit in support of the application. That there was no evidence to show that the area where bodies were exhumed belonged to the 1st accused person and no copies of the post mortem reports had been annexed to the affidavit. It was submitted that no evidence had been adduced to show how the respondents are linked or connected.

24. Mr. Kariuki submitted that the 1st respondent was not arrested but presented himself to the police station upon being called on phone together with the 2nd, 3rd and 4th respondents. That being the case, the said respondents were not flight risks. The respondents argued that the State had not demonstrated how the rest of the respondents participated. Counsel further argued that an identification parade could have been conducted while the respondents were in detention by virtue of the orders granted by the Malindi court. It was submitted that there was no evidence to show that the 1st respondent had a church. That nothing had been demonstrated to show that whatever has to be done cannot be done while the respondents are out on bond. Counsel submitted that since the rescue centre where the victims are said to be placed was not disclosed, it cannot be said that the respondents will interfere with the witnesses.

25. The respondents submitted that there was no evidence to show that they had been rejected by the community where they come from and there is an assumption that the respondents all come from

one community. Mr. Kariuki argued that given the time taken by the State, there ought to have been a sketch plan of the alleged crime scene where bodies are being retrieved from. That the respondents can stay out of Shakahola in as much as no evidence had been tendered to show that they were in Shakahola. It was submitted that the 1st respondent made two reports at Lango baya and Malindi police stations in November, 2022 touching on the matters under investigations. The respondents contended that the investigations lacked impartiality and were meant to please certain quarters. It was further contended that from November, 2022 when the 1st respondent made his reports, he had five months to interfere in whatever manner but did not. That the State had 5 months to investigate. Counsel urged the court to dismiss the application.

Reply by the state

26. Mr. Jami relied on section 33(4) of the *Prevention of Terrorism Act* and submitted that the objections raised by the respondents could not convince the court not to grant the orders sought. Counsel further submitted that the application for search warrants did not indicate that the police knew the respondents' homes. That the order was for a general search in any building or property. The State maintained that the respondents did not have a fixed place of abode save for the 1st. It was submitted that the State complied with the orders of the court at Malindi and that the Malindi files were closed. That there was full disclosure of material facts.

27. Mr. Jami argued that the court could take judicial notice of what was reported in the media. That the respondents had not been denied access to counsel nor food. Counsel however submitted that the complaints ought to be addressed through the procedure provided for by the *Persons Deprived of Liberty Act*. The State further submitted that the facts contained in the affidavit were not mere averments. That the standard was not beyond reasonable doubt but on a balance of probability. The State contended that the reasons given were compelling and that denial of bond was not a conclusion that the respondents were guilty.

Reply on behalf of the victims

28. Mr. Ole Kina urged the court to confine itself to the parameters of the application. Mr. Aboubakar submitted that at this stage, the standard of proof was on a balance of probability, which meant showing that something alleged was likely to happen. Counsel submitted that what is already in the public domain has established that people have died. That averments in an affidavit are evidence without any corroboration and a court can also take judicial notice of a matter. Mr. Aboubakar submitted that the Government Pathologist was always giving media briefings and it had not been refuted that people died in Shakahola.

Analysis and determination

29. I have carefully considered the application and given due regard to the submissions made by the parties. The constitutional underpinning of the law on Bail and Bond is to be found in Article 49(1)(h) of the *Constitution* which provides thus:

> " An arrested person has the right—
>
> to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

The following provisions of the *Constitution* of Kenya are also germane. Article 20 provides in part as follows:

"

" 1 The Bill of Rights applies to all law and binds all State organs and all persons.

2. Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

3. In applying a provision of the Bill of Rights, a court shall—

a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and

b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

4. In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

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

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

Article 29 provides in part as follows:

" Every person has the right to freedom and security of the person, which includes the right not to be—

a. deprived of freedom arbitrarily or without just cause;

b. detained without trial, except during a state of emergency, in which case the detention is subject to Article 58."

Article 24 thereof provides in part as follows:

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

a. the nature of the right or fundamental freedom;

b. the importance of the purpose of the limitation;

c. the nature and extent of the limitation;

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

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

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

My analysis of the foregoing provisions reveals that as far as bond or bail is concerned, the following principles should apply:

a. Every arrested person has a constitutional right to bond or bail;

b. The bond or bail must be on reasonable conditions. The bond terms should not be excessive so as to amount to a denial of bond;

c. Bond or bail must not be denied unless there are compelling reasons not to grant;

d. The arrested or accused person must not be deprived of his freedom arbitrarily or without just cause;

e. In determining whether or not to grant bond or bail, the court must adopt an interpretation that most favours the enforcement of the right to bond or bail and promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom as well as the spirit, purport and objects of the Bill of Rights;

f. The right to bond or bail shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, considering all relevant factors;

g. Where the State seeks to limit the right to bond or bail, it shall demonstrate to court that the limitation is reasonable and justifiable and that there are compelling reasons to warrant denial of bond or bail to the arrested or accused person;

h. While considering the question of bond or bail, the court must not lose sight of the arrested or accused person's right to be presumed innocent until the contrary is proved.

30. According to Article 19 of the *Constitution* of Kenya, the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. Further, the rights and fundamental freedoms in the Bill of Rights are subject only to the limitations contemplated in the Constitution. It is clear that the right to bond or bail is not absolute. What are the Constitutional limitations to this right? My understanding of the Constitution is that bond or bail can only be denied if the State or Prosecution advances reasonable, justifiable and compelling reasons to warrant such denial. My view is buttressed by the authority of *Republic v Robert Zippor Nzilu* [2018] eKLR wherein Odunga J (as he then was) held as follows:

> " It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation."

31. Similarly, in *Rodgers Nzioka & 10 others v Republic* [2018] eKLR, Ong'udi J held as follows:

> " A reading of Article 49(1)(h) of the *Constitution* clearly provides for the right to bail for accused persons on reasonable conditions from whichever angle one looks at it. Can this right be limited? The answer is yes, and it is found in the same article 49(1)(h)
>
> '... Unless there are compelling reasons not to be released.'
>
> In this case the DPP has objected to the applicant's admission to bail. He therefore bears the burden of satisfying the Court of the compelling reasons that make the respondent interfere with the applicants right to bail as provided for under the Constitution."

The Constitution does not lay down the guiding factors to be considered by the court before arriving at a decision of whether or not to grant bail to an arrested or accused person. These are to be found in Statute, Case law and Policy guidelines. The application is generally governed by section 36A of the *Criminal Procedure Code* which provides as follows:

> " 1. Pursuant to Article 49(1) (f) and (g) of the *Constitution*, a police officer shall present a person who has been arrested in court within twenty-four hours after being arrested.
>
> 2. Notwithstanding subsection (1), if a police officer has reasonable grounds to believe that the detention of a person arrested beyond the twenty-four-hour period is necessary, the police officer shall—
>
> a. produce the suspect before a court; and
>
> b. apply in writing to the court for an extension of time for holding the suspect in custody.
>
> 3. An application under subsection (2) shall be supported by an affidavit sworn by the police officer and shall specify—
>
> a. the nature of the offence for which the suspect has been arrested;
>
> b. the general nature of the evidence on which the suspect has been arrested;
>
> c. the inquiries that have been made by the police in relation to the offence and any further inquiries proposed to be made by the police; and
>
> d. the reasons necessitating the continued holding of the suspect in custody.
>
> 4. In determining an application under subsection (2), the court shall consider any objection that the suspect may have in relation to the application and may—
>
> a. release the suspect unconditionally;
>
> b. release the suspect subject to such conditions as the court may impose to ensure that the suspect—

i. does not, while on release, commit an offence, interfere with witnesses or the investigations in relation to the offence for which the suspect has been arrested;

ii. is available for the purpose of facilitating the conduct of investigations and the preparation of any report to be submitted to the court dealing with the matter in respect of which the suspect stands accused; and

iii. appears at such a time and place as the court may specify for the purpose of conducting preliminary proceedings or the trial or for the purpose of assisting the police with their inquiries; or

c. having regard to the circumstances specified under subsection (5), make an order for the remand of the suspect in custody.

5. A court shall not make an order for the remand in custody of a suspect under subsection (5)(c) unless—

a. there are compelling reasons for believing that the suspect shall not appear for trial, may interfere with witnesses or the conduct of investigations, or commit an offence while on release;

b. it is necessary to keep the suspect in custody for his protection, or, where the suspect is a minor, for his welfare;

c. the suspect is serving a custodial sentence; or

d. the suspect, having been arrested in relation to the commission of an offence, has breached a condition for his release.

6. The court may, for the purpose of ensuring the attendance of a suspect under subsection ((4)(b)(ii) or (iii), require the suspect—

a. to execute a bond for such reasonable amount as the court considers appropriate in the circumstances; and

b. to provide one or more suitable sureties for the bond.

7. Where a court makes an order for the remand of a suspect under subsection (4)(c), the period of remand shall not exceed thirty days."

32. Similar provisions are found in section 33 of the *Prevention of Terrorism Act*.

Section 123A of the *Criminal Procedure Code* provides as follows:

> "(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—
>
> a. the nature or seriousness of the offence;
>
> b. the character, antecedents, associations and community ties of the accused person;
>
> c. the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;
>
> d. the strength of the evidence of his having committed the offence;
>
> 2. A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—
>
> a. has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
>
> b. should be kept in custody for his own protection."
>
> Section 124 of the Criminal Procedure Code provides as follows:
>
> > "Before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer." (Emphasis supplied)

33. The foregoing provision reveals that the purpose of bond is to secure the attendance of the accused person at the trial or place of inquiry/investigations. Case law has affirmed this position. The Supreme Court of Nigeria in the case of Alhaji Mujahid Dokubo-Asari v Federal Republic of Nigeria SC No. 208 of 2006 observed (per Niki Tobi JSC) as follows:

> "The main function of bail is to ensure the presence of the accused at the trial.
>
> .....Accordingly, this criterion is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above. Dealing with the criterion, the Working Party on Bail Procedure in Magistrates' Courts in the United Kingdom, said in paragraph 22 of the Report:
>
> 'There are a number of other considerations to be taken into account in deciding a bail application, but in general they are not in themselves reasons for granting or refusing bail, but indicatory of the likelihood or otherwise -of the defendant's appearance.'
>
> As a matter of fact, all other criteria are parasitic on the omnibus criterion of availability of the accused to stand trial."

34. The Bail and Bond Policy Guidelines, March 2015 at pages 16 to 19 summarise the following non-exhaustive factors as formulated by case law:

1. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty. It has been argued that where the offence is serious in terms of the punishment to be meted out, there is an incentive for the accused person to abscond if released on bond;

2. The strength of the prosecution case. It is presumed that where the prosecution evidence is weighty, the accused person will have an incentive to abscond;

3. Character and antecedents of the accused person;

4. The failure of the accused person to observe bail or bond terms on previous occasions may warrant a denial of bond or bail;

5. Likelihood of interfering with witnesses. Where there is strong evidence of the likelihood of interfering with prosecution witnesses, which is not rebutted and the court cannot impose conditions to the bail or bond to prevent such interference, the accused person may be denied bond. In the case of Republic v Joseph Wambua Mutunga & 3 others [2010] eKLR, Ochieng J (as he then was) held as follows:

> "The prosecution has pointed out that the accused persons do now know the identities of each and every person whom the prosecution will call as witnesses. Furthermore, the accused persons know the exact nature of the evidence which each such witness will adduce at the trial. The accused persons became aware of the identity of the prosecution witnesses, and also of the evidence to be tendered by each such witness, as soon as the accused were provided with copies of the witness statements. In those circumstances, I do share the fear expressed by the prosecution; that the prosecution witnesses are likely to have fear inflicted in their hearts and minds, when they know that there was a real possibility of encountering the accused either in the streets or in the village. In this case I find that there is a real possibility of the accused making contact with the potential witnesses, if they are granted bail. That could probably inflict genuine fear and anxiety in the potential prosecution witnesses, especially because the accused persons know not only their respective identities, but also the nature of the evidence which each witness is expected to tender to the trial court. Secondly, I find that the severity of the sentences of death were such that the accused would, more probably than not, be tempted to abscond. In the event, there are compelling reasons for rejecting the application for bail pending trial, at this stage of the proceedings. The application for bail is thus rejected."

6. The need to protect the victim or victims of the crime from the accused person;

7. The relationship between the accused person and potential witnesses. Republic v Taiko Kitende Muinya [2010] eKLR, Ochieng J (as he then was) held that the relationship, if any, between the accused person and the potential witnesses is a factor to be considered in determining whether or not to grant bail. That if the accused was a person who was either related to the witnesses or a person who stood in a position of influence vis-à-vis the potential witnesses, there could arise a legitimate anxiety about the impact he might have on the witnesses, if he was released pending trial;

8. The accused person is a flight risk. In Republic v Ahmad Abolafathi Mohamed & another [2013] eKLR, Achode J (as she then was) cancelled bond that had been granted to the respondents by the lower court, inter alia, on the ground that the respondents were Iranian Nationals and that Kenya had not signed an extradition treaty with Iran, a fact that would have made it impossible to have the respondents returned in the event that they absconded and went to Iran;

9. Whether the accused person is gainfully employed. It has been argued that where the accused person is gainfully employed, there is a likelihood that the accused person will attend court for trial. The implication is that an unemployed accused person is more likely than not to abscond;

10. Public order, peace or security. In the case of Republic v Pascal Ochieng Lawrence [2014] eKLR, Sitati J (retired) held that one of the factors to be considered in determining whether or not to grant bond or bail is whether the release of the accused will jeopardize the security of the community. If the prosecution is able to demonstrate that the public response to an offence is such that the release of the accused person would likely lead to a public disturbance, the accused person may be denied bond or bail;

11. Protection of the accused person. In Republic v David Muchiri Mwangi [2018] eKLR, it was held that the accused person's safety, security and protection is one of the factors to be considered in deciding whether to grant or deny bond or bail.

    The above authorities and provisions relate to bond pending trial but the same principles would apply to granting of bond pending charge.

35. The Preamble to the Universal Declaration of Human Rights emphasizes that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Article 3 thereof recognizes the right to life, liberty and security of person whereas Article 9 stipulates that no one shall be subjected to arbitrary arrest, detention or exile. Article 9 of the International Covenant on Civil and Political Rights guarantees the right to liberty and security of person. The Article further provides that no one shall be subjected to arbitrary arrest or detention. That no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. It is provided in the same Article that it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

36. Similar provisions on the right to liberty and security of the person are found in Article 6 of the African Charter on Human and Peoples' Rights. The Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (Luanda Guidelines) provide a framework for member states in the African Union to implement their obligations in the specific context of arrest, police custody and pre-trial detention. These guidelines were adopted in May, 2014 by the African Commission on Human and Peoples' Rights (ACHPR). They provide a guide to policy makers and criminal justice practitioners aimed to strengthen day-to-day practice of arrest across the region. The guidelines provide that everyone has the right to liberty and security of the person. That detention must always be an exceptional measure of last resort and no one shall be subjected to arbitrary or unlawful arrest or detention. The guidelines further recognize the right of an arrested person to apply for release on bail or bond pending investigation or questioning by an investigating authority and/or appearance in court.

In the case of Masroor v State of U.P. & Anr, Criminal Appeal No. 838 OF 2009, the Supreme Court of India had this to say:

> " There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the 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."

The same court in the case of Brijesh Singh and Another v State [2002] CriLJ 1362, observed that:

> " Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law."

37. Granting bond or bail entails the striking of a delicate balance of proportionality in considering the rights of the accused/arrested person who is presumed innocent at the instant point on the one hand, and the public interest on the other. The court is usually placed in an awkward position. I say so because on one hand we have the Prosecution who have their facts and believe in the guilt of the accused/arrested person based on the facts and evidence in their possession. On the other hand, there is the accused/arrested person who believes in his innocence and who is entitled to the presumption of innocence until his guilt is proven. Then there is the court which is expected to strike a balance between these two conflicting interests without the advantage of having known the facts of the case. The position is exacerbated by circumstances such as those prevailing in the instant application. The circumstances are that the respondents are yet to be charged and the State seeks their continued detention so as to complete investigations. The court must exercise great caution before granting orders for detention before charge. Are there instances where the public interest outweighs personal liberty? I will revisit this question at a later stage in this ruling.

38. Having highlighted the law as above, I now move to consider the grounds relied upon by the prosecution in seeking orders for detention of the respondents for a period of 90 days. The grounds are contained on the face of the application and in the affidavit sworn by the investigating officer Inspector Raphael Wanjohi. I will summarise the grounds as follows:

    1. The period of detention already granted by the Malindi court has proved to be grossly insufficient owing to the evolving nature of the case and the lines of inquiry that are to be pursued;

    2. There exists new information that demonstrates compelling reasons for further detention of the respondents pending conclusion of investigations;

    3. The identities of the 2nd to 17th respondents are not yet known and have to be subjected to further investigations;

    4. Over 103 bodies have so far been exhumed and the numbers keep rising. That the search is still ongoing for recovery of more bodies within the vast land and some of the victims are reasonably

believed to be relatives of the respondents. It is only until the last body is recovered that DNA material can be obtained from it for analysis with that of the respondents. It will take a longer period and costly forensic investigations to identify the hundreds of the deceased;

5. Investigations are far from complete and the participation and cooperation of the respondents is necessary for the collection and gathering of critical and material

   information and evidence necessary to resolve the crime and without which the investigations will be hampered;

6. The victims are still undergoing medical and psycho social treatment and support. They are not able to meaningfully participate within the strict short timelines so far sought or granted;

7. The communities and families from which the respondents may hail from are highly unlikely to receive the respondents back to their fold, following the loses of children, spouses and relatives that may have been initiated into the cult;

8. The crimes under investigation by nature, gravity and seriousness are complex and constitute a compelling ground to deny the respondents bail at this juncture;

9. The 1st respondent's antecedents depict a tendency towards committing the same or similar offences under investigation or even committing further offences. The rest of the respondents still hold dear to their extreme religious ideology and beliefs and if released, they may complete the remaining journey in the same fashion;

10. The 1st respondent together with his accomplices command a following that is ready to die in his extreme beliefs. If his liberty is not curtailed through continued detention pending charges, possibility of further radicalization is almost guaranteed;

11. Given the huge following that the 1st respondent enjoys within the country, there is a possibility that if the respondents are released, there is a high likelihood that they will interfere with the investigations and tamper with the witnesses;

12. It is in the interest of the respondents to remain in custody pending completion of investigations for their own safety and security;

13. Given the nature and seriousness of the charges likely to be presented, the temptation to take flight is high. The true identities and places of abode for the 2nd to 17th respondents are unknown and their absence could jeopardize the integrity of key aspects of the investigations.

39. I have perused the application and find that the same meets the general form prescribed by section 36A (1), (2) and (3) of the Criminal Procedure Code as well as section 33(1) and (2) of the Prevention of Terrorism Act. What is to be determined is whether the grounds advanced by the prosecution are compelling so as to warrant denial of bond or bail with respect to the respondents. The word "compelling" is an adjective that in ordinary parlance would mean forceful or convincing. Other synonyms would be cogent, strong, overpowering or persuasive. A compelling reason is one that makes you feel certain that something is true or that you must do something about it. It is now settled that the standard of proof imposed upon the prosecution in establishing compelling reasons for denial of bond or bail is on a balance of probabilities. In Republic v Muema Mutia [2017] eKLR, Joel Ngugi J (as he then was) held that:

40. Finally, our emerging jurisprudence is clear as to the kind of evidence needed to establish the "compelling reasons": the evidence presented must be "cogent, very strong and specific evidence" and that mere allegations, suspicions, bare objections and insinuations will not be sufficient. However, it is

also true that the standard of proof required is on a balance of probabilities. There is no requirement that the Prosecution proves the compelling reasons beyond reasonable doubt."

41. It is worth noting that the respondents did not file Replying affidavits or seek leave to file in opposing the matters of fact contained in the affidavit in support of the application. However, this cannot be construed as an admission by the respondents of those facts. Has the application met the threshold? My view is that the factors mentioned under sections 36A of the Criminal Procedure Code and 33(5) of the *Prevention of Terrorism Act* are not exhaustive. I say so because each case exhibits its own peculiar circumstances and is tied to the question of whether the person concerned should be granted bond or bail pending investigations or charge.

42. It is not in dispute that prior to the instant application, some of the respondents have been in police custody ever since they were arrested and pursuant to court orders issued by the Malindi and Shanzu courts. The respondents argued that the application is an indication of dissatisfaction of the State with the orders granted by the Malindi court and previous orders by the Shanzu court. On the other hand, the State contends that the previous cases were closed and the application was necessitated by the evolving nature of the matter and the lines of inquiry to be pursued. I have not had the advantage of perusing the previous proceedings from the Malindi and Shanzu court as none of the parties tendered the same to me. It is therefore not clear to me what offences were under investigation in the previous applications.

43. Be that as it may, the position of the State is that they are now undertaking investigations relating to serious offences under various statutes and given the lines of inquiry to be pursued, more time is needed. I agree that the evolving nature of the matter amounts to a change of circumstances which would justify institution of the instant application. However, such change of circumstances does not ipso facto warrant the continued detention of the respondents. Other than establishing a change of circumstances, the State must prove that the offences now under investigation would call for the limitation of the respondents' liberty in the manner sought. In the application, the State has listed the offences under investigations. I agree that most of them are serious in nature and would require more time and facilities to conduct investigations.

44. The respondents did not dispute the fact that the investigations have since taken a new turn. In my view, for the court to find whether or not there are compelling reasons to deny the respondents bond or bail, the court must consider the grounds advanced by the State collectively as opposed to selectively. I have already stated that I agree with the State that the offences under investigation are serious in nature. I must emphasize that none of the respondents has been charged with any of those offences and as such, it would be improper to pass any judgment at this stage. However, the affidavit in support of the application by the State has implicated the respondents in their various capacities.

45. The courts have generally held that where the offence against an accused person or suspect is grave, there is always an incentive to abscond on the part of the accused person or suspect. For instance, in the case of Priscilla Jemutai Kolongei v Republic-Criminal Application No. 319 of 2002 (unreported) at page 3, Mbogholi Msagha, J (as he then was) held as follows:

> However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive."

46. In the Robert Zippor Nzilu case (supra), the court held that:

> The mere fact therefore that the offence with which an accused is charged carries a serious sentence is not necessarily a reason for denial of bail. The real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and determine the amount rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release."

47. The State alleges that the true identities and places of abode for the 2nd to 17th respondents are unknown. It is not known whether they are in any gainful employment. The investigating officer deposed that the 2nd to 17th respondents were arrested by the police on various dates in the bushes within Shakahola forest. That they did not provide their national identity cards or any form of identification. It is worth noting that all the respondents are adults and according to section 6 of the *Registration of Persons Act*, every person who attains or has attained the age of eighteen years is liable to registration under the Act. Section 9 thereof provides that upon the registration of a person under this Act, the registration officer shall issue an identity card in the prescribed form to that person. According to section 14 of the Act, any person who fails to apply to be registered in accordance with the provisions of the Act commits an offence punishable by law.

48. It is through registration that the identities of Kenyan citizens are known. The respondents did not dispute the allegation that they had failed to prove or establish their identities to the investigating officer. They did not confirm nor deny that the names on the application belong to them. The respondents did not deny that they had no fixed places of abode. They did not state either by way of affidavit or through counsel where they stayed. I am aware that under Article 49 of the Constitution, the respondents have a right to remain silent upon being arrested. However, the purpose of this right is to guard against giving incriminating information to the police. In my view, the right does not extend to refusing to give the name and address of the arrested person.

49. For the above view, I seek refuge in section 32 of the Criminal Procedure Code which provides that:

> (1) When a person who in the presence of a police officer has committed or has been accused of committing a non-cognizable offence refuses on the demand of the officer to give his name and residence, or gives a name or residence which the officer has reason to believe to be false, he may be arrested by the officer in order that his name or residence may be ascertained.
>
> 2. When the true name and residence of the person have been ascertained he shall be released on his executing a bond, with or without sureties, to appear before a magistrate if so required:
>
> Provided that if the person is not resident in Kenya the bond shall be secured by a surety or sureties resident in Kenya.
>
> 3. Should the true name and residence of the person not be ascertained within twenty-four hours from the time of arrest, or should he fail to execute the bond, or, if so required, to

furnish sufficient sureties, he shall forthwith be taken before the nearest magistrate having jurisdiction."

50. It would appear that the 2nd to 17th respondents merely gave names to the investigators but did not exhibit any identification documents. It would also appear that they did not state their addresses or places of residence. That being the case, the police have a duty under section 32 aforesaid to establish their true identities and places of abode before releasing them on bond. I agree with the State that given the circumstances, releasing the 2nd to 17th respondents at this stage without knowing their true identities and places of abode may be tricky and hazardous to the investigations. I have already stated that the nature of the investigations will require more time and facilities.

51. The affidavit in support of the application indicates that some of the deceased may be family members of some of the respondents. That persons believed to be family members of some of the respondents are also missing. These facts were not denied by the respondents in their submissions. It was also deposed by the investigating officer that over 100 bodies have since been exhumed and the number is expected to rise since the exercise is yet to be completed and the area to be covered is vast. Mr. Kariuki, learned counsel for the respondents admitted that there were reports of bodies having been exhumed. That it is a fact that cannot be ignored. The State and Counsel for the victims submitted that the court can take judicial notice of what is reported in the media.

53. The media wields tremendous influence in our society. Newspapers, radio, television, and new media not only spread information, but also help to determine what topics and stories people talk about. High profile cases such as the one at hand, often attract extensive and emotionally charged coverage. Judicial officers, like myself, do not live in a cocoon. They watch television, listen to the radio and read newspapers. It is not a secret that the incidents at Shakahola have been nationally and internationally reported in the media. In Kenya, this has been happening on a daily basis since mid-April, 2023 following the arrest of the 1st respondent and others. The media is regarded as one of the pillars of democracy. It has wide ranging roles in the society.

54. Media plays a vital role in moulding the opinion of the society and it is capable of changing the whole viewpoint through which people perceive various events. The media pushes people to prejudge the verdicts of criminal proceedings. Some people use the media to influence court case outcomes. In trials, the media serves as a conveyor for popular sentiment. The media are also used to practice parallel elements of justice outside the confines of the courtroom. Kenya is a country where all the people have an upsurge of curiosity to know about the sensational and the high-profile cases. People themselves start collecting information to lead the case in their mind and in this process the media by publishing their own versions of facts in the source of newspapers, news websites, and news channels pour water on the people's thirst for these sensational cases.

55. Can this court take judicial notice of the media reports concerning this matter? Section 60 of the *Evidence Act* provides in part that the court shall take judicial notice of all matters of general or local notoriety. Judicial Notice is defined in Black's Law Dictionary Tenth Edition on page 975 as follows: -

> Judicial notice: A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact the trial court took judicial notice of the fact water freezes at 32 degree."

56. It is further defined by Oxford Dictionary of Law (ed. Jonathan Law and Elizabeth A. Martin) 7th Ed. (Oxford University Press) at page 306 as: -

> The means by which the court may take as proven certain facts without hearing evidence. Notorious facts may be judiciary noticed without inquiry."

57. The Black's Law Dictionary aforementioned defines the term "Notoriety" as the quality, state or condition of being generally, and often unfavourably, known and spoken of.

58. In the case of Fredrick Chege Wambui v The Independent Electoral and Boundaries Commission [2013] eKLR, Odunga J (as he then was) held as follows:

> by a stretch of imagination, the closest that one can equate the media reports when it comes to matters that ought to be judicially noticed is that the matter is of general or local notoriety. Whereas the fact that a media house has published an article may be of general notoriety to stretch that to include the authenticity of the same report is to stretch the matters which ought to be judicially noticed too far. In Gupta vs. Continental Builders Ltd [1978] KLR 83; [1976-80] 1 KLR 809, the Court of Appeal held that the party who asks that judicial notice be taken of a matter has the burden of convincing the judge
>
> a. that the matter is so notorious as not to be the subject of dispute among reasonable men, or
>
> b. that the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy. The Court further held that the common cause of the business must first be proved or admitted, and then the court may presume that it has been followed in particular cases.
>
> I am not convinced that Newspaper reports can be taken to be so notorious with respect to the truth of their contents that the Court ought to rely on them for the purposes of judicial notice."

59. In the case of Ngunjiri Wambugu v Inspector General of Police, & 2 others [2019] eKLR, Makau J took judicial notice of media reports which were in the public domain and widely reported in the local dailies and news on all broadcasts, as sufficient prove that there were violations of the Petitioner's rights. Similarly, in the case of Republic v Diana Suleiman Said & another [2014] eKLR, Muriithi J took judicial notice of media reports concerning attacks in Lamu over a period, among others, and reviewed the order of release of the accused persons on bond. In Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others [2019] eKLR, Ogola J observed:

> On the issue of media reporting this Court has taken judicial notice that the Petitioner has been the subject of adverse media reports both print and audio–visual. The cumulative effect of such report is to paint the Petitioner in a bad light. While media reporting is not likely to influence the Court, the Petitioner is likely to be judged adversely in the Court of public opinion....."

60. In Republic v Kunguru Martin Opiyo Junior [2016] eKLR, Wakiaga J took notice of adverse media publicity to find that the security of the accused person therein was at stake. Having considered the above authorities, my view is that the court can take judicial notice of media reports depending on the circumstances of the case and subject to the conditions stipulated in the case of Gupta (supra). Media reports cannot be relied upon to prove, for instance, the guilt or otherwise of the suspect however much he may have been implicated or vindicated in such reports. They cannot be relied upon to resolve

issues in controversy. The media houses in and outside the country have been reporting incidents as they unfold at Shakahola. A simple Google search of the name "Shakahola" leads to a great number of links containing horrendous news and information on the incidents under investigation herein.

61. The respondents through their counsel admitted that several bodies have since been exhumed at the scene of the alleged crime and that the whole world is talking about Shakahola. Counsel further submitted, rightly so, that we cannot ignore what is going on and we should all be concerned. For close to a month now, the Kenyan Media has been reporting on the happenings at Shakahola. There has been news on bodies being exhumed and survivors being rescued. As rightly submitted by Mr. Aboubakar, the Chief Government Pathologist has been giving media briefings on the post-mortem exercise at Malindi. Reports indicate that when exhumations resumed on 9/5/2023, 21 bodies were exhumed and 5 people were rescued. The number of missing persons is said to be 566 or thereabout. It is in the public domain that His Excellency the President of the Republic of Kenya has since formed a Commission of Inquiry into the deaths at Shakahola.

62. It is also in the public domain that the Cabinet Secretary for Interior and National Administration has declared Shakahola forest as a disturbed area and a scene of crime via Kenya Gazette Legal Notices Number 52 and 53 of 2023 published on Tuesday, 25th April 2023. The measures are meant to secure the scene for purposes enhancing investigations. Curfew orders have also been declared and Gazetted within the said area between 1800 HRS in the evening up to and until 0600 HRS in the morning for a period of thirty (30) days. Without passing judgment on any of the respondents, this court cannot avoid taking judicial notice of all the media coverage and action taken by the Government with regard to Shakahola. This proves the fact that whatever happened at Shakahola is of a grave nature and cannot be taken lightly. It also proves the anxiety that the country has been thrown into. Consequently, I accept the invitation by the State and the victims to take, as I HEREBY DO, judicial notice of the general and local notoriety of the Shakahola saga.

63. The State submitted that the 1st respondent has a previous criminal record. That he was charged and convicted before a Malindi court in Criminal case number 182 of 2017 wherein he was accused of offering basic education in an unregistered institution. The State further submitted that the offence of which the 1st respondent was convicted is one of those under investigation herein. The State argues that if released, there is a likelihood that the 1st respondent and his accomplices will commit similar and further offences. The 1st respondent did not dispute the fact that he had a previous criminal record as was alleged. It is not possible to tell what the respondents may do in the future. However, having a previous criminal record in respect of an offence similar to what is under investigation would raise a reasonable apprehension that if released on bond or bail, the 1st respondent is likely to commit further offences.

64. In my view, this apprehension by itself may not always be sufficient to totally deny the 1st respondent bond or bail but may well be considered cumulatively with other factors. Whether or not such a ground is compelling such as to warrant a denial of bond will depend upon the facts and circumstances of the case as well as the nature and gravity of the offence in question. The previous conviction was in respect of an offence that attracts a maximum fine of Ksh. 200,000/= (on a first conviction) or a maximum of one year imprisonment. This is a misdemeanour according to the Penal Code. The respondents are still under investigation and no charges have so far been preferred against any one of them. It is yet to be established whether or not any of the respondents has committed an offence. Judging from the circumstances of the matter, I do not find this particular ground to be compelling so as to deny the 1st respondent or any of them bond.

65. The State argues that if released at this stage, the respondents are likely to interfere with the investigations and witnesses. The State submitted that the offences under investigation are linked to an extreme religious ideology of which the 1st respondent is the proponent. That he enjoys a huge following and if released, chances are high that the respondents will interfere with the investigations and witnesses. The 1st respondent did not comment on the assertion that he holds an extreme religious ideology. In the case of Sudi Oscar Kipchumba v Republic (Through National Cohesion & Integration Commission) [2020] eKLR, Joel Ngugi J (as he then was) observed that it is not enough to proclaim that an arrested person wields influence in his line of business, profession, trade or occupation. In order to restrict the person's right to be released on pre-charge bail, the State must credibly and specifically demonstrate the likelihood of such interference.

66. Korir J (as he then was) in the case of R v Dwight Sagray & 4 Others [2013] eKLR had this to say on the subject of interference with witnesses, which I respectfully agree with:

> It has been submitted by the prosecution that the 1st accused person and indeed all the accused are likely to interfere with prosecution witnesses As I have held before, interference with prosecution witnesses is in my view a compelling reason not to admit an accused person to bail as such interference goes to the root of the trial and is an affront to the administration of justice. For the prosecution to succeed in persuading the court on this criteria however, it must place material before the court which demonstrates 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 familial relationship between the accused and witnesses among others. I agree with the holding in Panju vs Republic [1973] E.A. 284, where the court in dismissing the prosecutor's fear of interference with witnesses stated that before any one can say there would be interference with vital witnesses, at least some facts should be led to the court, otherwise it is asking courts to speculate"

67. In Republic v Joktan Manyende & others [2012] eKLR, Gikonyo, J. stated as follows:

> Where there is evidence that a person is accosted, physically or otherwise, by an accused person in the case where the person is a witness, it suffices to prove that the accused did act(s) tending or intended to interfere with a witness. The court is then entitled, if not bound, to infer that the intention of the accused in accosting the witness had been to dissuade the witness from giving evidence. 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 give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice.....All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court which decides in the circumstances of each case 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."

68. Evidence of previous attempts to contact the witnesses would be a good pointer to direct interference of the witnesses. In considering this ground, this court is well aware that it must carefully weigh the facts in the case to satisfy itself that the stated fear is real and demonstrated and not merely speculative. As stated in the celebrated case of Jaffer v Republic [1973] EA 39, the court cannot be called upon to speculate. It is not automatic that where the suspect is related to the Prosecution witnesses, interference is bound to occur. In my view, the Prosecution must demonstrate that the suspect either made attempts aimed at interfering with the witnesses or is in a position of power and influence over the witnesses. In the Bail and Bond Policy, it is acknowledged as follows regarding this particular ground:

> However, this factor does not inexorably dictate that the accused person should be denied bail. Instead, it may simply require the police or the court to attach suitable bond or bail conditions to ensure that the relationship between the accused person and potential witnesses does not undermine the interests of justice."

69. The State alleged that after the 1st respondent was released on bail by a Malindi court in Malindi Misc application No. E024 of 2023, it was established from a reliable witness account that a Lorry procured by the 1st respondent moved several adherents from Shakahola forest to Kakuyuni forest. It was also alleged by the State and Counsel for the victims that the rescued victims appeared to have been brain washed and were undergoing medical, mental/psycho-social treatment and support in various medical facilities. That most of the victims were protective of the 1st respondent and others appeared to be afraid of him. The State further alleged that the rescued victims will remain vulnerable and exposed to the effects of the radical religious ideology if the respondents are released.

70. It is the position of the State that most of the victims are yet to record statements because they are not in a position to be interviewed and that if the respondents are released, there is reasonable apprehension that the victims will have genuine fear or have their hearts hardened in a manner that prejudices the preservation of their evidence. The State indicates that some of the respondents may have recruited their spouses and children into the religious outfit under investigations and some of their family members have been reported missing. It is believed that some of the deceased may be immediate family members or relatives of some of the respondents. The State intends to establish this through forensic analysis and this exercise may take considerable time owing to the large number of retrieved bodies and the fact that the search and exhumation exercise is still going on. It is worth noting that the area to be covered is vast.

71. Mr. Ole Kina likened the situation of the rescued victims to the Stockholm syndrome. Stockholm syndrome is a coping mechanism to a captive or abusive situation. In such a situation, people develop positive feelings toward their captors or abusers over time. People with this syndrome form a psychological connection with their captors and begin sympathizing with them. This condition gets its name from a 1973 bank robbery incident that happened in Stockholm, Sweden. During the six-day standoff with the police, many of the captive bank employees became sympathetic toward the bank robbers. After they were set free, some bank employees refused to testify against the bank robbers in court and even raised money for their defence. A criminologist and Psychiatrist investigating the event developed the term “Stockholm syndrome” to describe the affinity some bank employees showed toward the bank robbers. Movie lovers such as myself who have watched the Netflix Series, “Money Heist” may have a clear understanding of the term. In addition to the kidnapper-hostage situation, Stockholm syndrome now includes other types of trauma in which there’s a bond between the abuser and the person being abused.

72. The allegation by the State and victims and what is in the public domain is that the offences under investigation are largely linked to extreme religious ideologies in which, among others, adherents were

asked to fast to their death so that they may meet Jesus. It was also alleged and has been reported in the media that those who were rescued were found to be severely malnourished and it is believed that they were fasting in observance of their religious belief. The information in the public domain is that most of the autopsies conducted on the bodies retrieved from Shakahola revealed that the victims had died of starvation. I am aware that I cannot and should not draw any conclusions at this stage. However, if the allegations are anything to go by, then there is cause for alarm.

73. The circumstances of the matter indicate that the offences under investigation may have been committed over a considerable period of time and not just a one-time occurrence. If they are linked to extreme religious ideologies and given the number of retrieved bodies and rescued victims together with the number of missing persons believed to have been adherents of the religious outfit, I would agree that releasing the respondents at this stage would jeopardize the investigations. The circumstances of the case as depicted in the application and affidavit in support thereof together with the submissions by the State and the victims indicate that there is a high likelihood that some of the rescued victims who are potential witnesses may be suffering from the Stockholm syndrome. In such circumstances, it would be unsafe to release the respondents before the potential witnesses are restored to normalcy.

74. I also agree that if the respondents are released at this stage, the forensic analysis to establish the identity of the deceased and their possible relation to the respondents would be hampered. I have already indicated that the respondents have not denied that some of the deceased and missing persons may be their close relatives. In the interest of justice, it would be necessary for the investigators to establish the identity of the deceased and also establish whether they are members of the respondents' families. It is not clear where the 2nd to 17th respondents hail from. If they are from different parts of the country, as may be the case, and are released before their true identity and that the of the deceased is established, it would prove difficult for proper investigations to be conducted. Due to the large number of the deceased persons, the exercise is bound to take long, not to mention the financial implications. This is an exercise that would require the smooth and timely participation of the respondents.

75. Section 10 of the *Victim Protection Act* provides, inter alia, that a victim has a right to be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse as well as have their safety and that of their family considered in determining the conditions of bail and release of the suspect. The State alleges that as investigations were going on, more bodies were retrieved from the scene of the alleged crime and more people were rescued. That upon conducting post-mortems, some of the deceased victims appeared to have been subjected to violence, strangulation and asphyxiation. That the rescued victims were not in the proper state of mind so as to assist in the investigations. From the submissions by the State and Counsel for the victims, I agree that the victims need to be free from intimidation, fear or any form of interference.

76. It was alleged that the 1st respondent is or was the leader of the religious formation under investigation whereas the 2nd to 17th respondents were the enforcers of the alleged extreme ideologies. The State indicates that some of the rescued victims have narrated that there was a group of men who would deploy force and violence to ensure that the adherents starved to death. The 2nd to 17th respondents are believed to be part of that group. Preliminary investigations reveal that bows and arrows were recovered from the scene. The State alleges that there is need to conduct identification parades to ascertain whether the respondents and in particular the 2nd to 18th respondents are involved in the offences under investigation. The rescued victims are expected to participate in this exercise. However, given the large number of the rescued victims, which keeps growing and their current state of health, it may not be possible to conduct the identification parades at this point.

77. I agree that the circumstances of the case would warrant the conduct of identification parades. The incidents under investigation appear to have affected a large number of people and this number keeps

on increasing by the day. If the 2nd to 18th respondents are released before such parades are conducted, there is no guarantee that all the respondents will be available for the exercise. Furthermore, if the submissions of the State and Victims are anything to go by, it would appear that the respondents may be in a position of power and influence over the potential witnesses who are largely their alleged victims. Releasing the respondents before conducting the identification parades would expose the potential witnesses to intimidation and interference.

78. It has been stated that some of the missing persons are close relatives of the respondents. The search and rescue efforts are still underway. It is believed that the missing persons were recruited to the religious formation by the respondents. I am inclined to agree that if the respondents are released at this stage, the efforts to trace and find the missing persons may be jeopardized. This apprehension is buttressed by the allegation that the 1st respondent procured a Lorry believed to have ferried adherents from Shakahola forest to Kakuyuni forest. The allegation was not controverted by the 1st respondent. I am aware that it is the duty of the State to establish, on a balance of probabilities, the existence of compelling reasons to deny the respondent bond or bail.

79. My view is that where the State advances facts to support the grounds opposing the release of the respondents on bond, the evidentiary burden shifts to the respondents to rebut the facts. If the respondents do not rebut the facts in any manner or choose not to say anything concerning the facts, the court is likely to find the facts as established. For instance, the State alleged that the 1st respondent procured a Lorry to ferry suspected adherents from Shakahola forest to Kakuyuni forest. It was also alleged that the 2nd to 17th respondents did not have any identification documents and had no fixed places of abode. It was further alleged that relatives of some of the respondents were missing and others suspected to be among the deceased. The respondents did not rebut these allegations or respond to them in any manner.

80. The State alleged that there is reason to believe that there was financial and material gain and there is need to identify, trace, freeze and confiscate any illicit proceeds of crime. That if released, the respondents are likely to waste or dispose of the properties or conceal records and other information relating to those properties. I find this particular ground lacking in seriousness. I say so because it appears to be a shot in the dark and merely speculative. There is no evidence of any properties that may be owned by the respondents. Even if there were such evidence, the State has not demonstrated how the continued incarceration of the respondents would assist in identifying and tracing the properties. Where there is no evidence of existence of property, it cannot be said that the respondents are likely to waste, dispose of or conceal records of such unknown property.

81. It was alleged by the State and the victims that the Shakahola incident has stirred public anger. That it would be in the interest of justice and that of the respondents in terms of their safety and security to remain in custody. In Nicholas Kipsigei Ngetich & 2 others v Republic [2011] eKLR, Ouko J (as he then was) held as follows:

> First and foremost, it must be borne in mind that the main pillar of the right of a person arrested in connection with a criminal offence is the right to be presumed innocent until the contrary is proved (see Article 50(2)(a)). It must be remembered that by releasing the applicants on bond, the court has not cleared them of the charges. They are yet to be tried. It is the duty of the state in terms of Article 29(c) and 238 of the Constitution to ensure the security and safety of the applicants, a duty from which the State cannot run away or abdicate. It cannot be in the mouth of a State official charged with this duty to imply that Kenyans will only be safe in prisons."

82. According to sections 36A(5)(b) and 123A(2)(b) of the Criminal Procedure Code, a suspect can be denied bail on the ground of his protection only if the court is satisfied that the accused person ought to be kept in custody for his own protection. In my view, the requirement that the court must be satisfied behoves the prosecution to present cogent material indicating that the life of the accused person is in danger. The danger must be real and not imagined. In Republic v Richard David Alden [2016] eKLR, Lesiit J (as she then was) observed thus:

> As I have stated herein above there are many cases to quote from on the issue of public security but I need not go through all of them. It is quite clear even from the few I have quoted what the prosecution needs to place before the court in order to persuade the court to find that releasing the accused may endanger public security. The prosecution has stated that because the case was widely publicized in the local media, then it would cause a breach of public peace and order to grant the accused bail. That is hardly a ground to consider in relation to public order and security. I have not followed the publicity. If the prosecution was aware of instances where there was unrest due to this case it was its duty to place tangible evidence before the court to demonstrate this. Whose limb has the accused threatened, or how has the accused endangered public safety, or how has he attempted or intends to disrupt the criminal justice system; or is he such a public figure that arresting him may lead to chaos anywhere in Kenya. I ask the prosecution in this case to note the serious issues which courts have to consider on this question of public order and security and how they weigh on the very administration of justice and be advised that such an allegation is so grave that it ought not to be "dropped" as a ground to deny. Of course, this ground has not been proved."

83. There are divergent views amongst the Judges of the High court with regard to denying a suspect bail on account of his safety and security. Some Judges contend that such cannot be a ground to be considered by the court since the State has a responsibility to protect its citizens and members of public are not expected to take the law into their own hands. The authorities of Nicholas Kipsigei Ngetich (supra) and Gibson Kiplangat Bett (supra) frown upon detention of a suspect on account of his safety and security. In the authority of Gibson Kiplangat Bett, Gikonyo J held that the argument that the accused be detained for his own safety and security is without legal or factual basis.

84. There are several other authorities which recognize that ground as sufficient to deny a suspect bond. For instance, the authority of David Ochieng (supra) relied upon by the State and Republic v Kunguru Martin Opiyo Junior [2016] eKLR. The foregoing clearly illustrates that there are two different schools of thought on the subject. I am yet to come across a Court of Appeal decision. The doctrine of precedent dictates that the decisions of the higher courts are binding on the lower court. What happens when there are conflicting decisions by the same court? Which decision should the lower court follow? In the case of Justice Jeanne W Gacheche & 5 others v Judges and Magistrates Vetting Board & 2 others [2015] eKLR, a five Judge bench of the High Court held as follows:

> The circumstances in which a Court may decline to follow a decision which would otherwise be binding on it are:
>
> a. where there are conflicting previous decisions of the court; or
>
> b. , the previous decision is inconsistent with a decision of another court binding on the court; or
>
> c. the previous decision was given per incuriam.

85. As a general rule though not exhaustive, the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness or some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."

86. Being guided by the above authority, it follows that there being conflicting decisions by the same court, I will be entitled to choose which decision to follow. In my view, the choice should be made judiciously and in the interest of justice. To begin with, there is a legal basis for denying a suspect bond or bail on account of his safety and security. This is to be found in sections 36A and 123A of the Criminal Procedure Code and section 33(5)(b) of the *Prevention of Terrorism Act*. As for the factual basis, it is my view that courts need to be pragmatic in their approach to issues before them. I agree that the State has a responsibility to provide security to its citizen including those suspected of having committed crimes or even convicted and are serving sentences.

87. This security is ordinarily provided generally and not specifically to every citizen save for the lucky few in high places or privileged. In my view, it would be unreasonable to expect the court to close its eyes to the real situation on the ground and expect that nobody would break the law simply because the Statutes say so. If that were the case, there would be no criminal cases in the country. I am persuaded that the safety and security of the suspect is a factor to be considered in relation to bond or bail. By considering the factor, it cannot be said that the court is promoting lawlessness or anarchy. The court is simply being realistic. It was submitted by the State and on behalf of the victims that if the respondents are released, they are likely to suffer harm from members of public. That people are angry and emotions are high.

88. Paragraph 33 of the affidavit in support of the application indicates that on 1/5/2023 members of public brought down a wall and damaged vegetation on what was believed to be the 1st respondent's property. This was also reported on the main stream media. The fact was not disputed by the 1st respondent. Mr. Kariuki, Counsel for the respondents appeared to have admitted the fact that there was an attack on the 1st respondent's property but argued that it was just a building and not a church. The 1st respondent appears to have been convicted by the court of public opinion. Based on the material before me, I am satisfied that the safety and security of the respondents generally, may be at risk if they are released on bond at this stage. It is common knowledge that the situation on the ground is volatile. In such circumstances, the temptation to jump bail is heightened.

89. In the authority of Sudi Oscar Kipchumba (supra), the court held that in an application of this nature, the State must satisfy a double test:

    a. First, the State must persuade the Court that it is acting in absolute good faith and that the continued detention of the individual without a charge being preferred whether provisional or otherwise is inevitable due to existing exceptional circumstances;

    b. Second, the State must demonstrate that the continued detention of the individual without charge is the least restrictive action it can take in balancing the quadruple interests present in a potential criminal trial: the rights of the arrested individual; the public interest, order and security; the need to preserve the integrity of the administration of justice; and the interests of victims of crime where appropriate.

90. The court further held that by virtue of Articles 21(1) and 259 of the Constitution, the Court must act to aggrandize and not diminish the personal liberties of arrested individuals in line with the other three interests. Differently put, the State must demonstrate that there are compelling reasons to deny pre-

charge bail while balancing all factors within the complex permutation presented by these quadruple interests and without reifying or essentializing any.

91. I have carefully considered the submissions made on behalf of the respondents. The submissions were substantially in the form of lamentations and complaints regarding how the respondents have been mistreated while in custody and their Advocates frustrated. It was cleverly submitted by Mr. Komora, learned counsel for the respondents that the period of 90 days sought by the State would delay justice even for the victims and thereby deny them the justice sought. Considering the gravity of the matter and the nature of the investigations involved, coupled with the fact that the victims who are potential witnesses are said to be undergoing medical and psycho-social support, I doubt that the delay is unwarranted. It was also submitted that the State did not demonstrate the extent of their investigations and what was remaining.

92. The application together with the affidavit in support of the application clearly reveal what has been done so far. The respondents were not all arrested at the same time. The affidavit in support of the application details how the respondents were arrested. It further explains on the operations that have been conducted at Shakahola forest together with the results which include retrieval of bodies and rescue of victims. The affidavit in support of the application also states that exhumation or retrieval of bodies is still ongoing as well as the search and rescue operations. I disagree with the respondents' assertion that the State is merely speculating. It is unfortunate that the respondents have been in custody for quite sometime but this is no ordinary incident. It is a catastrophe that seems to have affected the country at large. I have not seen any indication of a deliberate injustice by the State.

93. The respondents further submitted that the application was an abuse of the process of the court. That the State exhausted the days that they were given to hold the respondents in custody and instead of seeking an extension before the Malindi court, they closed the matters. It was submitted by the respondents that since the State was aware that they were still investigating, they ought not to have closed the Malindi file but should have sought an extension of time. The affidavit in support of the application indicates that owing to the evolving and mutating nature of the case, the period granted by the Malindi court was grossly insufficient. The State opted to close the matter at Malindi. Whereas I agree that the act of closing the file at Malindi and filing an application before the Shanzu court would raise eyebrows, I must admit that the State through the ODPP had the discretion to handle the matter as they deemed fit as long as they acted within the confines of the law. In the absence of any evidence of mischief, I am unable to hold that the application is an abuse of the process of court.

94. The respondents argued that since Shakahola was under curfew, there is no way that the respondents would interfere with the crime scene. The ground of interference with investigations as advanced by the State is not limited to the crime scene. I have already discussed hereinabove the issue of interference with investigations and witnesses. Mr. Kariuki argued that there was no evidence to prove that the land where bodies were exhumed belonged to the 1st respondent and that no post-mortem forms were annexed to the affidavit to prove the cause of death of the deceased. The investigating officer filed an affidavit containing the allegations against the respondents. The 1st respondent did not deny either by way of a Replying affidavit or otherwise that the land in issue belonged to him or that he had control over the same.

95. As rightly submitted by Mr. Aboubakar, an affidavit is evidence. The respondent had the option of applying to cross-examine the deponent but they did not do so. As already indicated, the Shakahola saga is now a matter of general and local notoriety. It is in the public domain that the autopsies conducted revealed that the deceased died of various causes as stated in the affidavit. Facts deposed to in an affidavit cannot be said to be evidence from the bar. The respondents also raised issues that would otherwise be canvassed at the trial, in the event that the respondents are charged. It should be remembered that

the respondents are not on trial. The main issue is whether there are compelling reasons to continue holding them in custody pending completion of investigations.

96. I have considered the application in totality. I have further considered the gravity of the matter and the complexity of the nature of the investigations involved. The magnitude of the deceased persons so far and the rescued victims is not to be ignored. It is in the public domain that several people are reported missing. This is a matter that has caused national and international concern. It is in the public interest and the interest of all affected parties including the respondents that the matter be properly and thoroughly investigated. The liberty secured by the Constitution of Kenya to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members.

97. There is no indication that the State is acting in bad faith. I find that there are exceptional circumstances that warrant the continued detention of the respondents. I have pondered over the issue of whether there are less restrictive means to achieve the purpose of limitation of the respondents' liberty. I agree with the State that releasing the respondents at this stage would undermine the criminal justice system. In my view, the State has demonstrated that the continued detention of the respondents without charge is the least restrictive action it can take in balancing the rights of the respondents; the public interest, order and security; the needs to preserve the integrity of the administration of justice; and the interests of the victims. The grave public interest of the matter outweighs the right of the respondents to liberty. Being aware of the respondents' right to be presumed innocent until the contrary is proved, I find that there is reasonable suspicion that the respondents may have committed the offences under investigation.

98. Having considered the grounds cumulatively, I find that the State has discharged its burden. In the application, the State has prayed for detention of the respondents for a period of 90 days. Sections 36A (7) and 33(7) of the Criminal Procedure Code and Prevention of Terrorism Act respectively provide that where the court orders for continued detention of a suspect, such period must not exceed 30 days although there is room for extension at a later stage. The State rightly appreciated these provisions in their submissions. It is my finding that the limitation of the respondents' liberty at this stage is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, considering the importance of the purpose of the limitation. I find that the integrity of the criminal process may not be guaranteed and the evidence may not be preserved by attaching stringent bond terms.

DISPOSITION

99. Consequently, I find that the application is meritorious. The orders which commend themselves to me and which I hereby make are as follows:

    a. The application by the State is allowed pursuant to Article 49(1)(h) of the Constitution, section 36A(4)(c) of the Criminal Procedure Code and section 33(4)(c) of the *Prevention of Terrorism Act*;

    b. The police are hereby allowed to hold the respondents in detention for a period NOT EXCEEDING THIRTY (30) DAYS from 3/5/2023;

    c. The respondents shall be detained at the various police stations as proposed by the State for the period aforesaid;

d. The respondents while in custody shall at all times be treated in a humane manner and with respect for their inherent human dignity;

e. During the time of detention, the respondents shall be granted reasonable access to their Advocates and family or any other person whose assistance will be necessary. The access will include the right to communicate privately with the Advocates;

f. The respondents shall have the right to communicate whether by telephone or other means with any person of their choice and the persons in charge of facilities at which respondents are held shall facilitate the communication;

g. The respondents shall be accorded medical examination, treatment and healthcare whenever such need arises;

h. In the event that the State shall seek an extension of the period granted herein, the State shall be required to submit a report indicating the general status of the investigations done so far and what is left to be done.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT SHANZU THIS 10TH DAY OF MAY, 2023.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

HON. YUSUF ABDALLAH SHIKANDA