



Republic through DCI v Mackenzie & 30 others (Miscellaneous Criminal Application E077, E101 & E130 of 2023 (Consolidated)) [2023] KEMC 292 (KLR) (10 August 2023) (Ruling)

Neutral citation: [2023] KEMC 292 (KLR)

REPUBLIC OF KENYA
IN THE SHANZU LAW COURTS
MISCELLANEOUS CRIMINAL APPLICATION
E077, E101 & E130 OF 2023 (CONSOLIDATED)
YA SHIKANDA, SPM
AUGUST 10, 2023

BETWEEN

REPUBLIC THROUGH DCI APPLICANT

AND

PAUL NTHENGE MACKENZIE 1ST RESPONDENT
ROBERT KAHINDI KATANA 2ND RESPONDENT
ALFRED ASENSA 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 E101 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 (DECEASED) 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

AS CONSOLIDATED WITH
MISCELLANEOUS CRIMINAL APPLICATION E130 OF 2023

BETWEEN

REPUBLIC THROUGH DCI APPLICANT

AND

ALEX MNANGWE ODARI RESPONDENT

RULING

Introduction

1. This has to be the longest pre-charge detention sanctioned by the court in the history of the great Republic of Kenya following the promulgation of *the Constitution* of Kenya on 27/8/2010. I am not



saying this with a pang of regret or delusions of grandeur. John Rawls (1921-2002) an American moral, legal and political philosopher in his book, *A Theory of Justice*, observed that:

“The limitation of liberty is justified only when it is necessary for liberty itself, to prevent an invasion of freedom that would be still worse.”

2. Both reason and experience tell us that the notion of freedom or liberty without limitations is nonsensical, whether we are speaking of government, of life, or of anything else in this world. No rights are absolute and without restraint.
3. The Shakahola saga is one of a kind. It has caused great social panic both nationally and internationally. What started as a normal miscellaneous application for pre-charge custodial orders has metamorphosized into an antagonistic legal battle of rights and wits. The respondents in the lead file being Miscellaneous Criminal Application No. E077 of 2023 with the exception of the 18th respondent have been in custody, courtesy of the orders of this court, for over 90 days now. Those in Miscellaneous Criminal Application No. E101 of 2023 with the exception of the 7th respondent who is deceased have been in custody for over 60 days whereas the respondent in Miscellaneous Criminal Application No. E130 of 2023 has been in custody for over 30 days. The State now seeks more time to continue holding the respondents in pre-charge detention for a variety of reasons. The State filed a consolidated application comprising of the three related matters before this court. The parties made submissions and the proceedings were taken on the lead file. This Ruling therefore applies to all the three matters.

The Application

4. The application by the State is dated 31/7/2023 and is brought under the Provisions of Articles 49(g) and (h), 51, 159(2)(d) of *the Constitution*, sections 33(4)(c), 33(5), 33(8), 33(9), 33(10), 34, 35, 40B and 40C of the *Prevention of Terrorism Act* and section 36A of the *Criminal Procedure Code*. The State makes the following main prayers:
 1. That the custodial remand of the respondents in the three matters be extended by a period not exceeding 47 days;
 2. That the respondents be informed of the reasons for their continued custodial/remand/detention;
 3. That the Secretary of Probation and Aftercare services be directed to conduct and cause to be availed to court within 30 days, social inquiry reports on each of the respondents;
 4. That the officers in charge of Shimo La Tewa, Kilifi and Malindi GK Prisons be directed to allow the investigators herein to conduct under charge and caution interviews and to record and take away such written statements from the respondents;
 5. That the National Legal Aid Service be directed to provide a pool of at least two additional Advocates of the High court or accredited legal practitioners to be at the disposal of any of the indigent respondents for necessary legal assistance.
5. 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, save for the 1st respondent in Miscellaneous Criminal Application No. E101 of 2023.



The Main Issues for Determination

6. In my view, the main issues for determination are as follows:
 - a. Whether the State has established a case for denial of bond and extension of the detention period for the respondents for 47 days or any period pending charge;
 - b. Whether the State has established a case to warrant the need for social inquiry reports in respect of the respondents;
 - c. Whether the State has established a case to enable the court grant orders for access of the investigators at the Prison facilities for purposes of conducting investigations;
 - d. Whether there is need for the court to direct the National Legal Aid Service to provide additional counsel to the respondents.

Status of One of the Respondents

7. On 1/8/2023 when the matter came up before court, Mr. Jami, learned Ag. Assistant Director of Public Prosecutions informed the court that the 10th respondent in Misc. application No. E101 of 2023, Evans Kolombe Sirya was still hospitalized. That he was paralyzed and required special equipment to have him brought to court. The said respondent did not attend on 4/8/2023. The court dispensed with his attendance and the matter proceeded in the absence of the aforementioned respondent.

Submissions on Behalf of the State

8. The State was represented by Mr. Jami. Mr. Jami submitted that the State was seeking an extension of the detention period for a further 47 days. That going by the magnitude and evolving nature of the investigations, and noting that bodies were still being exhumed, the period sought was reasonable by any standard. Counsel submitted that the police had given sufficient reasons to warrant the extension. It was submitted on behalf of the State that based on the facts deponed in the affidavit and grounds relied upon in the application, it would be important for the court to consider a social inquiry report in the event that the court decides to release the respondents. Mr. Jami further submitted that the respondents ought to be in custody for their own protection. That the State had since obtained statements from family members of some of the respondents.
9. Counsel submitted that it was not known where some of the children belonging to the respondents were and that in some cultures belonging to some of the respondents, they would be considered cursed and would have to be cleansed. That the families of the respondents were yet to come to terms with the loss or idea of their missing loved ones. Counsel posed the question of whether the families of the respondents were ready to accommodate them and urged the court to see the necessity of a social inquiry report. That in the circumstances, detention was the least restrictive measure.
10. The State argued that releasing the respondents would cause interference with witnesses and ultimately with the investigations. That there were child witnesses at a rescue centre who were still traumatized. If the respondents are released, there would be an impact on all traumatized witnesses. It was submitted that identification parades were still going on. The State urged the court to do what was in the best interest of the minors. The State pointed out that there were 65 rescued persons at and up to the time of arguing the application, none of them had volunteered to be a witness owing to the deep radicalization. The State is apprehensive that if the respondents are released, the prosecution may not have witnesses.



11. Mr. Jami submitted that the bodies that had been exhumed were yet to be identified and that it was only after DNA analysis that the bodies would be identified. That the DNA analysis would take longer owing to various challenges. The State contended that no charge could be instituted if the deceased victims are unknown. In response to the filed submissions by the 1st respondent in Misc. Application No. E101 of 2023, the State argued that the issue of a holding charge had no basis in law. It was submitted that there was a high likelihood that the respondents would be charged and that it would be prudent to detain them so that they do not continue to do what they are being accused of. That preservation of national security would require the respondents to go through a deradicalization programme if released and that they cannot be released until it is safe for them to be released.
12. The State argued that the respondents were flight risks. That save for Mr. Mackenzie and his wife, the rest of the respondents have never stated where they live. Their last known address is Shakahola. It was argued that if the respondents are released and they flee, investigations would be delayed. Mr. Jami submitted that upon conclusion of investigations, the ODPP would require time to review the evidence so as to make a decision to charge. That there were over 90 files to be reviewed and at least ten counts for each respondent and the work kept on increasing because more bodies are being exhumed. The State urged the court to allow the application and relied on the following authorities:
 - a. Republic v Fredrick Ole Leliman & 4 others [2016] eKLR;
 - b. Republic v Milton Kabulit & 6 others [2011] eKLR;
 - c. Hassan Mahati Omar & another v Republic [2014] eKLR.

Submissions on Behalf of the Respondents

13. Mr. Makasembo, learned counsel opposed the application. Counsel submitted that the State had not presented any compelling reasons as to why the respondents should continue to be detained. That the State had a legal duty to inform the court on the extent of their investigations in terms of what has been covered so far and what they intend to cover if allowed more time. It was argued that the State had failed to do so. Counsel contended that the application was a general prayer for extension of time and that the State was abusing the court process to have the respondents detained. That no new and overwhelming circumstances had been brought out to warrant the prayers.
14. It was submitted that the respondents were innocent until proven guilty and that some of the averments, opinions and apprehensions pointed to serious offences yet no cogent evidence had been brought. That the respondents were being treated as if they were on trial. Mr. Makasembo submitted that the State had taken the court through irrelevant stories and that the customs that provide that killing is a curse had nothing to do with the respondents or what is before court. The respondents argued that they were in custody and could not therefore interfere with witnesses. That some witnesses were allegedly under protection and that being the case, there is no way the respondents could reach them unless they had supernatural powers. The respondents argued that no evidence was presented to show that there have been previous attempts to interfere with investigations or reach some of the witnesses.
15. Mr. Makasembo submitted that the police were not investigating anything but were in the business of earning per diems and that the more the extension, the more money for them. That if the police were incompetent, then such failure should not be visited on the respondents. The respondents argued that in this era of technology, a thumb print would be enough to identify a body. That there was no evidence to show that DNA samples had been collected from the respondents' family members and how many. The respondents argued that children could disappear under various circumstances such



- as kidnapping or turning into vagabonds. That the court had not been informed of the age bracket of the children said to have been missing. The respondents argued that there was no evidence such as birth certificates or photos to show that they had children.
16. It was argued that the State was being futuristic. That there was no report showing the mental status of the respondents before they went to Shakahola and after they were arrested so as to claim that they have been radicalized. Mr. Makasembo made an interesting argument that there was no evidence to show that those who died never made it to heaven. Counsel argued that the respondents were Kenyan citizens and not vagabonds. That the State must assume that the respondents reside where they were arrested from since there is freedom of settlement. It was submitted that there was no evidence to show that the respondents are likely to flee if released. Mr. Makasembo decried the slow exhumation of bodies and alleged that bodies were being planted in the forest so as to shift blame on the respondents.
 17. Counsel further observed that bodies were being exhumed from homesteads and that fresh bodies were being exhumed yet the respondents were in custody. Counsel argued that human beings were mortal and that they die of various reasons. That the prosecution had confined its mind to starvation instead of being flexible in its thinking. Mr. Makasembo further argued that some of the authorities cited by the State referred to accused persons already charged yet the respondents herein were yet to be charged. Counsel wondered why the matter was special or an exception and submitted that the State did not even know what to charge the respondents with. That if the State had sufficient evidence as alleged, they should charge the respondents. Mr. Makasembo contended that the application was incompetent and tainted with with narratives, fictitious fears and imaginary and irrelevant customs all intended to poison the court's mind. That the Prosecution was acting under pressure as the Cabinet Secretary, one Professor Kithure Kindiki was heard saying that nobody would be forgiven if the State lost the case. Counsel urged the court to dismiss the application.
 18. Mr. Otwoma, learned counsel for the 1st respondent in Misc. Criminal Application No. E101 of 2023 relied on the grounds of opposition and written submissions. He associated himself with the submissions by Mr. Makasembo and submitted that the burden of proof was on the prosecution. Counsel further submitted that it was not the duty of the court to investigate and the State was required to have evidence before arresting the suspects. That investigations were ongoing but the prosecution appeared to have convicted the respondents. Mr. Otwoma submitted that the respondents' rights under Articles 49 and 50 of *the Constitution* were being violated and that the prosecution wanted the court to hold the respondents in perpetuity. Counsel argued that there was no evidence against his client.
 19. It was submitted that the State had not rendered an account of what they had done nor whether statements were recorded. Counsel argued that the respondents did not have a duty to co-operate with the investigators. Counsel further argued that the State was on a fishing expedition and intend to delay the matter further. He urged the court to disallow the application. Mr. Kalimbo, learned counsel acting alongside Mr. Otwoma submitted that it had been presumed that the respondents were already guilty. That the court had a judicial duty to be guided by the evidence and facts. Counsel argued that the submissions by the State did not qualify for judicial notice under section 60 of the *Evidence Act*. That the court has to ensure that rights are protected and not assist the prosecution in stage-managing the case.
 20. Mr. Kalimbo submitted that *the Constitution* was supreme compared to all other laws and that the court must maintain impartiality. Counsel supported the notion that there was external pressure in the matter and that there was no evidence to support the allegations. Counsel further submitted that his client resided at Likoni area. Relying on Articles 27, 28 and 29 of *the Constitution*, counsel submitted that investigations could not be used as a machinery to detain the respondents and that liberty should



be protected. That the State does not have to complete investigations before charging the respondents since charges can be amended. Counsel argued that allowing the application would be tantamount to violating the rights of the respondents. That radicalization had not been proven by any forensic medical report. Counsel urged the court to disallow the application.

Reply by the State

21. Mr. Jami submitted that the standard of proof was on a balance of probability and not beyond reasonable doubt. Counsel further submitted that it may not be tidy to charge the respondents piecemeal as investigations continued. That charging triggers a trial and once charged, the State may not be able to do certain things. Counsel argued that the circumstances of the matter were that there was no opportunity to investigate before arresting. Counsel denied that the application was motivated by malice. He submitted that per diem was not a profit but was for covering living expenses. That the respondents had not suggested that it was the police who were allegedly planting bodies at Shakahola. Counsel further submitted that some bodies were severely decomposed such that no thumb prints can be found.
22. Mr. Jami referred the court to the annexures to the supporting affidavit in reply to some of the issues that had been raised by the respondents in their submissions. He argued that proof of whether the deceased reached heaven is an issue to be canvassed once the respondents are charged. Counsel referred the court to the supporting affidavit on the issue of the birth certificates of the missing children. He argued that requiring the production of photos was too high a burden and not the best evidence to prove that the missing children belonged to the respondents. On the issue of external pressure, counsel submitted that the court would act on the evidence presented. The State submitted that Shakahola was a crime scene and as such, the respondents would not be allowed to go back to the place. The State maintained that there were compelling reasons to detain the respondents and that detention was the least restrictive measure.

Analysis and Determination

23. It is not the first time that this court is being moved to clip the respondents' liberty pending charge. In Misc. Criminal Application No. E077 of 2023, the State had prayed for detention for 90 days. That period has since lapsed. In Misc. Criminal Application No. E101 of 2023, the State sought for detention for a period of 60 days. That period has also lapsed. In Misc. Criminal Application No. E130 of 2023, the State sought for detention of the respondent therein for a period of 30 days. That period has lapsed. In other words, the period originally sought by the State in all the matters has been expended. Nonetheless, here we are, dealing with the same issues. The question that the court has to grapple with is simple in terms of statement but sophisticated in terms of determination. It is a question of whether there are compelling grounds to warrant the continued detention of the respondents or any of them pending charge or investigations. This is the third time that this court is being called upon to determine the question. All the other prayers being sought in the instant application revolve around this simple yet big question.
24. Before delving further into the merits or demerits of the application, I wish to address the issue of holding charge as was raised by Counsel for the 1st respondent in Misc. Criminal Application No. E101 of 2023. Counsel relied on the authority of *Michael Rotich v Republic* [2016] eKLR, in which the learned Judge held in part that:

“...the recent trend where a person is arrested and arraigned in court within 24 hours specifically for the prosecution to seek extension of time to continue to detain such person, without any charge or holding charge being preferred against such person is



unconstitutional. The police have no authority in law to arrest and detain any person without sufficient grounds. Those grounds can only be sufficient if the police have prima facie evidence which can enable such person to be charged with a disclosed offence. The fact that the prosecution has a prima facie evidence of a disclosed offence can be presented in court in form of a holding charge setting out the particular offence. Such holding charge will enable an accused person to know of the reason for his arrest as provided under Article 49(1)(a) of *the Constitution*. It will not do for the prosecution to present a person who has been arrested in court and seek his continued detention without a charge or a holding charge being lodged in court. It is unlawful for the police to seek to have a person who has been arrested to continue to remain in its custody without a formal charge being laid in court. If this trend continues, it would erode all the gains made in the advancement of human rights and fundamental freedoms as provided in the Bill of Rights since *the Constitution* was promulgated in August 2010. A person's right to liberty should be respected at all times unless there are legal reasons for such person to be deprived of his liberty. The police should only arrest a person when they have prima facie evidence that an offence has been disclosed which can result in such person being charged with a disclosed offence or a holding charge of the likely offence being presented in court. The police should do this because of only one reason: *the Constitution* says so." (Underlining mine)

25. The State argues that there is no requirement in law for a holding charge if the suspect is to be detained further. The Black's Law Dictionary, 10th edition defines the term holding charge as a criminal charge of some minor offense filed to keep the accused in custody while prosecutors take time to build a bigger case and prepare more serious charges. Going by the above definition, I gather that a holding charge implies that the suspect is formerly charged albeit with a minor offence in anticipation of being charged with a more serious offence(s) once investigations are complete. My understanding of the provisions of Article 49(1)(g) and (h) is that once a suspect is brought to court on his first appearance, the following may happen:
- i. The suspect may be charged; or
 - ii. The suspect may be informed of the reason for the detention continuing. This means he may be detained further without charge; or
 - iii. The suspect may be released.
26. Paragraph (h) thereof provides that an arrested person has a right to be released on bond or bail pending a charge or trial, unless there are compelling reasons not to be released. It is clear that *the Constitution* allows for detention pending a charge provided there are compelling reasons for doing so. I agree with the State that there is no constitutional nor statutory requirement for a holding charge. There are several High court authorities which departed from the finding in the case of Michael Rotich (supra), on the requirement of a holding charge. Some of these authorities are Godfrey Osemudiamen Aigbibiremolen & 6 others v Republic [2018] eKLR, Betty Jemutai Kimeiywa v Republic [2018] eKLR, Chris Phillip Obure v Republic [2020] eKLR and Sudi Oscar Kipchumba v Republic (Through National Cohesion & Integration Commission) [2020] eKLR.
27. I am yet to come across a Court of Appeal decision on the same. In the Canadian case of Woolfrey v Piche [1958], 13 D.L.R. (2d) 605 LeBel J.A. stated as follows:
- “.....but I am now faced with two conflicting decisions in this Court on the same point, and in that unfortunate state of things I apprehend that I must choose between them as I have done. That is what was done in Young v. Bristol Aeroplane Co., [1944] 1 K.B. 718, where



three exceptions to the application of the rule in *Velazquez* [the stare decisis rule] were stated. One of these (the first incidentally) is that “the court is entitled and bound to decide which of two conflicting decisions of its own it will follow”. [p. 729]. There is authority also for the proposition that where two cases cannot be reconciled, the more recent and the more consistent with general principles ought to prevail “. (emphasis added)

28. In another Canadian case of *Jamt v Schuurman* [1985] 426 (BC SC), it was held that where there is a division of opinion between trial judges of the same court, the practice is to follow the more recent decision or decisions, provided that they have considered the conflicting decisions. It was further held that judgments which have been accepted and followed in later cases may have greater weight than those which have not been followed. The authorities cited above are more recent and considered the authority of *Michael Rotich* (supra). The holding in the latter case has not been followed in subsequent cases.

29. In the case of *Justice Jeanne W Gacheche & 5 others v Judges and Magistrates Vetting Board & 2 others* [2015] eKLR, a five Judge bench of the High Court held as follows:

“The circumstances in which a Court may decline to follow a decision which would otherwise be binding on it are:

- (a) where there are conflicting previous decisions of the court; or
- (b), the previous decision is inconsistent with a decision of another court binding on the court; or
- (c) the previous decision was given per incuriam.

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

30. In the case of *Samuel Cheruiyot Arap Langat v Republic* [1982] eKLR, the court held that:

“In the application for bail pending trial made before this court under section 123 (3) of the *Criminal Procedure Code*, Mr Khaminwa has submitted that under the laws of this country there is no animal known as “a holding charge”. With respect, I agree with Mr Khaminwa. There seems to be a dangerous precedent being introduced in our legal system by the prosecution of bringing an accused person to court on what has been referred to by the prosecution as a “holding charge”. Neither *the constitution* nor the criminal law of Kenya provides for such a charge. That being the position it is necessary to point out that the courts are not going to allow an accused person to be indefinitely held in custody because he is on what the prosecution call a holding charge, a phrase which is meaningless in the legal language of Kenya.....The impression one gets from the phrase “a holding charge” is that the prosecution has not decided the offence with which to charge the accused but they would like him to be kept in custody on a provisional charge while the prosecution make up their mind, and in the ultimate they may not even charge him. If such practice were allowed to go on, it would grossly infringe the citizens’ freedom and fundamental rights. The police would slacken down in their investigations which would lead to many persons being brought before the court before investigations are complete and the exact charge laid.”



32. Having made the above analysis, I would, as I am entitled to, respectfully disagree with the notion that continued detention of the respondents would be unconstitutional simply because there is no charge or holding charge. There is no such requirement in law.
33. I have meticulously and eagerly considered the application, applicable law as well as the submissions made by the parties. Upon determination of the application and depending on the decision of the court, there are three options available:
1. The court may release the respondents unconditionally;
 2. The court may release the respondents with conditions to ensure that the respondents:
 - a. do not, while on release, commit an offence, interfere with witnesses or the investigations in relation to the offences for which they have been arrested;
 - b. avail themselves for the purpose of facilitating the conduct of investigations and the preparation of any report to be submitted to the Court dealing with the matter in respect of which the respondents stand accused; and
 - c. appear at such a time and place as the Court may specify for the purpose of conducting preliminary proceedings or the trial or for the purpose of assisting the police with their inquiries.
 3. make an order for the continued remand of the respondents in custody.
34. Whatever decision that the court makes in line with the aforementioned, such decision must be made judiciously and not arbitrarily, whimsically nor idiosyncratically. I will consider the viability of each of the above options. The respondents in Misc. Criminal Application No. E077 of 2023 were first brought to court on 2/5/2023. As already indicated, it is the third time that the State is seeking orders for their continued detention pending charge. This is a clear indication of the gravity of the matter and complexity of the investigations involved. It is not in dispute that several bodies have since been exhumed from the Shakahola forest and that the deaths have generally been attributed to a religious outfit headed by the 1st respondent Mr. Paul Nthenge Mackenzie. The record indicates that several offences are under investigation.
35. The State indicates that the investigations are yet to be completed. Paragraph 13 of the grounds relied upon in the application by the State contains a list of fourteen (14) offences under various Statutes. The State alleges that the evidence gathered so far has disclosed reasonable grounds to believe that the respondents, individually or by pact committed the offences. From the material on record since inception of the matter up to the time of canvassing the instant application, it cannot be said that the matter is frivolous. The investigations entail grave issues that ought to be unearthed. The respondents vide their submissions, tend to agree that there is need for thorough investigations but contend that the respondents are entitled to be released on bond or bail pending investigations. Given the circumstances of the matter, it would not be prudent to release the respondents unconditionally. Consequently, the first option is not available to the court.
36. Can the respondents be released on conditional bond terms pending investigations? In my Ruling delivered on 10/5/2023, I pointed out that under Article 49(1)(h) of *the Constitution*, 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. I further cited Article 29 which provides in part that every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial,



except during a state of emergency, in which case the detention is subject to Article 58. In the initial application and subsequent Ruling delivered on 10/5/2023, I was guided by the following principles, which I find necessary to recapitulate:

- 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.

37. In my view, the above principles apply at all stages where the issue of bond is to be canvassed. As already stated, the 1st to 17th respondents in Misc. Criminal Application No. E077 of 2023 have been in remand custody for over 90 days now. Section 36A (10) of the *Criminal Procedure Code* provides that:

“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 ninety days.”

38. The foregoing implies that at the expiry of ninety days of remand pending charge, the State should either cause the suspect to be released unconditionally, or released on bond, or be formerly charged. There is no room for extension of the period of ninety days, for offences other than those under the *Prevention of Terrorism Act* (POTA).

39. I have looked at the offences currently under investigation as disclosed under paragraph 13 of the grounds on the face of the application. All the offences are under the *Penal Code* and other Statutes save for the offences of Radicalization, Committing a terrorist act and Recruitment. Therefore, as far as the respondents in Misc. Criminal Application No. E077 of 2023 are concerned, the State is time barred in terms of seeking extension for continued detention, unless the extension is being sought for the offences under the POTA. To this end, the State is obliged to demonstrate that all the said respondents are being investigated for offences under the POTA and that there are compelling reasons to continue detaining them pending charge.

40. A summary of the grounds relied upon by the State is as follows:



1. The minds of the victim witnesses are indoctrinated and radicalized and if the respondents are released, this will cause fear and interfere with the recovery processes and ability to testify;
 2. The evidence gathered so far discloses reasonable grounds to believe that the respondents either individually or by pact committed several offences. There is uncontroverted evidence indicating that the respondents caused the disappearance of their own children and have failed to account for them;
 3. The identification parades are yet to be completed. That apart from the respondents herein, 41 out of the 65 survivors who were at the rescue centre are now being treated as suspects and will now be part of the identification exercise. There are child witnesses who are still traumatized and unable to participate in the identification parades;
 4. The investigators need to interview the respondents and record statements under charge and caution, which exercise may be thwarted if the respondents are released;
 5. The respondents, with the exception of Mr. Mackenzie and his wife, are yet to disclose their fixed abodes other than their last residences in Shakahola. As such, they pose a flight risk if released. It is only their home counties that are known and their relatives are still embittered by loss of minors or assets disposed of or both;
 6. Preventive detention is necessary as there is compelling evidence pointing at radicalization being the vehicle used to cause mass deaths by fasting. That if released, the respondents are likely to continue disseminating and spreading the extreme religious doctrines, thereby further exposing the community to radicalization and religious violent extremism. Acts such as suicide may be triggered by the radical ideologies.
 7. As a matter of national security, there is need for deradicalization, disengagement, rehabilitation and reintegration of the respondents, whether or not they are convicted. That the rights of the respondents do not override the public interest in protecting families, communities and public conscience from exposure to eventual violent self-harm;
 8. The nature of the case warrants an order for social inquiry reports addressing the question of release and seeking the views of victims and victim complainants before a decision to release the respondents on bail is made;
 9. The pending lines of inquiry would require either the availability of the respondents or material evidence to facilitate completion of investigations before decisions to charge are made. Some of the pending matters of investigations are DNA sampling and profiling of about 100 bodies recently exhumed, DNA matching of all the exhumed bodies to identify the deceased. The State argues that identification of the deceased is material in drafting the particulars of the charges. The State also mentions aging of each of the body using modern technology, completion of post mortem forms, identification parades and further interviews and statement recording;
 10. Upon completion of investigations, the ODPP will require time to review the police files so as to make a decision to charge. The State avers that so far, there are about 90 files to be reviewed. Proper case management will require that the trial process is not triggered when investigations are incomplete.
42. The above grounds are buttressed by an affidavit sworn by Inspector (I am informed that he is now Chief Inspector) Raphael Wanjohi, who is one of the investigators herein. The investigating officer deposed that the investigations have confirmed that adoption and promotion of an extreme religious



belief is at the core of the mass deaths and unregistered burials, hence having a bearing on the offence of radicalization under the POTA. The investigating officer further deposed that the case has proved to be complex, costly and challenging, given the altered mindsets of the suspects, co-operating witnesses and victim witnesses. That the necessary trauma sensitive approach by the investigators has affected the turn round time granted to the State.

43. The affidavit by the investigating officer reveals that investigations have tremendously progressed and headed towards completion but the tasks that remain leave crucial gaps that are necessary to be completed before the police can place about 70 to 90 police files for review and decision to charge. It was further revealed that out of the 65 rescued persons who were at the rescue centre, 41 of them are now being treated as suspects and have already been presented to court vide Shanzu Misc. Criminal Application No. E152 of 2023. The State appreciates the fact that the court granted them 90 days as far as Misc. Criminal Application No. E077 of 2023 is concerned. However, the affidavit mentions the following challenges:
- a. The police lost around 30 days from mid-June to Mid-July when identification parades could not be organized or conducted against the respondents as they were weak and emaciated. That managing the hunger striking respondents and fire-fighting the 65 survivors were unforeseen incidences that put a strain on limited investigative resources with the consequences of reducing productivity despite intensive efforts in counselling the survivors with a view to meaningful participation with them;
 - b. The schedule for identification parades by child witnesses was pushed ahead because of the school calendar and the fact that trauma counselling was necessary for them so as to limit Post Traumatic Stress Disorders (PTSD);
 - c. The number of parades and participating witnesses is large and there will be a need to extend the identification parades to some of the 41 respondents before court No. 1 at Shanzu;
 - d. There are four witnesses under protection who cannot be allowed to meet and mingle because of the danger of re-traumatization. Consequently, this has slowed down the pace of the identification parades. I understand this to imply that the four witnesses cannot participate in the identification parades on the same day.
44. It is deposed in the supporting affidavit of the investigating officer that the police had to extend investigations to over 12 Counties in order to get to over 100 persons of interest to obtain information. That from the statements recorded so far, the relatives of the respondents are still confused, hurting and bitter for what they believe to be the inevitable eventuality of the death of their family members. The investigating officer is of the opinion that it would not be prudent for the court to unleash the respondents to their communities before their families are counselled and prepared.
45. The investigating officer made an interesting observation that the nature of the case is that while the time granted for investigations is fixed, the work keeps on increasing. I would add that from the material on record, it would appear that as the period granted decreases, the nature of the investigations keeps evolving and the lines of inquiry keep increasing. The affidavit by the State reveals that as at the time of filing the instant application, 425 bodies had been exhumed and more mass graves were yet to be dug up. The investigating officer annexed documents showing the challenge that has been faced in dealing with the child witnesses. There is also a letter from the Government Chemist indicating that the state of the DNA samples collected has been a challenge due to the various stages of decomposition and as such, the DNA analysis is bound to take longer.



46. The investigating officer attached a matrix containing the profiles of some of the respondents. It is important for me to delve into the matrix as the information contained therein is relevant for a proper determination of the instant application. The profiles are as follows:

1. Paul Nthenge Mackenzie-1st Respondent in Misc. Criminal Application No. E077 of 2023.

47. Preliminary findings indicate that he is the Chairman of Good News International Ministry and leader of the Good News International Church. That he was a Co-director of a media house that was used to deliver apocalyptic/end time sermons constituting the subject of the investigations. It is alleged that he delivered radical sermons through his church, TV station, Youtube channel, seminars and Audio/video tapes to his followers. That he invited his followers to Shakahola forest and compelled them to fast to death so as to go to heaven. It is reasonably suspected that he was directly responsible for the mass deaths and unlawful burials in Shakahola.

2. Robert Kahindi Katana- 2nd Respondent in Misc. Criminal Application No. E077 of 2023.

48. He hails from Dera village in Tezo location, Kilifi County. That he is a member of the Good News International Church. His wife and three children of tender age are missing.

3. Kelvin Sudi Asena alias Alfred Asena- 3rd Respondent in Misc. Criminal Application No. E077 of 2023.

49. His rural home is Luvuka village in Vihiga County. His wife was rescued from Shakahola forest and their five children, three of whom are below the age of ten and two teenagers are missing. Preliminary findings indicate that he is a member of the Good News International Church and resided at Shakahola. That he withdrew the children from school, burnt academic and property records then left for Shakahola in 2021.

4. Stephen Sanga Muye- 4th Respondent in Misc. Criminal Application No. E077 of 2023.

50. He is from Dindiri village in Kilifi County. He is a member of Good News International Church and was the head of the Mtwapa branch. He is regarded as one of the Church Trustees and was one of the leaders in Shakahola. It is alleged that his wife is missing and his mother in-law was rescued from Shakahola.

5. Elton Vundi Kyalo alias Gideon Mbithi Kioko-5th Respondent in Misc. Criminal Application No. E077 of 2023.

51. He is from Kwanga village in Kitui County. He is said to have been a member of the Good News International church and was residing at Shakahola. His wife and two children are missing.

6. Joseph Bokole Bimramba alias Joseph Kenga Bokole- 6th Respondent in Misc. Criminal Application No. E077 of 2023.

52. His rural home is Mida in Kilifi County. He is said to have been a member of the Good News International church and resided at Shakahola. His wife and child are missing.

7. Stephen Ominde Lwangu- 7th Respondent in Misc. Criminal Application No. E077 of 2023.

53. He was found at Shakahola and said to have been a member of the Good News International church. Apart from his name, the police have no details about his background. It is not known where he hails



from and whether he has a family. His true identity is yet to be established. He declined to record a statement.

8. Smart Deri Mwakalama- 8th Respondent in Misc. Criminal Application No. E077 of 2023.

54. He is from Kijiwetanga area in Malindi, Kilifi County. As at the time of filing the application, he was yet to record a statement. Preliminary findings indicate that he is a member of the Good News International church and said to have been mentioned by several witnesses as one of the leaders in Shakahola. That he ensured that he enforced the directive to fast. His wife was rescued from Shakahola and their six children are missing. Statements from witnesses indicate that his children and a grandchild died in Shakahola due to fasting and were buried there.

9. Lucas Owino Ogola- 9th Respondent in Misc. Criminal Application No. E077 of 2023.

55. He is from Kisumu Ndogo village in Siaya County. He is said to have been a member of the Good News International church. The Biodata does not indicate whether he has a spouse and children but the preliminary findings are exactly the same as those for Smart Mwakalama mentioned hereinabove. It appears to be an error.

10. Zablon Mchooka Atanda- 10th Respondent in Misc. Criminal Application No. E077 of 2023.

56. He is from Lukohe village in Kakamega County. The information received is that he is married and has four children. That the children and their mother all stay in Nairobi but the investigators are yet to confirm the position. Preliminary investigations reveal that he is a member of the Good News International church and resided at Shakahola where he was arrested.

11. Daniel Makori Oyaro- 11th Respondent in Misc. Criminal Application No. E077 of 2023.

57. He is from Mabuko village in Nyamira County. He is married with five children but is said to have travelled alone to Shakahola. He is said to be a member of the Good News International church. None of his family members are missing.

12. Mark Kiogora alias John Kiara- 12th Respondent in Misc. Criminal Application No. E077 of 2023.

58. He is from Kanjagi village in Meru County. He is yet to record a statement. The suspect was residing at Shakahola and his wife was rescued. The information contained in his profile is contradictory. In the background information, it is indicated that he is the father to five missing children "listed above." There is no list of children given. In the preliminary findings, it is indicated that the police are yet to establish whether any member of his family is missing.

13. Fredrick Kirimi Kaungi alias Frank Karimi- 13th Respondent in Misc. Criminal Application No. E077 of 2023.

59. He is said to be from Buriemara village in Meru County. It is alleged that he declined to record a statement. He was residing at Shakahola with his wife and two children of tender age. Preliminary findings indicate that he is a member of the Good News International church and that his spouse and two children are missing.



14. Baron Chahenza Lung'anyi alias Collins Kabaya- 14th Respondent in Misc. Criminal Application No. E077 of 2023.

60. He is from Gasianga village in Vihiga County. Preliminary findings indicate that he was married and left his home for Shakahola together with his three children. That he is a member of the Good News International church and his spouse and children are all missing.

15. David Ambwaya Amany- 15th Respondent in Misc. Criminal Application No. E077 of 2023.

61. He is from Ekamanji village in Kakamega County. Preliminary findings indicate that he is a member of the Good News International church and resided at Shakahola forest with his wife and five children, all minors. The names of the children are yet to be established. He is the brother to the 17th Respondent in Misc. Criminal Application No. E077 of 2023 and a cousin to the 6th Respondent in Misc. Criminal Application No. E101 of 2023. His other cousin is said to have been rescued from Shakahola forest together with his wife and four children. The preliminary findings further indicate that the respondent is a member of the Good News International church and his wife and five children whose names are yet to be established are still missing.

16. Emmanuel Amani Kilumo- 16th Respondent in Misc. Criminal Application No. E077 of 2023.

62. He is from Ezamoyo village in Kilifi County. It is alleged that he declined to record a statement. Preliminary findings indicate that he is a member of the Good News International church and was residing at Shakahola with his wife, two children of tender age and a brother. The findings further indicate that his wife, the two children and brother are missing.

17. Enos Amany alias Amos Ngala Amany- 17th Respondent in Misc. Criminal Application No. E077 of 2023.

63. He is from Ekamanji village in Vihiga County. He is said to be a member of the Good News International church and resided at Shakahola together with his wife and seven children. Preliminary findings further indicate that one of his daughters escaped from Shakahola and has since recorded a statement with the police. He is the brother to the 15th Respondent in Misc. Criminal Application No. E077 of 2023 and a cousin to the 6th Respondent in Misc. Criminal Application No. E101 of 2023. His other cousin is said to have been rescued from Shakahola forest together with his wife and four children. The respondent's wife and six children who were living with him at Shakahola are said to be missing.

18. Charles Kalume Charo alias Musa Suleiman- 1st Respondent in Misc. Criminal Application No. E101 of 2023.

64. He is from Bale village in Mombasa County. He is said to be a member and leader of the Good News International church and resided at Shakahola with his wife, three children and two grandchildren. Preliminary findings indicate that his spouse, three children and two grandchildren are missing. One of the missing children is said to have quit her job as an Air Hostess with Qatar Airways and joined the Respondent at Shakahola. This is a story that went viral on all forms of media.



19. Ernest Safari Kazungu Katana- 2nd Respondent in Misc. Criminal Application No. E101 of 2023.

65. He is from Kakoneni village, Malindi in Kilifi County. Preliminary findings indicate that he is a member of the Good News International church and resided at Shakahola. The profile indicates that he has a spouse but it is yet to be established whether the spouse or any member of his family is missing.

20. Newton Kimathi Ikunda alias Kim- 3rd Respondent in Misc. Criminal Application No. E101 of 2023.

66. He is from Ngirine village in Meru. He is a member of the Good News International church and resided at Shakahola with his wife and three children of tender age. His wife and three children are missing.

21. Peter Omondi- 4th Respondent in Misc. Criminal Application No. E101 of 2023.

67. He is from Kaodek village in Siaya County, as per the statement that he gave to the police. At the time of filing the application, his records from the National Registration Bureau had not been received. Preliminary findings indicate that he is a member of the Good News International church and resided at Shakahola with his father and step-mother. The father and step-mother are missing.

22. Gerishon Musyoka- 5th Respondent in Misc. Criminal Application No. E101 of 2023.

67. The only information given is that he is from Machakos. His true identity is yet to be established as he does not seem to have a national identity card. The information given is that his father sold a parcel of land in Machakos and a shop in Nairobi and asked the respondent to accompany him to Shakahola. He was residing with his father who is now missing.

23. Eric Omolo Adundo- 6th Respondent in Misc. Criminal Application No. E101 of 2023.

68. The respondent is yet to record a statement with the police. He is from Lodonyi village in Vihiga County. He is said to be a member of the Good News International church and was residing at Shakahola with his wife and four children. His brother is said to have been rescued from Shakahola. His two cousins are respondents herein. The profile contains conflicting information on the respondent. In one part, it is indicated that his wife and children were all rescued from Shakahola whereas under the preliminary findings, it is indicated that his wife and children are missing.

24. Julius Katana Kazungu- 8th Respondent in Misc. Criminal Application No. E101 of 2023.

69. He is said to be from Ganda area in Malindi, Kilifi County. The respondent is yet to record a statement. That he is a member of the Good News International church and resided at Shakahola with his two children and another belonging to a relative. All the children are said to be missing.

25. Lucas Karisa Dhuri- 9th Respondent in Misc. Criminal Application No. E101 of 2023.

70. He is said to be from Msabaha village in Malindi, Kilifi County. The respondent is yet to record a statement with the police but the preliminary findings indicate that he is a member of the Good News International church and resided at Shakahola with his wife and daughter. The wife was rescued from Shakahola forest but the child of very tender age is missing.



26. Evans Kolombe Sirya- 10th Respondent in Misc. Criminal Application No. E101 of 2023.

71. He is said to be from Kisimani village in Malindi, Kilifi County. The respondent is yet to record a statement with the police but preliminary findings indicate that he is a member of the Good News International church and resided with his wife and six children at Shakahola. The wife and all the children who are minors are missing.

27. Titus Munyao Musyoka alias Justus Makau Musyoka- 11th Respondent in Misc. Criminal Application No. E101 of 2023.

72. He is said to be from Shirikisho village in Tana River County. It is not clear whether or not he recorded a statement with the police. The preliminary findings indicate that he is a member of the Good News International church and resided at Shakahola forest with his wife and seven children, all minors. It is further indicated that his wife was rescued whereas all the seven children are missing.

28. Michael Baya Mweri- 12th Respondent in Misc. Criminal Application No. E101 of 2023.

73. He is from Bondeni village in Malindi, Kilifi County. The respondent is yet to record a statement with the police. Preliminary findings indicate that he is a member of the Good News International church and resided at Shakahola with his wife and two children. The names of the two children are yet to be established but it is said that the spouse and two children are missing.

29. Alex Munangwe Odali alias Alex wa Galilaya- the lone Respondent in Misc. Criminal Application No. E130 OF 2023.

74. He is said to be from Roret area in Nandi County. Preliminary findings indicate that he is a member of the Good News International church and was residing at Shakahola with his wife and two children of tender age. Preliminary findings indicate that his wife was rescued from Shakahola whereas the two children are missing. It is indicated that he informed the police that the two children died at Shakahola while he was in Nairobi where he worked.

75. I have deliberately avoided to mention the profiles of the 18th respondent in Misc. Criminal Application No. E077 of 2023 (Rhoda Mumbua Maweu) and the 7th respondent in Misc. Criminal Application No. E101 of 2023 (Joseph Juma Buyuka). This is because the former is out on bond whereas the latter is deceased and thus not subjects of the application for extension of the detention period. When the application was filed, the respondents asked for time to file their responses. Time was granted but on the date of the hearing, no response, save for grounds of opposition that were filed by the 1st respondent in Misc. Criminal Application No. E101 of 2023, was received. The grounds of opposition are in the form of points of law and not matters of fact. The result is that all the matters of fact deposed to in the supporting affidavit of the investigating officer remain unrebutted. This application is similar to the earlier applications for extension of time that I have already dealt with. As such, I may occasionally “regurgitate” my observations in my earlier rulings, particularly where similar grounds have been relied upon by the State.

76. The material on record and as tendered by the State indicates that although several offences under various Statutes are under investigation, they all revolve around the “wild animal” known as Radicalization. This is an offence under the POTA. I wish to emphasize that at this stage and in these proceedings, the State is not required to prove that the respondents engaged in committing the offence of Radicalization or any of the offences under investigations. The simple reason for this is that the respondents are yet to be charged with any offence and are thus not on trial. What the State needs to



establish is that there are reasonable grounds to show that the respondents could have been involved in the commission of the offences under investigation and that their continued detention is necessary for purposes of completion of the investigations.

77. Having considered the submissions by the respondents, I get the unfortunate impression that they may not have taken time to read and analyse the application by the State together with the affidavit in support thereof and the annexures. I disagree with the respondents on their submission that the State has not demonstrated what they have done so far and what is left to be done. In considering what the State or investigators have done and what remains to be done, due regard must be given to the previous applications that have been made herein seeking extension of the period of detention. In all the applications, the State has always endeavoured to state what has been done so far and what remains to be done.
78. I agree with the respondents that they have a Constitutional right to be presumed innocent until the contrary is proved. However, this does not mean that no detention pending charge can be sanctioned by the court or that the court can simply wave *the Constitution* and order for their release just like that. *The Constitution* itself envisages a situation where an arrested person may be denied bond or bail pending charge if there are compelling reasons to do so. When a person is denied bond or bail in such circumstances, it cannot be an acceptable or plausible argument that they are being treated like an accused person on trial or that their right to be presumed innocent is being violated. It is trite law that the right to bond is not absolute.
79. However, 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).

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."

80. I must emphasize that the respondents are not on trial yet. As such, the State is not obligated to adduce evidence to show that they committed the offences under investigation as alluded to by the respondents in their submissions. 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 previous application, 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. In the instant application, the State has once again attached a matrix bearing the profiles of the respondents herein and information on their missing relatives said to have been residing at Shakahola with the respondents. Similarly, none of the respondents has disputed the information either by way of affidavit or even in their submissions through counsel.

81. The information so far submitted by the State indicates that all the respondents apart from a few, were residing with members of their nuclear families at Shakahola and that some or all the other members of their families are missing or cannot be accounted for. As already indicated, the allegation of missing close relatives has never been disputed. The only response from the respondents on the issue was made by Mr. Makasembo who submitted, quite passionately, that children can disappear under various circumstances. That they can be kidnapped and taken to a foreign country or run away and turn into vagabonds. The allegation on the missing relatives was made more than three months ago. It has never been disputed by the respondents that they were residing at Shakahola with the relatives said to be missing.
82. I appreciate the respondents' constitutional right to remain silent and refuse to give incriminating statements and agree with their counsel on the submission that the respondents are not under any duty to co-operate with the investigators. However, where it is alleged and suspected that the respondents' relatives who were residing with them at Shakahola are missing and believed to be among the dead, and the respondents opt to remain silent and thus fail to account for the missing relatives in the exercise of their right to remain silent, there is reasonable suspicion that indeed, their missing relatives could be among the dead. It would not be incriminating for the respondents to state that they do not know where the relatives are or state where they are if alive. If the court were to go by Mr. Makasembo's assumption that they could have been kidnapped or run away from home, then the court would have expected at the very least, an allegation that reports were made to the police on the missing relatives. The deafening silence on the part of the respondents causes great anxiety and lends credence to the State's apprehension on the missing relatives. It is for this reason that the DNA analysis and matching become necessary.
83. Mr. Makasembo submitted that human beings are mortals and die of various reasons. That the State should not confine its mind to the aspect of starvation as the cause of death. I agree that human beings are mortals and that every being shall have to die someday. However, in a situation where it is reported that over 400 bodies were buried without dignity in shallow mass graves in the same locality and that their deaths are unreported and unregistered; and nobody is laying claim to the bodies, there is reasonable suspicion to believe that the deaths may not have been caused by natural causes. In such circumstances, it is only prudent that proper investigations be done.
84. Mr. Makasembo further asked for evidence to show that the people who died never went to heaven and wondered whether the prosecution counsel had communicated to God. Mr. Jami rightly responded that it is a question that may be asked during the trial in the even the respondents are charged. Furthermore, the issue for investigation is not whether or not the deceased went to heaven but the manner in which they met their deaths. I also tend to think that the submission by Mr. Makasembo was frivolous. This is a serious matter of national and international concern in which hundreds of deaths are being investigated. It is not a matter in which Counsel can jest about in such an insensitive manner.
85. For the rest of the respondents, the preliminary findings by the investigators are as follows:
 - a. None of the family members of Paul Nthenge Mackenzie is missing. However, he is considered the mastermind of the extreme religious ideologies and person responsible for the mass deaths at Shakahola;



- b. The true identity and background of Stephen Ominde Lwangu is unknown. There is no information on where he comes from nor his family;
 - c. There is no information on any missing relatives of Lucas Owino;
 - d. The status and whereabouts of the wife and children of Zablou Atanda is yet to be established;
 - e. Daniel Makori is said to have gone to Shakahola alone. His family is intact;
 - f. There is contradictory information as given by the State on the missing family members of John Kiara alias Mark Kiogora;
 - g. There are no missing relatives of Rhoda Mumbua Maweu;
 - h. It is yet to be established whether there are any missing family members of Ernest Kazungu; and
 - i. There is conflicting information from the State on the issue of missing family members of Eric Omollo.
86. There is a letter from the Government Chemist at Mombasa confirming receipt of DNA samples but certifying that the exercise is bound to take long. The State is on record as having said that most of the bodies that were exhumed were either moderately or severely decomposed. The State has previously indicated that for moderately and severely decomposed bodies, it would take a considerable time to analyze and match the DNA profiles. This challenge has been confirmed by the letter from the Government Chemist. I agree with the State that without identifying the bodies that have since been exhumed, the State may not have any charges to prefer against the respondents with regard to the deaths.
87. There is also a letter from the Children department and an unsigned letter from an alleged Psychologist, indicating that the child witnesses are not ready to participate in any identification parades owing to trauma. That they need further counselling. The State also indicates that there has been a challenge with the rescued survivors. That 65 survivors were at a rescue centre. It would appear that the State's efforts at counselling and treatment of the survivors has not borne fruit since 41 of them are now being treated as suspects. I agree that it is a setback on the investigations and a pointer to the magnitude of the problem that the State could be dealing with.
88. Given the above information, would it be prudent to release the respondents on bond at this stage? Where there is unrebutted information that the respondents were residing at Shakahola with their family members who are now missing and it is reasonably suspected that they could be among the deceased, and the respondents have remained tight lipped about the whereabouts of the missing relatives, who are said to have been under their care, would a reasonable court release such respondents before it is established whether the missing relatives are part of the deceased? I think not.
89. I have considered all the relevant factors and circumstances of the matter. In his submissions, Mr. Makasembo asked why this matter was an exception and what was special about it. I have previously held that the matter is complex and demanding. It is always a back and forth for the investigators. The investigating officer deposed that as at the time of filing the instant application, a total of 425 bodies had been exhumed. If the allegations by the State are anything to go by, we are dealing with 425 deaths whose causes are linked to an extreme religious ideology. It is said that more mass graves are yet to be dug out, an indication that the number of bodies is likely to increase with time. The identities of the deceased are yet to be established and it would appear that the deaths may not have been reported nor registered.



90. No such incident has ever occurred in the country before. From the material on record, and without appearing to judge the respondents, the investigators and by extension the country could be facing a different or sophisticated kind of extremism. The nature of the investigations herein is such that apart from gathering evidence to establish whether crimes were committed, the investigators have to deal with counselling and trauma management of the survivor victims. The scope of the investigations is also wide. It would appear that the offences under investigation could have been hatched and committed in secrecy with multiple victims and suspects involved. The investigations as shown, would entail the unearthing of serious technological evidence, hence it may take longer for the investigators to collect relevant and admissible evidence.
91. The Supreme Court of India in the case of *Bachhan Singh v State of Panjab* [1980] AIR SC 898, devised the doctrine of Rarest of rare case with regard to the death penalty in capital offences. However, the phrase was first coined in the case of *Machhi Singh v State of Punjab* [1983] AIR SC 1957. According to this doctrine, the general rule is that life imprisonment should be imposed as a sentence for capital offences and the death penalty is the exception. That the death penalty should be imposed only in the rarest of the rare cases and after considering the mitigating and aggravating factors. The manner or commission of the crime and the magnitude of the victims would place a case under the doctrine. For instance, where a person kills several people in a spree or in a brutal manner, the doctrine may be applied to impose the death sentence.
92. This doctrine is invoked in extremely exceptional circumstances, where such crime is totally new and un-imaginable in front of the Judiciary and it has caused a grievous injury to the maximum extent that is irreparable or cannot be restituted. In the case of *Jaswinder Singh v State of Haryana* CRR 1780/2021 (O&M), the Punjab and Haryana High court in India invoked the doctrine in a different manner and held that in narcotic drugs and psychotropic substances cases, extension of the period of remand for purposes of investigations ought to be given in the rarest of rare cases. The State has exhausted the period sought in their initial applications in all the three matters. Drawing an analogy from Indian jurisprudence, I would invoke the doctrine and hold, as I hereby do, that a further extension for the period of detention after the State has exhausted the period initially prayed for would only be granted in the rarest of rare cases. Is this such a case?
93. My answer to the above question would be in the affirmative. This is a matter that can be considered to be the rarest of the rare owing to the circumstances already mentioned hereinabove. I still agree with the State that for any charges to be preferred in relation to the deceased persons, their identities ought to be established. Furthermore, it has to be established whether they are related to the respondents herein and whether they are their missing relatives. Since exhumation is yet to be completed as well as DNA analysis and matching, and given the fact that the respondents' last known address is Shakahola which has since been declared a disturbed area and thus out of bounds coupled with the fact that the respondents are many and from different Counties, I do not think that releasing them on bond on whatever conditions would be appropriate.
94. There is a likelihood that if the respondents are released before the pending crucial exercises are complete, investigations are likely to be hampered either because of non-availability of the respondents or unreasonable delay or both. It is also on record that the exercise of conducting identification parades is yet to be completed. The State has explained the challenges involved. If the respondents are released before the identification parades are done and completed, it is highly likely that the parades may not be conducted yet they are crucial in establishing the involvement or otherwise of the respondents in the commission of the offences under investigation.



95. It has been shown by the State that some of the rescued survivors are close family members of some of the respondents. The State intends to procure witnesses from the survivors. The State alleges that it has experienced challenges in managing the survivors since most of them appear to be have been deeply indoctrinated and are sympathetic of the respondents. 41 of the survivors are now suspects after having stayed with the other survivors for a while. Given the circumstances, it is my opinion that if the respondents are released at this stage on whatever terms, bearing in mind the nature of the allegations against them, witness interference is likely. The investigating officer deposed that there is a child witness who relapsed because of just visiting Shakahola. Judging from the material before court, interference of witnesses in this case may not even require an overt act on the part of the respondents. If the allegations by the State are anything to go by, the mere act of releasing the respondents may be sufficient to interfere with the witnesses and ultimately the investigations.
96. I think I have said enough to show that special and exceptional circumstances prevail in this case. The State maintains that the respondents are flight risks. Although the investigators have managed to establish the rural homes of most of the respondents, their last known address is Shakahola. Most of the respondents had relocated from their rural homes to Shakahola. As already pointed out, Shakahola is a no-go zone for the time being. That being the case, it cannot be expected that the respondents will return to Shakahola if released. It was deposed by the investigating officer that some families are yet to come to terms with the fact that their family members are missing. I agree that the respondents are Kenyan citizens with a right to settle anywhere. However, at this point in time, they are persons of interest in the investigation herein. It is important that even as the court considers their release, there is an assurance that they will be available for investigations. Availability will require that their places of abode upon release be known.
97. The material tendered by the State reveals that most of the respondents left their homes for Shakahola with the intention of never to return to their rural or other homes. Given the nature and gravity of the matter, I do not think it would be prudent for this court to release the respondents without doing a background check of where they are expected to go. It is also important for the court to establish whether they will be accepted and accommodated at their rural homes or wherever they may intend to go. Given the nature of the matter, the material presented before this court, what is in the public domain and the fact that the respondents have already been convicted by the court of public opinion, it is not expected that upon release, they would be given a heroes' welcome or red-carpet reception with showers of confetti by their kin and communities.
98. On this, I agree with the State that there is need for a social inquiry to be conducted before the respondents are released. Mr. Makasembo did not oppose the prayer for a social inquiry report. Mr. Kalimbo opposed the prayer on the grounds that it had been brought too late in the day and that it was a means of seeking further detention of the respondents. I am aware that the respondents are not facing any charges yet but unfortunately, they have been prosecuted and convicted by the court of public opinion. The State has demonstrated that before this court sends them back to the community, it is important to establish whether it is safe for them. In view of the foregoing, I agree with the State that the respondents are still flight risks.
99. The State maintains that this is a matter of great public interest and that the public interest outweighs the respondents' right to liberty. The fact that the matter is of great public interest is undeniable. In my Ruling delivered on 3/7/2023, I observed that the court had 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.



100. I reiterate that 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 47 days. Having considered the application in its entirety as well as the submissions by the parties and applicable law, I am satisfied that the State is acting in absolute good faith and that the continued detention of the respondents without charge is inevitable due to existing exceptional circumstances. I am also persuaded that 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 need to preserve the integrity of the administration of justice and the interests of victims of the crimes.
101. The respondents may tend to think that the court may not have been impartial in handling this matter and that their rights have been infringed by the lengthy detention without charge or trial. To them, justice would mean that the court orders for their release. The question that I wish to pose is this; whose justice are we seeking? What of the over 400 deceased persons whose identities and circumstances under which they met their death are unknown? What of the families who live in anxiety and confusion for not knowing the whereabouts of their loved ones? What of the State which appears to have lost a large number of its citizens under mysterious circumstances? My view is that justice demands that the matter be thoroughly and properly investigated so that what happened at Shakahola is brought to light.
102. At the end of the day, if investigations reveal that the respondents or any of them is not culpable, justice will have been served. The course of justice is not a smooth ride. It takes a lot of sacrifice and more often, suffering. From the material presented to court since inception of these proceedings, I disagree with the respondents' suggestion that the State has turned these proceedings into a circus or that the State is playing to the gallery. Counsel for the 1st respondent in Misc. Criminal Application No. E101 of 2023 contended in their written submissions that the continued detention of the respondents was unjustified, a mockery of justice and a violation of their client's rights by both the court and the State. Counsel came on record just the other day and from their submissions, it is evident that they have not read and appreciated the previous proceedings herein. Their submissions also reveal that they may not have read the instant application. I am satisfied that the continued detention of the respondents is justified, for the reasons already given.
103. The respondents did not object to the prayer for the investigators to be granted access to the Prison facilities for purposes of conducting interviews and recording statements. Quite interestingly, Mr. Makasembo on behalf of his clients declined further legal representation from the National Legal Aid Service whereas Mr. Otwoma and Mr. Kalimbo did not oppose the prayer. In view of the objection by Mr. Makasembo and noting that the respondents already have legal representation coupled with the fact that there is no demonstration that substantial injustice is likely to occur if such additional representation is not given, I will disallow the prayer.

Disposition

104. In view of the foregoing, I find merit in the application by the State. Consequently, I make the following orders:
- a. The application by the State for extension of custodial orders is allowed to the extent that the 1st to 17th respondents in Misc. Criminal Application No. E077 of 2023, all the respondents in Misc. Criminal Application No. E101 of 2023 with the exception of the 7th respondent who is since deceased and the respondent in Misc. Criminal Application No. E130 of 2023 shall be remanded in custody for a further period Not Exceeding 47 days from 2/8/2023;
 - b. The National Secretary of Probation and Aftercare Services is hereby directed to conduct and cause to be submitted to court within 30 days from today, social inquiry reports on each of



the respondents, with the exception of the 7th respondent in Misc. Criminal Application No. E101 of 2023, who is deceased;

- c. The officers in charge of Shimo La Tewa, Kilifi and Malindi GK Prisons are hereby ordered to grant access to the investigators herein at the said facilities for purposes of conducting further interviews and recording statements;
- d. The prayer for additional Advocates by the National Legal Aid Service is declined since the respondents are already represented by counsel and it has not been demonstrated that substantial injustice is likely to occur if they are not accorded such further representation;
- e. The earlier orders on the treatment of the respondents while in custody still subsist.

105. For avoidance of doubt, this ruling shall apply to Misc. Criminal application No. E077 of 2023, Misc. Criminal application No. E101 of 2023 and Misc. Criminal Application No. E130 of 2023.

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

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

