



Republic v Lali (Criminal Case E437 of 2023) [2023] KEMC 293 (KLR) (23 June 2023) (Ruling)

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**REPUBLIC OF KENYA
IN THE SHANZU LAW COURTS
CRIMINAL CASE E437 OF 2023
YA SHIKANDA, SPM
JUNE 23, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ABDILLAHI SHOSI LALI ACCUSED

RULING

1. Abdillahi Shosi Lali (hereinafter referred to as the accused person) was initially brought to court on 2/5/2023 via a miscellaneous application in which the State sought custodial orders against the accused person pending completion of investigations into terrorism related offences. Upon hearing the application, the court granted the application whereupon the accused person was remanded in police custody for 21 days. At the lapse of the said period, the accused person was charged with the offences before court. Following an amendment of the charge, the accused person now faces three counts under the *Prevention of Terrorism Act, 2012*.

The Application

2. When the accused person was presented before court on 22/5/2023 the Prosecution sought leave to amend the charge and further indicated that they intended to oppose the release of the accused person on bond. An affidavit to oppose bond was filed simultaneously with the charge. The prosecution was granted leave to amend the charge and on 23/5/2023 the accused person took plea. Following the taking of plea, the prosecution opposed the release of the accused person on bond. The parties made submissions which I will highlight shortly.

Main Issue For Determination

3. The main issue for determination is whether the state has established a case to warrant denial of bond and allow for the remand of the accused person in custody pending the trial and determination of the case.



Submissions By The State

4. The State was represented by Ms. Ogega, learned Senior Prosecution counsel. Counsel relied on the affidavit filed by the State as well as the *Criminal Procedure Code* and *Prevention of Terrorism Act* (POTA). The prosecution submitted that the accused person was facing serious offences and that if released on bond, he was likely to abscond. That the evidence showed that the accused person played an integral part in the commission of the offences. The prosecution argued that the accused person was a threat to national security as the recovered items were related to commission of a terrorist act. It was further submitted that the accused person was a flight risk as he had to families, one in Kenya and the other one in Tanzania. That if the accused person flees to Tanzania, it would be difficult to trace him.
5. The prosecution submitted that the accused person did not have any identification document on him and no fixed place of abode. That he was found staying with a relative in Malindi and his wife and child were in Tanzania. The prosecution further submitted that intelligence reports had indicated that the accused person had very strong ties in Somalia and if released, he was likely to flee to Somalia. It was further submitted that if released, the accused person and his associates were likely to cause harm to the witnesses. That some of the witnesses were known to the accused person at a personal level and there was a possibility that the accused person would interfere with them if released. It was argued that if released, the accused person may continue radicalizing the prosecution witnesses and interfere with the remaining part of the investigations. The prosecution relied on the following authorities:
 - a. Republic v David Ochieng Ajwang Alias Daudi & 11 Others [2013] eKLR;
 - b. Nasanga Ibrahim & another v Director of Public Prosecutions [2020] eKLR;
 - c. Benson Mwangi Maina v Republic [2019] eKLR.

Submissions On Behalf Of The Accused Person

6. Mr. Chacha Mwita, learned counsel for the accused person cross-examined the investigating officer on the contents of his affidavit before making submissions. I will deal with the cross-examination at a later stage. Having cross-examined the investigating officer, counsel submitted that the right to bond was not absolute but argued that the state was bound to demonstrate compelling reasons. The defence contended that the prosecution had failed to demonstrate any compelling reasons. That having pleaded not guilty, the accused person was to be presumed innocent until the contrary is proved. It was submitted that it was not justifiable to deny the accused person bond until determination of the case and that the application was being used to punish the accused person before conviction.
7. The defence submitted that seriousness of the offence cannot be a stand-alone reason to deny the accused person bond. That a charge under POTA alone is not sufficient to deny the accused person bond. The defence argued that there was no demonstration that the accused person would interfere with witnesses. That the charge sheet indicates two witnesses who are police officers and that the accused person cannot interfere with people he does not know. It was submitted by the defence that the prosecution had not undertaken to expedite the trial, an indication that they were out to punish the accused person. Counsel urged the court to admit the accused person on extremely lenient bond terms as life is tough at the moment.
8. The defence further submitted that the investigating officer had confirmed that the accused person had family in both Kenya and Tanzania and that Kenya has an extradition treaty with Tanzania. Nevertheless, counsel for the defence argued that it had not been demonstrated that the accused person had nexus in Tanzania. The defence further argued that it was irrelevant to submit that there was



sufficient evidence to sustain the charge. That the remaining areas of investigations had not been disclosed. It was also argued that the accused person was not facing any charge of radicalization. That the affidavit in support of the application did not state that the witnesses were known to the accused person and vice versa. The defence contended that harsh bail terms were tantamount to denial of bond. The defence relied on the authority of Office of the Director of Public Prosecution v Sakina Mariam Abdalla [2019] eKLR.

Reply By The State

9. Ms Ogega, learned Senior Prosecution counsel submitted that by charging the accused person, they had undertaken to expedite the matter. That they could not wait for a terrorist attack in order to prosecute terrorism cases. The prosecution argued that the authority relied upon by the accused person was not applicable to this case.

Analysis And Determination

10. 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.”

11. 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.”

12. 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."

13. 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.”

14. 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.
15. 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.”

16. 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 accused person. These are to be found in Statute, Case law and Policy guidelines. 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."

17. 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)

18. The foregoing provision reveals that the purpose of bond is to secure the attendance of the accused person at the trial. 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 indicative 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."

19. 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.
20. 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.
21. 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. 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.”
22. 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.”
23. Granting bond or bail entails the striking of a delicate balance of proportionality in considering the rights of the accused 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 person based on the facts and evidence in their possession. On the other hand, there is the accused 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.
24. Having highlighted the law as above, I now move to consider the grounds relied upon by the prosecution in seeking orders for denial of bond for the accused person. The grounds are contained in the affidavit sworn by the investigating officer Police Constable Onduso Osoro. I will summarise the grounds as follows:



1. The preliminary investigation indicated that the accused person was a Kenyan citizen and at the time of his arrest, he did not have any identification documents;
2. The accused person has other associates who are yet to be apprehended and if released, the accused person will interfere with the apprehension of the associates who are still at large;
3. There is reliable information that the accused person is a threat to national security;
4. The accused person is a trained ISIS member and if released, he will influence other associates who may retaliate and cause harm to the witnesses;
5. That the accused person, if released, may continue with further radicalization or potentially interfere with investigations;
6. If granted bond, the accused person may abscond and flee to Somalia as it has been established that he has links within Somalia;
7. That the accused person has two families in Kenya and Tanzania and if released on bond, he may abscond and seek refuge in Tanzania and it will be difficult to trace him;
8. The accused person's objectives remain unclear and unrealizing and releasing on bond will make him achieve them.

Cross-examination of the investigating officer

25. Counsel for the defence applied for leave to cross-examine the investigating officer on the contents of his affidavit. There was no objection from the prosecution. The cross-examination revealed the following aspects which are relevant to the instant application:
 1. The investigating officer did not indicate in his affidavit that he had challenges in arresting the accused person;
 2. The investigating officer did not indicate in his affidavit that during the 21 days pre-charge detention, the accused person exhibited certain behaviour which would warrant his denial of bond;
 3. Counts 2 and 3 were not mentioned in the affidavit and there was no reason for such failure;
 4. No evidence had been attached to the affidavit to show that the accused person was a trained ISIS member;
 5. The accused person is not charged with radicalization;
 6. The investigating officer had verified that the accused person was registered as a Kenyan citizen and he had the accused person's national identification number;
 7. The court had not been given any information, even in camera, that the accused person was a threat to national security;
 8. It had not been demonstrated how the accused person could facilitate his alleged associates to flee;
 9. The accused person's alleged associates had not been mentioned and no application for their warrant of arrest had been made;



10. The affidavit in support of the application does not indicate the alleged links of the accused person in Somalia;
11. The affidavit does not indicate that the accused person has a wife and child in Tanzania;
12. The accused person was arrested just as he had arrived from Tanzania.

Bail information report

26. After the parties had made their arguments, the court called for a Bail information report on the accused person. The report reveals the following important information:
 - i. The accused person was raised by his maternal relatives;
 - ii. The accused person has no permanent residence of his own;
 - iii. The accused person has a girlfriend and child in Tanzania and has been travelling there;
 - iv. The accused person has resided in different areas during his development stages. That he moves between Mombasa, Lamu and Dar es salaam;
 - v. The accused person's sister and father are willing to accommodate him if released;
 - vi. The accused person is a fisherman and spends long periods away from home owing to the fishing;
 - vii. The accused person is related to one of the witnesses herein. The witness did not raise any concerns over her safety.
27. 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 accused person. 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:
28. 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."
29. It is worth noting that the accused person did not file a Replying affidavit 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 accused of those facts. Has the application met the threshold?
30. I now proceed to consider the specific grounds that have been relied upon by the prosecution. The issue of lack of identification documents was dispelled by both the investigating officer and the Bail information report. It was established that the accused person was a registered Kenyan citizen with a national identity card. That dismisses the ground based on his identity.



Flight risk/Gravity of the charges.

31. The ground of seriousness of the offences with which the accused person is charged was not deposed to in the affidavit. It was raised by the prosecution during submissions. Nevertheless, it is a matter that the court can take judicial notice of. The accused person is charged with three offences under the [Prevention of Terrorism Act](#) (POTA). The first charge attracts a maximum penalty of thirty (30) years imprisonment upon conviction whereas the second and third charges attract maximum penalties of twenty and thirty years imprisonment respectively. No doubt, the offences are of a serious nature.
32. The courts have generally held that where the offence against an accused person is grave, there is always an incentive to abscond on the part of the accused person. For instance, in the case of *Priscilla Jemutai Kolongei v Republic-Criminal Application No. 319 of 2002* (unreported) at page 3, Mboghli Msagha, J (as he then was) held as follows:
33. 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.”
34. In the case of *Republic v Robert Zippor Nzilu* [2018] eKLR, Odunga J (as he then was) held that:
35. 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.”
36. There was no indication that the accused person was in hiding or attempted to evade the police dragnet during investigations. The investigating officer and the Prosecution did not allege that there were difficulties in tracing and arresting the accused person. Perhaps the accused person was not aware that the police were looking for him. With the new Constitutional dispensation, all offences areailable and as such, the prosecution cannot rely on the mere fact that the accused person faces serious offences, in seeking to have the accused person denied bond or bail. This would militate against the Constitutional provisions. The accused person cannot be judged merely on the basis of the nature of the charges against him. It is a factor to be considered, not in isolation, but cumulatively with other factors.
37. I am aware that the mere fact that the accused person is charged under the POTA is not an exception to the grant of bond. However, like I have always observed, offences related to terrorism are unique in nature and cannot be treated as any other criminal offence. The court must exercise great caution when dealing with the issue of bond or bail in terrorism related charges. I say so because of the transnational nature of terrorist networks and the fact that terrorists do not have a specific identity. Complex and interconnected terrorist networks have features that make their behaviour unstable and unpredictable.
38. The court takes judicial notice of the fact that there have been several terrorist acts within the country and it would appear that most of them go undetected prior to their execution. This is a matter of public



and international interest and the accused person's right to liberty must be weighed against the public interest. In the case of *Waiss Abdulaziz Mohammed v Republic* [2017] eKLR, Ngenye-Macharia J (as she then was) held as follows:

39. I am alive to the fact that terrorism has become a security danger to this country. The court cannot shut itself from this danger or work in isolation from other security agencies. It must be seen to support the security mechanisms put in place to secure our country. That is why if suspects are brought to court and concrete evidence is advanced to support a request for their continued detention, courts will not hesitate to act accordingly. However, I must emphasize that courts must resist to be used as conduits to trample on suspects' constitutional right to their fundamental freedoms. That is why the Bill of Rights as enshrined in our Constitution safeguards the right to liberty of its citizens. Courts must jealously guard them."
40. The foregoing confirms that matters related to terrorism are of public interest but the courts must also safeguard the accused person's right to liberty, hence the need to strike a balance between the two competing interests.
41. It was submitted by the prosecution that the accused person did not have a fixed place of abode. Indeed, the bail information report revealed that the accused person was raised by his maternal relatives and has since been oscillating between Mombasa, Malindi, Lamu and Tanzania. It was further revealed that the accused person's father is a Prison officer based at Lamu. The fact that the accused person was raised by his maternal relatives indicates that he does not have strong ties with his father. One of the relatives whom the accused person resided with is said to be a potential witness herein. Counsel for the accused person submitted that the accused person was spoilt for choice on where he could reside. That is one way of looking at it.
42. However, without appearing to judge the accused person based on his social status, his position in terms of residence is precarious. I say so because there is no place where the accused person can cogently call home. The bail information report indicates that the accused person dropped out of school mainly because of parental neglect. This was after the death of his mother. That fact further confirms that the accused person does not have strong ties with his father. The accused person is an adult who cannot be confined to a particular residence. He has a child who resides with the mother in Tanzania. The bail information report reveals that the accused person's relatives in Kenya do not know his other "home" in Tanzania. They have never met the mother to the accused person's child. In the event that the accused person is released and decides to travel to Tanzania, his relatives would not be in a position to trace him.
43. Counsel for the accused person argued that Kenya has an extradition treaty with Tanzania. That may be so. However, my view is that if there is a risk that an accused person is likely to flee to a foreign country, existence of an extradition treaty between the two countries provides no solace nor does it minimise the risk, more so where nobody apart from the accused person knows his residence in the foreign country. The accused person is said to be a deep-sea Fisherman who spends most of his time in the deep sea. Whereas the choice of his employment should not be used as a sword against him, it offers no shield in terms of having a fixed place of abode. A man who spends most of his life in the deep waters and who has no place he can call home is more likely to abscond when charged with serious offences such as the ones herein. When such a man absconds, it would be difficult to trace him.
44. It was alleged that the accused person had links to Somalia but no tangible evidence to that effect was exhibited nor further information revealed. I guess this forms part of the famous intelligence reports which are hitherto a secret.



Interference with witnesses and investigations.

45. The investigating officer deponed that the accused person, if released, would influence his associates who may retaliate and cause harm to the witnesses. 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:
46. 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 v 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”
47. 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.”
48. Although not expressly stated in the affidavit in support of the application for denial of bond, the prosecution submitted that the accused person was closely related to some of the witnesses herein. That if the accused person is released, the witnesses will be intimidated and may be afraid of attending court. The Bail information report reveals that one of the intended witnesses is a close relative with the accused person and has resided with the accused person before. The information on record reveals that this particular witness is part of the relatives that took care of the accused person when he was growing up.



49. I agree that the relationship is so close that it may put the accused person in a position of influence over the intended witness. The possibility of the accused person attempting to influence the witness in one way or another cannot be ruled out. Given the relationship between the accused person and the said witness, I agree that there could be cause for genuine fear and anxiety.
50. It is not automatic that where the accused person is related to the Prosecution witnesses, interference is bound to occur. In my view, the Prosecution must demonstrate that the accused person 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:
51. 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."
52. As already stated, the information on record is that the intended witness is one of the relatives who helped raise the accused person. Even in adulthood, the accused person has occasionally resided at the home of the intended witness. The Bail information report reveals that the accused person has very strong ties with his relatives and if released, nothing would stop him from residing at the home of the intended witness. From the cross-examination of the investigating officer by counsel for the accused person, it would appear that the intended witness could have played a role in the transactions forming part of the charges herein. Given the circumstances, my view is that even if the court releases the accused person on bond and places conditions to ensure that there is no contact between the accused person and the intended witness, it would be difficult for the conditions to be realised.
53. It may not be easy to put the accused person under surveillance to ensure that he does not contact the intended witness either by himself or through proxy. There is an allegation that the state has sought assistance from the Witness Protection Agency. The court has not been informed whether the intended witness has already been admitted to witness protection. That being the case and being mindful of the nature of the charges against the accused person as well as the close proximity between the accused person and the witness, I find that it would be unsafe to release the accused person before the intended witness is placed under protection.
54. It was deposed by the investigating officer that it is believed that the accused person has other associates who are yet to be apprehended and if released, the accused person is likely to interfere with their arrest. It was further deposed that the accused person was likely to interfere with investigations if released. When the investigating officer was cross-examined by counsel for the accused person, he stated that he was yet to receive Mpesa statements from Safaricom. The investigating officer further stated in cross-examination that he was still investigating other allegations concerning the accused person. Apart from the mere allegation in the affidavit by the investigating officer that other suspects were at large, there was no demonstration of how the release of the accused person would hamper further investigations or prevent the police from tracing the other suspects.
55. Even when the investigating officer was cross-examined by counsel for the defence and examined by the prosecution counsel, he was not able to demonstrate how the accused person would interfere with the alleged ongoing investigations. There was no indication that any efforts were being made to trace the alleged suspects and that such efforts would be stifled by the release of the accused person on bond. In my view, an accused person cannot be denied bond simply because there is another unknown person who ought to be arrested and charged. What if the suspect said to be at large is not traced? In as much as suspects may be jointly charged, each one of them takes personal responsibility in the event of a conviction. These proceedings relate to the accused person before court and not imaginary suspects



that are yet to be arrested and charged. I find that this particular ground lacks in seriousness and proceed to dismiss it.

56. Even if more investigations were to be carried out, that fact is not sufficient to deny the accused person bond. In the case of *Republic v Richard David Alden* [2016] eKLR, Lesiit J (as she then was) made the following observations:

“Ms. Mwaniki urged the court not to release the accused on bond as he was likely to face other charges. The issue of other charges as a ground to deny bail was considered in *Ahmad Abolafathi Mohammad*, supra and the court observed as follows:

I will not speculate on the likelihood of further charges being brought against the respondents or on the probability of guilt of the respondents, since the law presumes them innocent until proved guilty. The applicant is not barred from preferring other charges against the respondent.’

57. I associate myself with this observation. The possibility of multiplicity of charges being brought against an accused person cannot be a ground to deny bail. However once preferred then the prosecution may apply to court to cancel bail for this reason. Cancellation would not be automatic as the court has to consider several issues. If for instance it is shown that the offences are more serious, or they change the nature of the offence the accused now faces or that there is new evidence to prove that the factors the court found not to exist in the earlier consideration for bail/bond are now a reality. This is of course not an exhaustive list.”
58. Whereas it is possible that the accused person may face further charges, that alone cannot be a ground to deny him bond at this stage. Even if more investigations were to be carried out, that fact alone is not sufficient to deny the accused person bond, although it may well be considered. Once the police complete their investigations in the other cases or possible cases, they may cause fresh charges to be preferred against the accused person or amend the charge herein as the case may be.

Possibility of commission of further offences

59. The investigating officer merely stated in his affidavit that the accused person was a trained ISIS member and that if released, he may continue with further radicalization. It is not clear what information the investigating officer relied upon in forming that opinion. The court notes that the accused person is not facing a charge of Radicalization. At this stage, no evidence has been adduced to show that the accused person is an ISIS member. There is no evidence to show that the accused person has a previous criminal record. There is no material on record upon which the court may infer the possibility of commission of further offences by the accused person.
60. The prosecution cannot expect the court to speculate on what the accused person is likely to do if released on bond. They should tender sufficient and credible material to enable the court form such an opinion. It is to be borne in mind that the accused person has a right to be presumed innocent until the contrary is proved. This court cannot act in a manner that would make the accused person feel that he has already been convicted before the hearing commences. The right to a fair trial cannot be limited under any circumstances. Article 25 of *the Constitution* of Kenya is clear on this point.

Threat to National security

61. It was deposed in the affidavit that there was reliable information that the accused person was a threat to national security. That he is an ISIS member whose objectives remain unclear and that releasing him would enable him achieve his objectives. I have already said that so far, there is no evidence to show



that the accused person is an ISIS member. The information touching on national security was not revealed to the court. I agree that acts of terrorism are a big threat to national security.

62. However, being mindful of the accused person's right to be presumed innocent until adjudged guilty and owing to the fact that no details of the threat to national security were revealed, I find it difficult to hold at this stage that the accused person is a threat to National security. As already indicated, the court is not expected to speculate.
63. 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 considered the application in totality. I have further considered the gravity of the matter and the complexity of the nature of the charges. 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.
64. I have pondered over the issue of whether there are less restrictive means to achieve the purpose of limitation of the accused person's liberty. I agree with the State that releasing the accused person at this stage would undermine the criminal justice system. In my view, the State has demonstrated that the continued detention of the accused person is the least restrictive action that can be taken in balancing the rights of the accused person and the public interest, order and security as well as the need to preserve the integrity of the administration of justice.
65. Having considered the grounds cumulatively, I find that the State has discharged its burden. It is my finding that the limitation of the accused person's 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 by attaching stringent bond terms.

Disposition

66. 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*;
 - b. The accused person shall be remanded in custody pending the hearing and determination of the case. However, if there is a change of circumstances in favour of the accused person, he will be at liberty to apply;
 - c. It is further ordered that this matter be heard on a priority basis since the accused person has been denied bond.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT SHANZU THIS 23RD DAY OF JUNE, 2023.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

