Republic through DCI v Mackenzie & 29 others (Miscellaneous Criminal Application E077 & 101 of 2023 (Consolidated)) [2023] KEMC 291 (KLR) (3 July 2023) (Ruling)

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REPUBLIC OF KENYA

IN THE SHANZU LAW COURTS

MISCELLANEOUS CRIMINAL APPLICATION E077 & 101 OF 2023 (CONSOLIDATED)

YA SHIKANDA, SPM

JULY 3, 2023

(INCORPORATING MISCELLANEOUS CRIMINAL APPLICATION NO. E101 OF 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

AS CONSOLIDATED WITH

MISCELLANEOUS CRIMINAL APPLICATION 101 OF 2023

BETWEEN

REPUBLIC THROUGH DCI ..... APPLICANT

AND

CHARLES CHARO ALIAS MUSA SULEIMAN ..... 1ST RESPONDENT

ERNEST KAZUNGU ..... 2ND RESPONDENT

NEWTON KIMATHI ..... 3RD RESPONDENT

PETER OMONDI ..... 4TH RESPONDENT

GERISHON MUSYOKA ..... 5TH RESPONDENT

ERICK OMOLO ..... 6TH RESPONDENT

JOSEPH JUMA BUYUKA ..... 7TH RESPONDENT

JULIUS KATANA KAZUNGU ..... 8TH RESPONDENT

LUCAS KARISA DHURI ..... 9TH RESPONDENT

EVANS KOLOMBE SIRYA ..... 10TH RESPONDENT

TITUS MUNYAO MUSYOKA ALIAS JUSTUS MAKAU MUSYOKA ..... 11TH RESPONDENT

MICHAEL BAYA MWERI ..... 12TH RESPONDENT

RULING

1. Once again, this court has been called upon to curtail the liberty of the respondents herein pending charge or investigations into the infamous Shakahola Massacre. I have learned that the previous proceedings herein and the ruling made on 10/5/2023 earned me a new name. I have facetiously been referred to as the Shakahola Magistrate even by my colleagues on the bench and in the legal fraternity. Where I grew up, my people call me Shaq. My dear Mother tells me that they now call me Shaq wa Shakahola (Shaq of Shakahola). I do not take offence at the humorous way of referring to me because it reminds me of the level of the public interest in the matter. Furthermore, when Playwright William Shakespeare asked the question, "What's in a name?" in Romeo and Juliet, he was referring to the idea that names themselves are a convention to distinguish things or people, but do not have any worth or meaning.

2. On 2/5/2023 the State filed Miscellaneous Criminal application No. E077 of 2023 in which it sought custodial orders against the 18 respondents for a period of 90 days. The court allowed the application and granted the orders for 30 days in the first instance as provided by law. On 26/2023 upon expiry of

the period granted, the State filed an affidavit with the purpose of moving the court to extend the period of detention of the respondents. On the same day, the State filed Miscellaneous Criminal Application No. E101 of 2023 against 12 other suspects. There was also Criminal Miscellaneous Application No. E102 of 2023 involving one suspect. In Miscellaneous Criminal Application No. 101 of 2023, the State sought continued detention of the 12 respondents in police custody for a period of 60 days pending investigations into the Shakahola Massacre. On 14/6/2023 before the application for extension of custodial orders and that of fresh custodial orders were heard, the State filed other applications dated 12/6/2023 under a certificate of urgency, seeking, inter alia//, the transfer of the respondents in the two matters from police custody to prison custody.

Directions On The Applications

3. The respondents were granted leave to file responses to the applications. When the matter came up on 21/6/2023, the parties agreed and the court directed that the four applications in Miscellaneous Criminal application No. E077 of 2023 and Miscellaneous Criminal application No. E 101 of 2023 be consolidated for purposes of hearing and determination of the same. Miscellaneous Criminal application No. E077 of 2023 was selected as the lead file and proceedings as well as submissions by the parties were made in the lead file.

4. This ruling thus comprises of the court's determination on the four applications aforementioned. For purposes of good order, I will begin with the application for extension of the period of detention in No. E077 of 2023. I will then determine the application dated 2/6/2023 in No. E101 of 2023 followed by the two applications dated 12/6/2023 in both matters. The ruling herein shall apply to both Misc. applications No. E077 of 2023 and E101 of 2023.

The Application For Extension Of Custodial Orders In Misc. Application No. E077 of 2023.

5. The application is premised on an affidavit sworn on 1/6/2023 by Inspector Raphael Wanjohi as well as supporting grounds dated 2/6/2023. The gist of the application is that the State urges the court to order for extended judicial remand of the respondents for a further 60 days. On 21/6/2023 the State filed a further affidavit in support of their application. The application is opposed by the respondents. The respondents sought and were granted time to file Replying affidavits in opposition to the application. However, only the 1st respondent filed a Replying affidavit sworn on 13/6/2023. No response(s) was filed on behalf of the 2nd to 18th respondents.

The Application Dated 2/6/2023 In Misc. Application No. 101 of 2023.

6. The application was filed against 12 respondents. The same was filed by the State 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 detention continuing;

    2. That the respondents be detained at Malindi police station, Marereni police station, Watamu police station and Mtwapa police station for a cumulative period of Sixty (60) 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.

7. 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. Although the application was opposed by the respondents, no response in the form of Replying affidavits or at all was filed.

The Twin Applications Dated 12/6/2023 In Both Misc. Applications No. E077 Of 2023 and e101 of 2023.

8. The application in Misc. application No. E101 of 2023 was filed on 13/6/2023 whereas the one in Misc. application No. E077 of 2023 was filed on 14/6/2023. The two applications generally seek for the following orders:

    1. That the respondents in both matters be transferred from police custody to Shimo La Tewa Prison (for E077 of 2023) and Malindi GK Prison (for E101 of 2023);

    2. That each of the respondents be subjected to a psychiatric assessment and the reports be filed in court;

    3. That each of the respondents be held in isolation from one another and more particularly the 1st respondent in E077 of 2023, Paul Nthenge Mackenzie be held in isolation from the rest of the respondents;

    4. That the Honourable court be pleased to direct the medical officers stationed at the Prison facilities to subject each of the respondents to forcible feeding, treatment and or any other or further action as the medical officer may consider necessary to safeguard and or restore the health of each of the respondents;

    5. That the Honourable court be pleased to make any other order that it may deem necessary.

9. The applications were both supported by affidavits sworn by No. 233726 Chief Inspector of Police Joshua Nyambu Shoka and are premised on the following general grounds:

    i. That the respondents have colluded with one another and as a result, they have refused to eat or drink anything since 4/6/2023;

    ii. That there is a real risk that, as a result of their self-imposed hunger-strike, the respondents are likely to suffer health complications and or even death.

10. The respondents sought for time to file their responses. The court granted them the time sought but no response was filed by any of the respondents.

The Main Issues for Determination

11. As already pointed out, there are four applications for determination herein. In my view, the main issues for determination are as follows:

    a. Whether the State has established a case for extension of the detention period for the respondents in Misc. application No. E077 of 2023;

    b. Whether the State has established a case to warrant denial of bond and allow for detention of the respondents in Misc. application No. E101 of 2023 in custody for 60 days or any period pending charge;

    c. Whether the State has established a case to warrant the transfer of all the respondents in both from police custody to prison custody pending investigations;

d. Whether the State has established a case to warrant the respondents to be subjected to psychiatric assessment or examination;

e. Whether the State has established a case to warrant an order for forcible feeding or treatment of the respondents;

f. Whether the State has established a case to warrant an order for the respondents, and in particular the 1st respondent in Misc. application No. E077 of 2023-Paul Nthenge Mackenzie to be held in isolation from the rest of the respondents.

Status of Some of the Respondents

12. On 21/6/2023 when the matter came up before court, Mr. Jami, learned Ag. Assistant Director of Public Prosecutions informed the court that the 13th respondent in Misc. application No. E077 of 2023, Fredrick Karimi had been hospitalized owing to complications believed to be as a result of a hunger strike. Counsel further informed the court that the 7th respondent in Misc. application No. E101 of 2023, Joseph Juma Buyuka had since passed on whereas the 10th respondent, Evans Kolombe Sirya had been hospitalized. The matter proceeded in the absence of the aforementioned respondents.

Submissions on Behalf of the State

13. The applications were argued on 21/6/2023. The State was represented by Mr. Jami and Ms. Ogega. Mr. Jami submitted that the ongoing investigations were intertwined as some offences under investigations were subject to the *Prevention of Terrorism Act* (POTA) whereas others were subject to the *Criminal Procedure Code* (CPC). Counsel contended that the period of 90 day sought was reasonable given the nature of the investigations. He relied on the affidavits and submitted that the State had given compelling reasons to extend the period of detention. It was submitted on behalf of the State that a team of investigators and Prosecution counsel had been formed, which fact was a pointer to the complexity of the ongoing investigations.

14. The State pointed out that the investigations were yet to be concluded and the issue of starvation or hunger strike by the persons involved impeded investigations herein. The State submitted that investigations had revealed that Shakahola was referred to as Jangwani and that the 1st respondent was said to be the leader. Further, the place was divided into cities which were allegedly administered by the rest of the respondents. It was argued that it was important to conduct Identification parades and that the exercise would require time. Mr. Jami further submitted that names similar to those given by the respondents were mentioned but that could not be conclusive identification of the respondents. Counsel observed that there were 29 respondents and each one of them would require eight (8) others to be on the parade. That over 200 members of the public were expected to participate in the identification parades.

15. It was submitted by the State that when the respondents allegedly went on hunger strike, their body formations changed and the police lost more than 20 days trying to restore them. That more time was needed to restore them so as to be able to conduct the identification parades. The State observed that since the respondents were detained at the Prison, they were attended to and their health conditions had improved. Counsel stated that it was important for the respondents to be detained separately. The State submitted that it was necessary for the respondents to be held in remand for their own protection. That releasing them could subject them to harm and further agony to their families. The State relied on my earlier ruling made on 10/5/2023 in Misc. application No. E077 of 2023.

16. Mr. Jami submitted that at the time the initial application for continued detention was being made, only 100 bodies had been retrieved but at the time the instant application was being argued, 337 bodies had been retrieved. That there were more mass graves to be dug out and the situation was worsening and circumstances changing. The State believes that 73 children from different parts of the country were buried at the scene and urges the court to make a rebuttable presumption that the children were taken there by adults. That the adults involved could either be the respondents or those rescued. It was argued that there were a lot of people still missing and as such, there was need for protective custody of the respondents since the missing were believed to have gone to Shakahola.

17. The State submitted that post-mortems on the retrieved bodies had been done but the identities or particulars of the deceased were unknown. There was need to conduct a DNA analysis so as to obtain the identity of the deceased for purposes of preferring charges. The State argued that if the respondents are released, there is a likelihood of witness interference since some samples had been given by the respondents' relatives. Reliance was placed on section 35 of the POTA and the State urged the court to limit the respondents' rights and freedoms. That one of the possible offences was radicalization and the victims herein appear to be still hinged on their extreme beliefs. Mr. Jami pointed out that they had filed Criminal case No. E523 of 2023 against some of the victims.

18. The State asked the court to order for the remand of the respondents at Shimo La Tewa, Kilifi and Malindi GK Prisons for their protection and to prevent further offences. The court has been urged to order the Prison authorities to ensure that the respondents eat. Relying on paragraph 11 of the supporting affidavit sworn on 1/6/2023, the State submitted that it would take approximately 80 days to profile the retrieved bodies for purposes of DNA analysis. Ms. Ogega, learned Senior Prosecution counsel submitted that holding the respondents in custody was the less restrictive way. That this matter falls within the doctrine of the rarest of the rare cases as such happenings have never been seen in our country. Counsel submitted that the victims herein have not been co-operating and need counselling. That the period requested for is lawful and proportionate to the nature of offences under investigation. Ms. Ogega submitted that it was difficult to charge the respondents at the moment. The State relied on the authority of Zeeshan Qamar v State of New Delhi delivered by the High Court at New Delhi on 24/2/2023.

Submissions on Behalf of the Victims

19. Mr. Aboubakar associated himself with the submissions made by the State and stated that the investigations were highly complicated and there was need to safeguard them from any interference. Counsel further submitted that forensic evidence was necessary to establish the identities of the deceased. Mr. Aboubakar submitted that there was already interference with the other victims who were at the rescue centre as they had been influenced to go on hunger strike. Counsel observed that there was still communication with the victims yet the respondents were in custody and wondered what would happen if the respondents were released. Counsel argued that such interference justifies the continued detention of the respondents.

20. That there was a case before court No. 1 at Shanzu wherein the victims were charged. Mr. Aboubakar submitted that the circumstances of Shakahola exhibited novelty thereby calling for thorough and proper investigations. That thorough and proper investigations can only be conducted if the applications by the State are allowed. Counsel observed that it will not be a surprise if, at the expiry of 90 days, the State returned to ask for more days. Counsel pointed out that in other jurisdictions such as the USA, suspects would he held for years at Guantanamo bay pending investigations. That it is also for the benefit of the respondents if thorough investigations are done. Counsel urged the court to allow the applications. Ms. Musa appearing on behalf of the Kenya National Commission on Human Rights

supported the applications by the State and observed that the matter required serious investigations. That the application ought to be allowed for the security of the respondents.

Submissions on Behalf of the Respondents

21. Mr. Makasembo, learned counsel was a one-man army for the respondents. This followed the withdrawal of Messrs Kariuki and Komora before the applications were argued. Counsel opposed the applications and relied on the Replying affidavit sworn by the 1st respondent in Misc. application No. E077 of 2023 ON 13/6/2023. Mr. Makasembo submitted that the application was incompetent and did not contain any compelling reasons to warrant further detention of the respondents. That no reasons had been given to explain why the assorted police units investigating the matter could not work simultaneously to speed up the investigations. Counsel wondered whether it was lack of capacity or incompetence.

22. The respondents argued that the application was purportedly brought under the POTA and other Statutes but the other Statutes have not been brought to the court's attention. Counsel contended that the application had been brought in bad faith as the Cabinet Secretary in charge of internal security had made statements indicating that the respondents would be re-arrested even if released by the court. That the respondents would never see their liberty. It was argued that the respondents were presumed innocent under Article 50 of the *Constitution*. That the Cabinet Secretary in charge of internal security was using the application to fix the respondents. Mr. Makasembo submitted that the excuse of starvation and hunger strike was meant to have the respondents in continued detention. That if there was any hunger strike, it was a reaction to the physical and mental torture by the investigating team.

23. Mr. Makasembo further submitted that the issue of protection of the respondents was fictitious as no evidence had been placed before court to show that there was any danger to the respondents if released. That the police have a duty to protect the respondents and any citizen in Kenya. Counsel argued that no evidence such as of burial permits had been placed before court to show that children had been buried at Shakahola. That missing persons could not be blamed on the respondents as the Government had the machinery to look for missing persons. It was argued that the prosecution and the police were on a fishing expedition as they do not have an idea of the likely charges and whether they will charge the respondents. That the State admitted that the investigations were complicated and that it does not have the capacity to investigate.

24. The respondents contended that the confusion on the part of the prosecution should not be used to punish the respondents. Mr. Makasembo submitted that the prosecution had made very serious allegations without presenting any evidence. That there was no evidence of communication between the respondents and the outside world and that the apprehensions and fears by the State were not backed up with any evidence. There was no evidence to show that the respondents would tamper with any witnesses or investigations or the course of justice. It was argued that no medical evidence had been attached to the application to show how many post-mortems had been done and how many were pending nor any medical literature to show how post-mortems are done.

25. It was further argued that the application would prejudice the respondents and their rights under Article 49(1)(h) of the *Constitution*. Counsel for the respondents submitted that Freedom of worship is enshrined under Article 32 of the *Constitution*. That the court had been treated to irrelevant matters intended to poison the court's decision without cogent evidence. The respondents argued that this court was not privy to the proceedings before court No. 1 at Shanzu and urged the court to disregard the submissions made by the State and proceed to dismiss the applications.

Reply by the State

26. Mr. Jami submitted that the matter was before an independent and impartial court and that the sentiments of the Cabinet Secretary in charge of internal security ought not be taken out of context. That prosecutors are administrators of justice and are fair and the court would consider the applications and objections then arrive at a decision. Counsel submitted that the respondents have a right of appeal in the event the court orders for their continued detention. Counsel further submitted that the action of hunger strike was meant to intimidate the police. Mr. Jami submitted that the issue of burial permits related to one of the offences under investigation as was indicated in the initial application.

27. Counsel argued that the instant application could not be delinked from the initial application. The State submitted that the issue of Freedom of worship could only be canvassed once the respondents have been charged. Nevertheless, freedom cannot be entertained if it amounts to an offence. That in determining freedom of worship, the court should look at whether the act is an essential and integral part of the religion. Counsel wondered whether fasting to death was an integral part of Christianity. The State contended that the investigators have capacity and are competent. Mr. Jami urged the court to look at the affidavits in support of the applications. That the further affidavit mentioned the proceedings before court No. 1 and therefore constituted evidence that this court should look at. It was argued that investigations could not be completed when 65 potential witnesses are neither eating nor co-operating. That such circumstances should worry the court. The State submitted that the objections by the respondents did not dispel the compelling reasons.

Analysis and Determination

28. I have carefully considered the applications and given due regard to the submissions made by the parties. I have further properly, in my view, directed my mind to the law and have arrived at an independent and impartial decision. As already indicated, I am required to determine four applications in a single sitting. This explains why the Ruling was not delivered as earlier scheduled. I wish to sincerely apologise for the delay in delivering this Ruling. I hope and believe that the content of this Ruling will explain and justify the delay. The proceedings herein have been hot and heavy and riddled with some drama from both the State and the Respondents. Messrs Kariuki and Komora could not withstand the heat and opted out.

29. The drama was experienced even outside of these proceedings. At one time, the Cabinet Secretary for Interior and National Administration Prof. Abraham Kithure Kindiki made the following remarks in the Kiswahili language:

> " Na yule Mackenzie yule hatoki jela tena. Huyo hatoki jela, atazeekea pale jela. Na tunaomba Mungu amueke miaka mingi ndiyo aone Kenya ambayo itakua Kenya salama, ambayo haitakua na hii maneno yake ya upumbavu. Sijui kama tunaelewana. Lakini jela hatoki. Hataona mwangaza wa hii dunia tena. Atakaa pale jela mpaka azeekee hapo halafu apotee aende kwa shetani wake. Kama atatubu, hiyo ni mambo ya Mungu. Hata Mahakama ikimuachilia, tutamrudisha pale. Kwa sababu Mahakama zetu saa zingine tunaambia hawa watu, huyu ni mkora ameua watu, wanasema iko haki sijui.....sijui katiba gani inatumika, wanaachilia. Hata wakimuachilia, yule bwana atazeekea pale jela na atatoka jela aende akakutane na hukumu ya Mwenyezi Mungu. Sijui kama tunaelewana....."
>
> (And that Mackenzie will not get out of jail anymore. He is not getting out of jail, he will grow old in jail. and we ask God to give him many years to see a Kenya that will grow into

> a safe Kenya, that will not grow with his foolish words. I don't know if we understand each other. But he will not get out of jail. He will not see the light of this world again. He will stay there in jail until he grows old and disappear then he will go to his devil. If he repents, that is God's business. Even if the Court releases him, we will return him there. Because our Courts sometimes, we tell these people, this is a crook who has killed people, they say there are rights, I don't know.....I don't know which constitution is being used, they let them go. Even if they release him, the gentleman will grow old in prison and he will come out of prison to face the judgment of God. I don't know if we understand each other.....)

30. The above remarks were quite unfortunate considering that they were made by a high-ranking Government official and a Professor of law. I will leave it at that. This case attracted and continues to attract a lot of interest from various quarters both nationally and internationally. Article 1 of the *Constitution* of Kenya provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the *Constitution*. It further provides that sovereign power is delegated to, among others, the Judiciary which shall perform its functions in accordance with the *Constitution*. Article 159(1) of the *Constitution* expressly provides that Judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals. Under Article 160(1) of the *Constitution*, in the exercise of judicial authority, the Judiciary or courts shall be subject ONLY to the *Constitution* and the law and shall not be subject to the control or direction of any person or authority.

31. This court appreciates its role and mandate as stipulated by the *Constitution* of Kenya. In spite of all the sideshows, I am glad to confidently report that the decision herein has been reached upon properly directing my mind to the law and evidence on record and without fear or favour. I am aware that my decision will not be embraced by some quarters and will cause a lot of ripples and dissatisfaction; but again, that is expected in our criminal justice system which is largely adversarial. In the hearing and determination of the applications, I was guided by Article 159 (2) (a) of the *Constitution* of Kenya which provides that justice shall be done to all, irrespective of status and Article 160 (1) of the same Constitution which provides as follows:

> "In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority".

32. The above Articles envisage the cardinal principles of independence of the Judiciary which extends to the independence of the individual judicial officer in hearing and determination of disputes. A judicial officer is bound to decide each case fairly and in accordance with the relevant facts and the applicable law, even when the decision is not the one that the public or sections of it want. Only the Judicial officer handling a matter can say, as a matter of conscience and the ethical and sacred responsibilities of the judicial office that fairness has prevailed over fear about the public's reaction. It takes a courageous judicial officer to maintain the rule of law while also maintaining the public's respect for the administration of justice. In my view, A judicial officer is an administrator of justice and not a mere conduit through which justice is served.

33. It is my considered opinion that a judicial officer must show the example of law fairly, equally, independently and courageously applied. The determination of facts and the application of the law is the exclusive province of the court. No one and nothing should be allowed to influence that determination. The court must not only do justice but must create and perpetuate a perception of justice having been done. A judicial officer who personifies courage and independence plants the seeds for public confidence and public trust in our system of law and becomes a torchbearer and an ambassador for that which motivated most of us to enter this noble profession; that is the fulfilment

of equal justice under the law. I wish to recall the words of the great Martin Luther King Jr. who stated as follows in his discourse, Remaining Awake Through a Great Revolution, 1968:

> " Cowardice asks the question: is it safe? Expediency asks the question: is it politic? Vanity asks the question: is it popular? But conscience asks the question: is it right? and there comes a time when we must take a position that is neither safe, nor politic, nor popular, but one must take it simply because it is right."

34. Having made the above observations, I now wish to address the applications at hand. I will do so in the manner proposed hereinabove.

35. The application of 2/6/2023 for extension of custodial orders in misc. application no. E077 of 2023.

36. The State initially applied for the respondents to be detained in police custody for a period of 90 days pending investigations. In a ruling delivered herein on 10/5/2023, the court granted the application and ordered that the respondents be detained for a period not exceeding 30 days. The court further ordered that in the event that the State shall seek an extension of the period granted, the State was required to submit a report indicating the general status of the investigations done so far and what is left to be done. I have perused the record and find that the report is contained in the affidavit sworn on 1/6/2023 filed in support of the application for extension of the custodial orders granted.

37. As already indicated, the State seeks to continue holding the respondents for a further period of 60 days to enable the investigators complete their investigations. The application is supported by an affidavit sworn on 1/6/2023 by Inspector Raphael Wanjohi and supporting grounds dated 2/6/2023 as well as a further affidavit filed herein on 21/6/2023. In summary, the grounds for extension are as follows:

    1. The DCI has submitted several inquiry files with preliminary findings and upon perusal of the same by the ODPP, the DPP has directed that several areas need to be covered extensively before a decision to charge is arrived at;

    2. That some of the areas of investigation to be covered are dependent on the exhumation of the last body to be DNA profiled alongside other forensic analyses;

    3. Over 464 persons have provided DNA samples to assist in identifying their missing family members that are either believed to have perished or missing in relation to the Shakahola massacre. It is an indication that more work lies ahead;

    4. The 1st, 2nd, 8th and 13th respondents are yet to record their statements under inquiry;

    5. The number of bodies exhumed has increased and there are more mass graves yet to be dug out in the Shakahola forest;

    6. DNA profiling of the deceased is a continuous exercise since more graves are being discovered;

    7. The process of DNA sequencing and comparisons has not commenced and can only commence once a reasonable number of DNA from the bodies has been profiled. That only 12 bodies out of the possible 243 so far exhumed have been profiled. In the further affidavit, it was reported that 337 bodies had been exhumed;

    8. Most of the bodies are severely decomposed and it would take a lot of days to profile the bodies for DNA;

    9. It is critical to the investigation that each of the bodies be identified through forensic analysis to determine the identity and family ties to the survivors and respondents, without

which the police are not able to recommend charges to the prosecutor or make any other recommendations that are fair and just to the respondents;

10. Counselling and psycho-social support for survivors is a continuous exercise with no specific timelines as more persons are still being rescued. That out of the 65 survivors, only 40 of them have been partially counselled;

11. Forensic exploitation and analysis of suspected religious books, DVDs, mobile phones and other media is continuing and is estimated to be completed within a period of 30 days;

12. Some of the rescued survivors are giving scripted versions of events, have refused to eat, refused medication and refused to sign their statements. That the 65 persons who were rescued were still unstable, therefore slowing down the preservation of their statements and gathering of evidence;

13. The identities of the 2nd to 17th respondents are yet to be known and have to be subjected to further investigations. That some of the respondents provided false identities;

14. That the fixed abode of the respondents, other than Shakahola, remains unknown and if released on bond before investigations are complete, it would frustrate the investigations and defeat the course of justice;

15. New information is being received on a daily basis that demonstrates compelling reasons to further remand the respondents;

16. That the compelling reasons that the court found in the initial application still exist as there has not been a change of circumstances to allow the release of the respondents on bond;

17. Public interest militates against granting the respondents liberty as the complexity of the investigations requires extended time and resources to complete;

18. The preventive detention for the period sought is a necessary and proportionate response to the crimes under investigation for which preliminary findings demonstrate that the respondents are amongst those who bear the greatest responsibility.

38. In my Ruling delivered herein on 10/5/2023, I discussed elaborately the law and principles or guidelines regarding release of arrested persons on bond. The same principles apply even at this stage. The instant application is governed by the provisions of section 33(8), (9) and (10) of the POTA and section 36A (8), (9) and (10) of the *Criminal Procedure Code*, which provide as follows:

> "(8) A police officer who detains a suspect in respect of whom an order has been issued under subsection (4)(c) may, at any time before the expiry of the period of remand specified by the Court, apply to the Court for an extension of that period.
>
> (9) The Court shall not make an order for the extension of the time for remand under subsection (8) unless it is satisfied that having regard to the circumstances for which an order was issued under subsection (4)(c), it is necessary to grant the order.
>
> (10) Where the Court grants an extension under subsection (9), such period shall not, together with the period for which the suspect was first remanded in custody, exceed three hundred and sixty days."

39. For the *Criminal Procedure Code*, the cumulative period does not exceed 90 days.

40. It therefore follows that in an application for extension of the detention period, such as in this case, the requirement is that the court must be satisfied, having regard to the circumstances under which the initial order for detention was issued, that IT IS NECESSARY TO GRANT THE ORDER. This implies that the decision to extend the period for detention is discretionary. In the case of Smith v Middleton [1972] SC 30, it was held that discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. Similarly, John Marshal CJ in the American case of Osborn v. Bank of the United States, 22 U.S. (9 Wheaton) 738, 866 observed that:

> " Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."

41. It is my opinion that the provisions of section 33(9) of the POTA and section 36A (9) of the CPC must be considered together with the law on the grant of or refusal to grant bond or bail. I say so because ultimately, continued detention of the respondents would mean denial of bond or bail pending charge. In view of the foregoing, the court will have to answer the following twin questions:

    a. Are there compelling grounds to deny the respondents bond or bail? and

    b. Is it necessary to continue holding the respondents in custody pending charge?

42. It is to be borne in mind that detention must always be an exceptional measure of last resort. It is also 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. This is the requisite standard of proof by which a court must determine the existence of contested facts. The balance of probabilities when a matter is judged as a whole is a reference to the likelihood of one party's version of events being more probable to have occurred than not (TNT Management Pty Ltd v Brooks (1979) 23 ALR 345).

43. In Re H (Minors) [1996] AC 563 at 586, Lord Nichols had this to say concerning the standard:

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

44. The circumstances under which the initial order for detention made on 10/5/2023 was granted, can be summarized as follows:

1. Most of the offences under investigation are serious in nature and require time and facilities to conduct the investigations;

2. The true identities and places of abode for the 2nd to 17th respondents were unknown and releasing them would have been tricky and hazardous to the investigations;

3. If released on bond, the respondents were likely to interfere with potential witnesses who were said to be related to some of the respondents;

4. The potential witnesses were not in a position to assist the police in the investigations as they appeared to have been malnourished and brain washed. There was high likelihood that some of the rescued victims who were potential witnesses were suffering from the Stockholm syndrome. There was need for time to restore them to normalcy;

5. Exhumation or retrieval of bodies as well as search and rescue operations were ongoing and the area to be covered was vast;

6. Given the number of retrieved bodies and rescued victims together with the number of missing persons believed to be adherents of the 1st respondent's religious outfit, releasing the respondents would jeopardize the investigations;

7. Releasing the respondents would hamper the forensic analysis to establish the identities of the deceased and their possible relation to the respondents;

8. There was need to conduct identification parades and the rescued victims were expected to participate. If the respondents were released before the identification exercise, there was no guarantee that all the respondents would be available for the exercise;

9. The respondents appeared to be in a position of power and influence over the potential witnesses who were largely their alleged victims. Releasing the respondents before conducting the identification parades would expose the potential witnesses to intimidation and interference;

10. Releasing the respondents would jeopardize the efforts to trace and find the missing persons who are believed to be close relatives to some of the respondents;

11. The safety and security of the respondents was at risk as the situation on the ground was volatile. In such circumstances, the temptation to jump bail was also heightened;

12. Releasing the respondents would undermine the criminal justice system;

13. The grave public interest of the matter outweighed the right of the respondents to liberty.

45. Has the situation changed? From the affidavits on record, it would appear that the situation has changed in some instances, either to better or worse. One thing that has not changed is the nature, complexity and seriousness of the offences under investigation. In my view, for the court to consider this ground as a compelling reason to order for the extension of the period for detention of the respondents in custody, the State must inform the court of the progress done so far and what remains to be done. Furthermore, the State must demonstrate to the satisfaction of the court that what remains to be done calls for the respondents' continued detention rather than for their unconditional release or release on bond.

46. It is not in doubt that the investigations are complex and demanding. When the initial application was filed, slightly over 100 bodies had been retrieved. The affidavit in support of the application for

extension of the period of detention filed on 2/6/2023 indicates that 243 bodies had so far been exhumed whereas the further supporting affidavit filed on 21/6/2023 indicates that as at 20/6/2023, 337 bodies had been exhumed from Shakahola forest. Out of 337, post-mortems had been conducted on 243 bodies. The challenge appears to be on the DNa analysis of the bodies to establish their identity and also whether they are related to any of the respondents.

47. In the initial application, it was alleged by the State that some of the respondents' relatives who are believed to have gone to Shakahola were missing. This allegation has never been denied to-date by the respondents. In the further affidavit sworn on 20/6/2023, a list containing the names of some of the respondents and their relatives suspected to have gone to Shakahola was attached. The list was not disputed by the respondents. I am aware that the further affidavit was filed on 21/6/2023 when the matter came up for hearing. The respondents did not object to its admission and neither did they ask for time to respond to that particular revelation.

48. I agree with the State that for any charges to be preferred in relation to the deceased persons, their identities ought to be established. Paragraph 11 of the supporting affidavit sworn on 1/6/2023 indicates that out of the 243 bodies that were exhumed or retrieved, 7 bodies were fresh, 49 were moderately decomposed and 187 bodies were severely decomposed. It should be remembered that as at 20/6/2023, the body count was at 337. No information on the condition of the 94 bodies was given to court. Paragraph *11* aforesaid further reveals that it would take 21 days to profile 49 bodies that are moderately decomposed and 80 days for 187 bodies that are severely decomposed for purposes of DNA. That as at 1/6/2023, DNA profiling had been done for only 12 bodies. The State revealed in the supporting affidavit that majority of the respondents and survivors had been profiled for DNA purposes.

49. The State argued that although the DNA samples for the respondents had been taken, if released, there was a likelihood of witness interference since some samples had been given by the respondents' relatives. The State did not demonstrate how such interference was likely to occur but instead, it invited the court to imagine what would happen if the respondents were all released. Quite unfortunately, the court is not expected to imagine in order to reach a decision. The State has a duty to demonstrate how the respondents are likely to interfere with the witnesses so as to constitute a compelling reason to warrant their continued detention in custody. I am afraid that imaginations cannot constitute compelling reasons.

50. From the material on record, I do not see how the respondents are likely to interfere with the DNA or forensic analysis of the bodies. Since as at 1/6/2023 a majority of the respondents and survivors appear to have submitted their DNA samples, I do not think that their release on bond would interfere with the identification of the deceased and their possible relation to the respondents. The State has not indicated that more samples ought to be taken from the respondents. The State has already had about 30 more days since 1/6/2023. It is expected that the samples from the remaining respondents and survivors have already been taken. In any event, the State did not indicate which of the respondents and survivors had not provided their DNA samples and why.

51. In the same breath, I do not see how the respondents, if released, are likely to interfere with the forensic exploitation and analysis of suspected religious books, DVDs, mobile phones and other media. I say so because these are items already in the custody of the police and no evidence or even an allegation has been made to show that the respondents have the ability to interfere or control a forensic exercise done by the police. Unless the State demonstrates how the respondents are likely to interfere with the forensic exploitation if released from custody, this court is not prepared to speculate.

52. In the Ruling delivered on 10/5/2023, the court found that the true identities of the 2nd to 17th respondents were unclear as well as their places of abode. In the supporting affidavit sworn on 1/6/2023, the State indicated that the identities of the 2nd to 17th respondents were still unknown. However, in the further supporting affidavit sworn on 20/6/2023, it was deposed that some of the respondents had given false identities. A list of the true and given names was attached to the affidavit. The list indicates the national identity card numbers, names on the identity card and name provided by the particular respondent. I have perused the list and have noted that the true identities of the 2nd, 4th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th and 17th respondents have been established. It is only the true identities of the 3rd, 5th and 7th respondents that appear to be in question. The supporting affidavit sworn on 1/6/2023 indicates that the fixed places of abode for the 2nd to 17th respondents remain unknown.

53. In my initial Ruling delivered on 10/5/2023, I held that the respondents had a legal duty to disclose their true identity and place of abode to the police, pursuant to section 32 of the *Criminal Procedure Code*. Even after the respondents were given time to respond to the supporting affidavit by the State, none of them, with the exception of the 1st respondent, bothered to file a response. To date, none of the 2nd to 17th respondents has disclosed their place of abode. The inference that can be drawn from this silence is that they have no fixed place of abode. That makes them flight risks whose release on bond may be unsafe at the moment, considering the gravity and complexity of the matter under investigation.

54. The State alleged in the initial application as well as the instant application that family members of some of the respondents were still missing. This allegation was never rebutted by the respondent in the initial application. It is worth noting that the same has still not been denied by any of the respondents. It is believed that the missing family members were in Shakahola. The State contends that the investigations have so far revealed that the 1st respondent was the leader of a religious outfit whose edicts were executed by most of the respondents. This implies that the respondents are believed to be part of an organized network acting with a common intention.

55. If the relatives of some of the respondents are said to be missing and it is believed that they were taken to Shakahola by the respondents, a reasonable suspicion would be cast on all those suspected to be part of the organization and not just those whose relatives are missing. I agree that before it is established whether the missing relatives or all those reported missing are dead or just missing, releasing those who are suspected to be responsible for their missing is likely to prejudice the investigations. I say so because if still alive, those who allegedly took them to the Shakahola forest would know where to find them, and when they do, interference cannot be ruled out.

56. At the time of filing the initial application, it was alleged by the State that over 40 victims had been rescued and were undergoing medical, mental/psycho-social treatment and support. In the supporting affidavit sworn on 1/6/2023, it was indicated that 65 persons were at the rescue centre and 40 of them had been partially counselled. It would appear that there was a new development while the instant application was pending hearing. The further affidavit sworn on 20/6/2023 revealed that the 65 rescued persons had exhibited instability after they went into starvation mode between 6th June, 2023 and 10th June, 2023. Paragraph 8 of the further supporting affidavit reveals that the 65 rescued persons were taken to court and remanded at Shimo La Tewa GK Prison before being committed back to the rescue centre.

57. Mr. Aboubakar, counsel for the rescued victims submitted that there was interference with his clients to the extent that they were influenced to go on hunger strike. Counsel believed that there was communication between the respondents and the victims and wondered what would happen if the respondents were released from custody. Mr. Abubakar revealed that the victims had been charged

before Court No. 1 at Shanzu. In the application dated 12/6/2023, it was alleged that the respondents herein had gone on hunger strike from 4th June, 2023. This was two days before the victims allegedly staged a hunger strike or went into starvation mode. The State believes that there was a connection between the hunger strike for the respondents and that of the victims.

58. The issue of hunger strike has not been denied by the respondents. On that issue, Mr. Makasembo, counsel for the respondents submitted that if there was any hunger strike, it was a reaction to the physical and mental torture by the investigating team. The record will bear me witness that on 7/6/2023 Mr. Makasembo informed the court that some of the respondents had staged a hunger strike owing to some utterances that were made by the Cabinet Secretary for Interior and National Administration. The respondents are accused of championing a radical religious ideology that, inter alia, advocates for fasting to death in order to meet Jesus Christ. If they go on hunger strike for unclear reasons and the victims follow suit, then we should all be worried. It is a clear indication that things may not be well.

59. This raises reasonable suspicion that the victims could still be suffering from the Stockholm syndrome. They appear to be vulnerable. That being the case, and without appearing to judge the respondents, it would be advisable to ensure that there is no communication between the respondents and the rescued victims. I agree with the State that the victims need to be protected and their evidence ought to be preserved so as not to undermine the criminal justice system. The kind of victims herein are unique. They are victims who may be having a high affinity with the respondents, and especially their alleged leader, the 1st respondent herein. In my view, releasing the respondents on strict bond terms may not guarantee non-interference. The respondents may be restrained by an order of the court from communicating or engaging with the rescued persons but there would be no way of restraining the rescued persons from looking for or meeting the respondents once released. If the latter happens, the investigations would turn futile. It therefore follows that the only less restrictive means would be to continue holding the 1st to 17th respondents in custody until the condition of the rescued persons improves.

60. The State alleged that identification parades were yet to be conducted. This fact was not disputed by the respondents. That owing to the strict procedures in conducting identification parades and the number of witnesses expected to participate, time was needed for such exercise. The record indicates that a lot has been going on in terms of investigations. Exhumations, search and rescue, post-mortem exercise, Forensic analyses, recording of statements and counselling of victims are some of the activities that the investigators have been involved in. I agree that the investigations are complex and wide. Given the circumstances, it is understandable that the investigators may not have found time to conduct the identification parades before the expiry of the initial period of 30 days that was granted by the court.

61. Mr. Jami submitted that when some of the respondents went on hunger strike, their body formations changed and that time was lost in trying to restore them. I am aware of the rules of conducting identification parades. Given the number of the respondents and the expected witnesses, the exercise may require considerable time. This is also bearing in mind that there are several lines of inquiry to be pursued and other matters which may require the attention of the parties involved in the investigations. Just like I held in my previous Ruling delivered on 10/5/2023, releasing the 2nd to 17th respondents before conducting the identification parades would be ill-advised.

62. The State maintains that the safety and security of the respondents would still be at risk if released on bond. The State relied on the same grounds that were given in the Ruling made on 10/5/2023. In the initial application, the State had demonstrated circumstances which indicated that the lives of the respondents would be in danger if they were released from custody. The State argued that the situation had worsened since 337 bodies had since been retrieved and more mass graves were to be dug out. I

reiterate that the danger must be real and not imagined. The prosecution and alleged victims did not allege nor allude to any threat on the life of the respondents.

63. Other than deposing that the compelling reasons upon which the court allowed continued detention still existed, the State did not go further to give instances showing that the lives of the respondents were in danger. There is no material showing any threats against the respondents. The mere fact that the body count had increased is not sufficient to demonstrate the alleged risk on the lives of the respondents. Kenyans are a funny lot. They will react to grave situations when they happen and tend to forget with the passage of time. At the moment, I cannot hold with certainty that the respondents ought to be kept in custody for their own protection. I am not saying that there is no danger on the lives of the respondents. My point is that the State has failed to demonstrate the existence of danger at the moment.

64. The State argues that this is a matter of great public interest and that the public interest outweighs the respondents' right to liberty. Indeed, in my Ruling delivered on 10/5/2023, I held as follows:

> " 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.....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."

65. The State as well as counsel for the victims observed that this matter was one of a kind. That it relates to incidents that have never been experienced in the country. Indeed, to my recollection, the country has never experienced a calamity of this nature. I am aware that there have been several terrorist attacks leading to the demise of a lot of people. However, the Shakahola massacre as it is popularly known is unique. I say so because, unlike other incidents where the events leading to the death of victims is known, this matter is shrouded in mystery. Over 300 bodies have been retrieved from mass graves but the events preceding the deaths are unknown. Furthermore, the deaths have been linked to religious fanaticism that is different from the one experienced with violent extremism.

66. Ms. Ogega, learned Senior prosecution counsel submitted that this matter fell within the doctrine of the rarest of the rare case. Counsel relied on the authority of Zeeshan Qamar v State of New Delhi, a decision by the High Court at New Delhi. I have carefully read the authority. With all due respect, I am afraid that counsel may have misinterpreted the same. The authority speaks to say that the period of detention for 180 days under the Narcotic Drugs and Psychotropic Substances Act of India for purposes of investigations is sufficient and that any extension of the period should only be granted in the rarest of rare cases. The case of Zeeshan related to terrorism under the Unlawful Activities (Prevention) Act of India, wherein the initial period of detention was 90 days. The court in the Zeeshan case held that the test of rarest of rare case did not apply to investigations under the Unlawful Activities (Prevention) Act of India as the Act limited the grounds upon which the extension for the period of detention could be granted.

67. I appreciate the Indian jurisprudence but, in this case, the State has not exhausted the maximum period provided by Statute. The extension sought is within the period stipulated by law. It does not require a rare case to extend the period. Even if the doctrine were to apply, my view is that it would be premature to invoke it as this stage. The law grants the court discretion to extend the period if it is satisfied that, having regard to the circumstances for which the initial order was granted, it is necessary to extend the

period. I have considered the objections that were raised by the respondents. As already indicated, only the 1st respondent filed a Replying affidavit. The 1st respondent stated that he was a complainant in the offences that he was being investigated for. That he made a report at Langobaya Police station on 8/11/2022 after a person known to him made allegations similar to those made herein by the State.

68. The 1st respondent stated that the allegations were made by the daughter to a Pastor with whom he had cut ranks and was fighting him. The 1st respondent denied being a flight risk and alleged that he had presented himself to the police station before he was arrested. That the application was made in bad faith and meant to punish the 1st respondent. He deposed that no link had been established between him and the other respondents and that there was no evidence to show that he would prevent the State from conducting investigations. The 1st respondent complained about the conditions at the police station where he had been detained and denied the allegations against him. He further denied that he was in danger and averred that he was safe.

69. I have already addressed the grounds relied upon by the State and made findings thereon. I reiterate that the respondents are presumed innocent until proven guilty. The respondents have not been charged before this or any other court. It is not the duty of this court to establish the truth or otherwise of the accusations against the respondents. That will be the duty of the trial court in the event that the respondents will be charged. What the court is concerned with is whether there are compelling reasons to warrant the continued detention of the respondents pending completion of investigations. There is a possibility that the respondents could be innocent but that is subject to proper and thorough investigations. It is my finding that the State has established the need for thorough investigations. As for the sentiments expressed by the Cabinet Secretary for Interior and National Administration, this court expresses its displeasure and assures the parties that such utterances would pass as mere irrational outbursts of a rabble-rouser.

70. The whole country and the international community want to know what really happened at Shakahola. The number of retrieved bodies so far is alarming. There is no evidence nor material to show that any of the bodies that were retrieved was claimed by anybody not connected to the Shakahola massacre. The respondents have been implicated in one way or the other. The material before court indicates that the State has invested heavily to ensure that it gets to the bottom of the Shakahola massacre. There is need to establish whether it was indeed a massacre and if so, who was responsible. Owing to the magnitude of the matter, investigations are bound to take time. In the circumstances, the court has to choose between two evils:

    a. The evil of releasing the respondents before completion of the investigations; or

    b. The evil of curtailing the liberty of the respondents to pave way for proper and thorough investigations.

71. Given the stage at which the investigations have reached, as indicated in the affidavits by the state, public interest demands that the court chooses the evil of curtailing the liberty of the respondents. The State has requested for a period of extension for 60 days. Sections 33(10) and 36A (10) of the POTA and CPC respectively provide that where an extension is granted under subsection (9), such period shall not, together with the period for which the suspect was first remanded in custody, exceed three hundred and sixty days and ninety days respectively. My understanding is that in case of extension, the court is not bound to give a maximum of 30 days as in the first instance. The court may extend for whatever period provided the cumulative period does not exceed the stipulated maximum days.

72. I have considered the case of the 18th respondent Rhoda Mumbua Maweu. In the initial application, the State alleged that she had been arrested in the company of a two-year old minor. That there was need

for the minor to be medically examined to ascertain whether the child had been exposed to any form of neglect or abuse. No report on the status of the child has been presented by the State in whatever form. There is nothing in the affidavits in support of extension of the detention period to show that the 18th respondent was adversely mentioned by any potential witness or that she is still being investigated.

73. It would appear that her undoing was to be the 1st respondent's wife. It is only mentioned that she is believed to have resided with the 1st respondent at Shakahola. There is no allegation that she was involved in any of the impugned acts. If her only sin is being the 1st respondent's wife, then her continued detention would be unwarranted and unfair. The upshot of the above considerations is that the State has established a case to warrant the continued detention of the 1st to the 17th respondents herein. There is no basis for holding the 18th respondent in custody any further.

The application dated 2/6/2023 in Misc. Application No. E101 of 2023.

74. As already indicated, the State sought for the continued detention of the 12 respondents. Before the application was heard, the court was informed that the 7th respondent had passed on. In this application, the State prays that the respondents be detained in police custody for a period of 60 days. The grounds relied upon by the State 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 respondents are believed to have played greater roles in the commission of offences that culminated in the deaths and illegal disposal of bodies being exhumed or recovered at Shakahola;

    2. The 1st to 5th respondents were arrested in the bushes at Shakahola, the 6th to 10th respondents were arrested at various places after being tracked down by a team of investigators through mobile communications and connections related to the ongoing investigations;

    3. The 11th and 12th respondents were found at Shakahola and showed signs of starvation. They were treated and taken to the rescue centre but were adversely mentioned by other survivors;

    4. The period of detention initially 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;

    5. There exists new information that demonstrates compelling reasons for further detention of the respondents pending conclusion of investigations. The information is contained in the supporting affidavit sworn on 1/6/2023 and filed in Misc. application No. E077 of 2023;

    6. The actual identities of the respondents are not yet known and have to be subjected to further investigations;

    7. 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;

    8. 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;

    9. 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;

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

11. It is in the interest of the respondents to remain in custody pending completion of investigations for their own safety and security owing to public interest and given the nature of the offences;

12. 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;

13. Public interest balances in favour of curtailing the liberty of the respondents whereas releasing the respondents may result unreasonable delay or total inability to complete the investigations;

14. 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 by them.

75. 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.

76. It is worth noting that despite having been given time, the respondents did not file Replying affidavits 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.

77. 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.

78. The State alleges that the true identities and places of abode for the respondents are unknown. It is not known whether they are in any gainful employment. The investigating officer deposed that the respondents 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.

79. 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.

80. 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."

81. It would appear that the 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 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.

82. The affidavit in support of the application indicates that some of the deceased may be family members of the respondents. This fact was not denied by the respondents in their submissions. It is common knowledge that bodies are still being exhumed at Shakahola and the record herein indicates that the body count was 337 as at 20/6/2023. It was also deposed by the investigating officer that the exercise of exhuming bodies is yet to be completed. I 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 say so because it is indicated that DNA sampling of the respondents is yet to be done.

83. I have already indicated that the respondents have not denied that some of the deceased may be their close relatives. In the interest of justice, it would be necessary for the investigators to establish the identities of the deceased and also establish whether they are members of the respondents' families. It is not clear where the respondents hail from. If they are from different parts of the country, as may be the case, and are released before their true identities and those of the deceased are established, it would prove difficult for proper investigations to be conducted.

84. 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 the respondents were initially taken to the rescue centre but were adversely mentioned by some of the victims. That their presence at the rescue centre has caused emotional anxiety and fear amongst the survivors. 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.

85. The State alleges that there is need to conduct identification parades to ascertain whether the respondents and in particular the respondents are involved in the offences under investigation. I have already dealt with the issue of identification parades with respect to the application in Misc. application No. E077 of 2023. The same finding applies to this application. 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. There is no evidence to show that the lives of the respondents could be in danger if released. I have already dealt with the issue hereinabove. My earlier finding applies to this application.

86. In the authority of Sudi Oscar Kipchumba v Republic (through National Cohesion & Integration Commission [2020] eKLR, 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.

87. 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.

88. I have considered the application in totality. 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 need not belabour on the issue of public interest. 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 60 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 respondents have been in custody for 30 days pending the hearing of the application. The initial grant has already been overtaken by events. I however affirm that it would have been justified. Further directions on this will follow.

89. The twin applications dated 12/6/2023 in both Misc. applications Nos. E077 of 2023 and E101 of 2023.

90. I have already indicated hereinabove what the applications are seeking and the general grounds relied upon. As per the supporting affidavits, the grounds relied upon are:

1. That the respondents had since 4/6/2023 colluded with one another and subjected themselves to a self-imposed hunger strike thereby exposing themselves to a real risk to health complications or even death;

2. There was reasonable belief that Paul Nthenge Mackenzie was the ring leader of the collusion between the respondents;

3. There is urgent need to separate the respondents from one another and subject each of them to forcible feeding, treatment or any other further action necessary to safeguard and restore their health;

4. The foregoing would be impossible if the respondents remained at the police stations as the stations do not have the requisite capacity in terms of space, food and medical facilities;

5. The requisite space, food and medical facilities and available in Prisons where isolation, forcible feeding and medical treatment would effectively be implemented, enforced and supervised.

91. The parties did not pay much attention to these applications. Brief submissions on the same were made by Mr. Jami. Mr. Makasembo did not make any submissions on the applications. It is not known whether it was by default or design. Without any objection from the respondents, the applications are deemed unopposed. Nevertheless, the court is not obliged to allow an application just because it is not opposed. The court must be satisfied that the application is merited. I have considered the applications. On 14/6/2023, the parties agreed to have all the respondents in the two matters detained at Malindi GK Prison pending further orders. So far there are 28 respondents to be considered for detention at the Prison facilities. I say so because one respondent was reported dead and the court has already held that it is no longer viable to keep holding the 18th respondent in Misc. application No. E077 of 2023 (Rhoda Mumbua Maweu) in custody.

92. Considering the period that the respondents are likely to be in custody, I agree that a prison facility would be most appropriate to hold them. The prisons are better equipped than police stations in terms of space, diet and other amenities. I agree that given the nature of the offences under investigation, it may be desirable to hold them separate from one another. However, I am not in a position to direct how the separation should be implemented as I have no idea of the set up of the prison facilities intended to hold the respondents. The applications further seek orders for forceful feeding and treatment of the respondents. In the further supporting affidavit sworn on 20/6/2023 and filed in Misc. application No. E077 of 2023, it was deposed that the respondents went into a hunger strike from 4/6/2023 to 14/6/2023.

93. It would appear that when the respondents were remanded at Malindi GK Prison, the hunger strike ended. When the applications were argued on 21/6/2023, there was no allegation that the respondents were still on hunger strike. As a matter of fact, Mr. Jami submitted that the respondents had improved in terms of health as they had been attended to at the prison. After the applications had been argued, the respondents, through their counsel Mr. Makasembo informed the court that they were being served with food that was different from the one that was being served to other inmates. This is a clear confirmation that there is no existing hunger strike. That being the case, the application for forceful feeding is overtaken by events.

94. In any event, section 29 of the *Prisons Act* provides thus:

(1) There shall be a medical officer stationed in or responsible for every prison.

(2) The medical officer shall be responsible for the health of all prisoners in a prison and shall cause all prisoners to be medically examined at such times as shall be prescribed.

(3) A medical officer may, whether or not a prisoner consents thereto, take or cause or direct to be taken such action (including the forcible feeding, inoculation, vaccination and any other treatment of the prisoner, whether of the like nature or otherwise) as he may consider necessary to safeguard or restore the health of the prisoner or to prevent the spread of disease.

(4) All actions of a medical officer, prison officer, medical orderly, or other person acting under the provisions of the preceding paragraph, or in pursuance of directions given thereunder, shall be lawful."

95. In my view, the Medical officer does not require a court order to invoke the provisions of section 29 of the Act.

96. There is a prayer for the respondents to be subjected to psychiatric assessment. No grounds have been given to warrant granting of the order. However, if the order was being sought because the respondents were allegedly on hunger strike, then the prayer is also overtaken by events. I find no basis for granting such an order.

Disposition

97. In view of the foregoing, the applications by the State partially succeed. Consequently, I make the following orders:

a. The application by the State for extension of custodial orders in Misc. application No. E077 of 2023 is allowed to the extent that the 1st to 17th respondents shall be remanded in custody for a further period not exceeding 60 days from 2/6/2023;

b. The 18th respondent in Misc. application No. E077 of 2023 Rhoda Mumbua Maweu is hereby released on a personal bond of Ksh. 100,000/= together with a bond of Ksh. 300,000/= with a surety of a similar amount. Pending approval of her proposed surety, the said respondent shall remain in custody;

c. Further to the bond terms aforesaid, the 18th respondent in Misc. application No. E077 of 2023 shall be required to visit a police station as may be directed by the investigators as and when required until completion of the investigations herein;

d. The respondents in Misc. application No. E101 of 2023 with the exception of the 7th respondent who is deceased have already spent 30 days in custody. The law provides that in the first instance, the court can only grant a maximum of 30 days. That period is already spent. Since the period has expired owing to circumstances beyond the control of the State, the State shall be given time to indicate whether they will require an extension and probably apply for such extension. To that end, the respondents in Misc. application No. E101 of 2023 (with the exception of the 7th respondent) shall be detained in custody for a further three days to enable the State put its house in order;

e. The twin applications dated 12/6/2023 are allowed only to the extent that the respondents in both matters (save for the 7th respondent) shall be remanded in Prison custody. As proposed by the State, the respondents shall be remanded at Malindi, Kilifi and Shimo La Tewa GK Prisons at the discretion of the State;

f. Pursuant to Article 49(1)(e) of the *Constitution*, the respondents shall be held separately from persons who are serving sentence or convicted persons and in isolation from one another as far as is practicable;

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

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

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

98. As agreed by the parties and directed by the court, this ruling shall apply to Misc. Criminal application No. E077 of 2023 and Misc. Criminal application No. E101 of 2023.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT SHANZU THIS 3RD DAY OF JULY, 2023.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.