Republic v Kenga & 65 others (Miscellaneous Criminal Application E153 & E156 of 2023 (Consolidated)) [2023] KEMC 14 (KLR) (18 August 2023) (Ruling)

Neutral citation: [2023] KEMC 14 (KLR)

REPUBLIC OF KENYA

IN THE SHANZU LAW COURTS

MISCELLANEOUS CRIMINAL APPLICATION E153 & E156 OF 2023 (CONSOLIDATED)

JM OMIDO, SPM

AUGUST 18, 2023

BETWEEN

REPUBLIC ..... PROSECUTION

AND

AMANI SAMUEL KENGA & 40 OTHERS ..... RESPONDENT

AS CONSOLIDATED WITH

MISCELLANEOUS CRIMINAL APPLICATION E156 OF 2023

BETWEEN

REPUBLIC ..... PROSECUTION

AND

MILCAH NASIMIYU MUDAMBWA ALIAS MIRIAM NEKESE ONENTIA & 24 OTHERS ..... RESPONDENT

RULING

A. Introduction.

1. In the consolidated matters, I have before me a total of 66 Respondents in respect of whom the State has applied for orders through the almost identical applications dated 28th July, 2023 (filed in Miscellaneous Criminal Application No. 153 of 2023) and 3rd August, 2023 (filed in Miscellaneous Application No. 156 of 2023).

2. It is important to state that although Feminies Mwoma the 66th Respondent herein was not part of either of the initial applications, the state made an oral application on 10th August, 2023 that she be

joined to the instant consolidated matter and as there was no resistance to the application, the order was issued in the terms sought.

3. The applications by the State are presented or expressed to be brought under Articles 29(a), 49(1)(a), (b), (d), (f), (g) and (h) of *the Constitution* of Kenya, 2010, Sections 33, 34, 35, 40B and 40C of the *Prevention of Terrorism Act*, No. 30 of 2012, Section 36A of the Criminal Procedure Code, Cap 75 Laws of Kenya and Section 43 of the *Legal Aid Act*, No. 6 of 2016 and all other enabling provisions of the law.

4. Save for the prayer that I will shortly reproduce, the other orders sought by the State have either been granted and/or determined or have been overtaken by events.

5. The identical prayers in both matters that is now the balance of the applications, that is subject of this ruling, is couched in the following words:

> "That the Respondents be and are hereby detained at Shimo La Tewa GK, Kilifi GK and Malindi GK Men and Women Remand respectively for a period not exceeding 45 days with 30 days in the first instance, pending completion of investigations and the decision to charge respectively."

6. The grounds upon which the applications are premised are outlined on their faces.

7. The applications are supported by the affidavits of No. 237715 Inspector Raphael Wanjohi, a police officer attached to the Homicide Investigations Department of the Directorate of Criminal Investigations ("DCI"). The deponent describes himself as a member of the team of officers from the DCI who are tasked to investigate what is now in the public domain commonly referred to as the Shakahola Massacre.

8. At the hearing of the applications, Mr. Jami, Assistant Director of Public Prosecutions represented the Applicant ("State") while the Respondents were represented by Mr. Mureti and Mr. Mutegi, both advocates having been instructed by the National Legal Aid Service ("NLAS").

B. Submissions By The State's Counsel.

9. In urging the applications, Mr. Jami submitted that the applications and affidavits in support address compelling reasons that are sufficient for the court to order the detention of the 66 Respondents at the Remand Prison facilities stated above pending the completion of investigations and decision to charge.

10. Mr. Jami told the court that the nature of offences that the Respondents were being investigated for include murder, attempt to murder, manslaughter, manslaughter by suicide pacts, aiding suicide, doing grievous harm to others, radicalization, cruelty and neglect of children, failure to provide minors with necessaries without lawful excuse, failure by parents to take children to school, failure to give notices of deaths and burying without burial permits among other offences under Penal Code, Cap 63 Laws of Kenya and the *Prevention of Terrorism Act* ("POTA") No. 30 of 2012.

11. The learned ADPP premised his submissions under the following titles:

a. The nature of charges under investigations and the strength of the evidence so far collected.

12. Mr. Jami stated that the investigations conducted thus far, though ongoing, had revealed that save for the 45th Respondent – Daniel Geji Yaro alias Dan – the children of the 1st to the 48th Respondents had been reported to be missing under circumstances connected to the affairs at Shakahola. Counsel invited the court to peruse a matrix annexed to the affidavits providing preliminary findings in respect

of all the Respondents as suspects of various crimes. He told the court that investigations had revealed that the 45th Respondent – Daniel Geji Yaro alias Dan – had the role at Shakahola of enforcing the fasting that may have led to the death of several persons.

13. Counsel stated that the offences for which the Respondents are under investigations are felonies, some of which attract the capital sentence and others long imprisonment sentences and that would possibly motivate the Respondents not to return to court or make themselves available for purposes of investigations or trial.

b. The Respondents are a flight risk.

14. Counsel submitted that the last known addresses of all the Respondents was Shakahola, which has since been declared to be a crime scene, hence every possibility that the Respondents committed the crimes associated with Shakahola. There is in the meantime no possibility that the Respondents would be allowed to go back to Shakahola as the public is circumscribed from ingressing into the crime scene in order to allow investigations to be undertaken.

15. Relying on the Deponents affidavits, Mr. Jami further stated that apart from Shakahola, the only other known places of abode of the Respondents are their respective homes. That the investigators have since interacted with some members of the families of the Respondents and most of them are bitter and confused and yet to come to terms with the reality that their children or kin could be dead, having left their homes in the company of the Respondents, for Shakahola, after the Respondents had sold all their belongings.

16. Counsel for the State submitted that if the Respondents were to be released, it would be difficult, in any event, to trace them as they have no funds or sources of income that would enable them to travel back to their homes and thus their addresses or abodes would remain unknown.

c. Protective and preventive custody is warranted.

17. Following the fact that the children of many of the Respondents are missing, it is inconceivable, Mr. Jami argued, for the Respondents to be released to proceed to their homes where their reception is likely to be hostile. That their security may not in the premises be guaranteed.

18. Counsel further stated that the law provides under Section 35(2) of POTA that rights such as liberty may be limited for purposes of preventing a terrorist act, noting that among the offences being investigated by the DCI is the offence of radicalization contrary to Section 12D of POTA.

19. It was Mr. Jami's further argument that as per the mental/psychiatric assessment and psychosocial reports submitted to this court on an earlier application, the Respondents require treatment and psychosocial support as many were found to have been psychologically disturbed, anxious, depressed and even suicidal.

20. That in the situation, protective detention is necessary considering that the Respondents have adopted extreme religious or cultic beliefs which they would most likely pursue by fasting to death as a means of transitioning to heaven or meeting Jesus Christ as per the teachings they are said to have embraced.

d. National security.

21. It is urged by the State that if the Respondents are not detained, they may likely radicalize other persons in the more than twelve counties where they hail from, a state that would jeopardize national security. As such, their detention is necessary for the State to undertake its mandate under Section 40(b) and

(c) of POTA which provisions empower state agencies to engage in deradicalization, disengagement, rehabilitation and reintegration.

22. That in the premises there is the need to ensure that it is safe for the Respondents and the public at large that before their release, they are deradicalized, disengaged, rehabilitated and reintegrated back to their communities.

e. Social inquiries.

23. Noting that the court had made orders on 4th August, 2023 that the Probation and Aftercare Service conducts and causes to be filed in court within a period of 30 days social inquiry reports on each of the 66 Respondents, the State took the position that it would not be possible for the reports to be prepared considering the magnitude and/or number of the Respondents unless they were detained for a period to enable interviews and inquiries to be made and reports prepared.

f. Decision to charge and case management.

24. Mr. Jami submitted that due to the complexity of the investigations on the affairs at Shakahola, the Office of the Director of Public Prosecutions (ODPP) would require sufficient time to make a decision on the nature of charges to be preferred against each of the Respondents. As consequence thereof, Counsel submitted that it would not be unreasonable to detain the Respondents pending a charge or charges.

g. Likelihood of interference with witnesses and investigations

25. The Learned ADPP made submissions that as the exercise of search, discovery and exhumation of dead bodies is still ongoing at the vast Shakahola property and as DNA profiling and autopsies are being conducted on the (about) 445 bodies already exhumed, tracking and tracing of witnesses is necessary and considering the serious nature of the charges that the Respondents may face, there is a likelihood that they will interfere with witnesses and scuttle investigations if they are not detained.

26. It was submitted further by Mr. Jami that it is essential to consider the needs of traumatized witnesses, noting further that at least four potential witnesses are currently under the Witness Protection Programme and a number of the Respondents' children who are also potential witnesses in rescue centres.

27. In urging the application, Mr. Jami relied on the following authorities:

    a. Republic v Milton Kabulit & 6 others [2011] eKLR in the which the High Court, while citing the Supreme Court of Nigeria in the case of Alhaji Mahahid Dukubo-Asari v Federal Republic of Nigeria (SC No. 208 of 2006), (which was earlier cited with the approval of Ibrahim J (as he then was) in the case of Republic v Danson Mgunya & another [2010] eKLR), set out the considerations that would amount to compelling reasons for declining to grant bond or bail, which are essentially the same considerations in ordering for pre-charge detention. The court observed as follows:

> "The Supreme Court of Nigeria in the case of Alhaji Mahahid Dukubo-Asari v Federal Republic of Nigeria (supra), cited the following considerations as compelling reasons for declining to grant bail or bond:
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> i. the nature of the offence,
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> ii. the strength of the evidence which supports the charge,

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

iv. the previous criminal record of the applicant,

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

vi. the likelihood of further charges being brought against the accused,

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

viii. the probability of finding the applicant guilty as charged,

ix. the detention for the protection of the accused,

x. the necessity to procure medical or social report pending final disposal of the case."

b. Republic v Danson Mgunya (supra). (Holding reproduced above as cited verbatim from Alhaji Mahadit Dukubo-Asari (supra).

c. Hassan Mahati Omar & another v Republic [2014] eKLR in which the court addressed itself on the necessity by the court to consider sustaining public confidence as one of the compelling reasons and the need by the court to consider and/or take judicial notice of prevailing pertinent circumstances in the country when dealing with an application such as the one before me. The other aspects that the court stated should be considered are the nature of the charges and the gravity of the punishment in the event of conviction which the court stated could present an incentive to abscond. The court cited with approval the decision of Danson Mgunya (supra).

d. Republic v Fredrick Ole Leliman & 4 others [2016] eKLR where the court inter alia emphasized on the need to consider possible interference with witnesses where the weight of the evidence bore the probability of a conviction, when determining whether to grant or deny an accused person bond. The court further observed that the availability of bail under Article 49 of *the Constitution* was not an absolute right and proceeded to deny the accused bail on account of compelling circumstances. The court went on to state that the other grounds that would be considered in determining whether there are compelling reasons for denial of bond are the seriousness of the charge and the gravity of the sentence if the accused was to be convicted and the need to protect the accused person from possible perils associated with the case.

e. Chiediebeze v S (BA18/20) [2020] ZAMPMHC 4 in which the High Court of South Africa held as follows:

> " The reasons for refusal of bail can usually be found in one or two considerations, or both: (1) will the accused abscond; and (2) will the granting of bail lead to interference with the investigation and/or prosecution? These considerations entail a projection of future conduct taking into account past conduct. Section 60 (4) of the CPA stipulates that:
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> > " (a).Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or

(b).Where there is a likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

(c).Where there is the likelihood that the accused, if he or she were released on bail will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d).Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system;

(e).Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security."

f. Wolfrey v Piche [1958]. The court was not supplied with a copy of this Canadian authority or its proper citation and I was unable to get it in my research. Its reference is in the circumstances unclear.

g. Sudi Oscar Kipchumba v Republic [2020] eKLR in which the court (Ngugi J, as he then was) set out the parameters on what constitutes a compelling reason and further explained a double test rule as follows:

" 24. So, even while accepting that the text of Article 49(1)(f) may, in certain circumstances and contexts, comprehend a situation where a person is presented before a Court without being formally charged and is, thereby, informed of the reasons for his continued detention through the State's Application to have him so held, 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 needs to preserve the integrity of the administration of justice; and the interests of victims of crime where appropriate. By virtue of Articles 21(1) and 259 of *the Constitution*, the Court must act to aggrandize 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."

C. Submissions By The Respondents' Counsel.

28. In his submissions in resisting the State's applications, Mr. Mureti, told the court that the State has had sufficient time to investigate the matter and the affairs at Shakahola, noting that the Respondents had been committed to a rescue centre for a considerable period of time.

29. Counsel added, while referring to the psychiatric report for the 66th Respondent that she or any other Respondent who had been found to be mentally unstable should be taken to a mental hospital or facility for treatment and not committed to remand custody.

30. Mr. Mureti submitted further that it was not apt for the Respondents to be treated wholesome while investigations were being conducted but rather, each of the 66 should be investigated separately. The position counsel then took was that the Respondents should not be detained as the specific offences for which each of them is being investigated have not been stated.

31. Relying on the authority of Sudi Oscar Kipchumba (supra), Counsel urged that the twin test as set out by Ngugi J (as he then was) in the said case had not been properly satisfied and that in any event, the period for detention that the State was seeking was excessive as the State had had access to the Respondents and was possessed of adequate facilities and resources to conduct and complete investigations while they were at Sahajanad Rescue Centre for a period of not less than 110 days. While seemingly partly conceding to the application, Mr. Mureti stated that a period of detention for 14 days would be sufficient to conduct and conclude investigations and make a decision or decisions on whether or not to charge the Respondents.

32. On the State's position that the Respondents are a flight risk, Mr. Mureti's rejoinder was that as they are all Kenyans, the Respondents ought not to be considered to be flight risks.

33. Mr. Mureti further submitted that the allegation by the State that the families of the Respondents are bitter, confused and yet to come to terms with the reality that their children are or could be dead is far fetched as no evidence was provided by the State to prove or establish the allegation.

34. The last submission made by Mr. Mureti was that the Respondents have the right to liberty under Article 29(a) of *the Constitution* and the right to be released on bond under Article 49(1)(h) of *the Constitution* and as such, the applications by the State should not be granted as they seek to take away or limit the Respondents' constitutional rights, which would amount to detention without trial, a situation expressly prohibited by Article 29(b) of *the Constitution*.

35. Learned Counsel for the Respondents relied on the following authorities:

    a. Republic v Danson Mgunya (supra) in which the court made the holding that in interpreting *the Constitution*, an emphasis must be laid on enhancing the rights and freedoms granted and enshrined rather than in any manner that curtails them. Counsel was in this case referring to the possible curtailment of the Respondents' right to liberty in the event that the applications by the State are to be allowed.

    b. Michael Rotich v Republic [2016] eKLR in which the court (Kimaru, J as he then was) held that where a person is arrested and arraigned in court within 24 hours specifically for the prosecution to seek for extension of time to continue to detain such person without any charge or holding charge being preferred against such person, the continued detention is unconstitutional.

    c. Sudi Oscar Kipchumba (supra) where it was held that an order for pre-charge detention can only be properly made where the police has presented prima facie evidence or grounds that

meet the compelling reasons test. With regard to the instant case, Mr. Mureti argued that what the State considers to be possible charges against the Respondents are speculations and that the Respondents should not be detained on that basis.

d. Republic v Joseph Thiong'o Waweru & 17 others [2016] eKLR. The court was referred to paragraph 45 of the authority but I note that the decision ends at paragraph 17. I am therefore uncertain of the point that counsel intended the court to consider. That perhaps was occasioned by the fact that both Counsel for the State and for the Respondents referred to some authorities which had not been filed or provided at the time the application proceeded, which practice must be discouraged.

36. On his part, Mr. Mutegi told the court that there was no danger or likelihood of the Respondents interfering with witnesses as the intended witnesses had already been placed under the Witness Protection Agency. He further stated that the Shakahola scene had already been cordoned off and/or secured and that the Respondents would not have access to the same.

37. Mr. Mutegi observed that in the event that the Respondents are detained and it emerges at the end of the investigations that they are not criminally culpable, they will have been subjected to immense prejudice for which there would be no recourse.

D. Rejoinder By The State's Counsel.

38. In his rejoinder, Mr Jami submitted that the standard of proving that there are compelling reasons is that of a balance of probabilities and that the State had presented factual findings through the deponent of the two supporting affidavits which in his view presented sufficient material to warrant the detention of the Respondents. The learned ADPP pointed out that none of the Respondents filed affidavits to discount the claims made in the supporting affidavits.

39. On Mr. Mureti's submissions that the detention period sought was excessive, Mr. Jami stated that one of the statutes under which offences are under investigation is POTA, which statute allows for a period of detention of upto 360 days. As such, the 45 days that the State was seeking was reasonable and proportionate considering the complexity of the investigations and the number of Respondents in respect of which the investigations are being conducted.

40. On the finding reached by the High Court in the authority of Michael Rotich (supra) that detention in a case where there is no charge or holding charge is unconstitutional, Mr. Jami referred the court to the authorities of Betty Jemutai Kimeywa v Republic [2018] eKLR, Chris Philip Obure v Republic [2021] eKLR and Samuel Cheruiyot arap Lang'at v Republic [1982] eKLR where contrary findings were reached. Counsel concluded on this point that Article 49(1) (f) does not make provision for a holding charge but is express that what is required is for an arrested person to be charged on his first court appearance within 24 hours, or to be informed of the reasons for his continued detention.

E. Issue For Determination.

41. Having considered the applications, the affidavits in support thereof, the able submissions thereon made by the three Counsel herein and the record in its entirety, it is clear to me that the single issue for determination is whether the State has sufficiently presented compelling grounds to warrant the detention of the 66 Respondents for the period sought.

F. Analysis And Findings.

42. I will begin by addressing the issue raised by Mr. Mureti that emerges from the authority of Michael Rotich (supra) that in the absence of a charge or draft charge sheet, the detention of a person presented

before the court within 24 hours is unconstitutional. The authorities of Betty Jemutai Kimeywa (supra), Chris Philip Obure (supra) and Samuel Cheruiyot arap Lang'at provide a contrary finding. Considering that Article 49(1)(f) of *the Constitution* does not make reference to a charge or draft charge sheet but provides that an arrested person be charged on the first court appearance; or to be released; or to be granted bond on reasonable conditions; or be informed of the reasons for his continued detention, I will be guided by the holdings made in the three authorities that the absence of a charge or draft charge sheet does not render the ensuing detention unconstitutional.

43. Under Article 49(1)(h) of *the Constitution*, an arrested or accused person is entitled to be released on bail on reasonable terms unless there are compelling reasons not to release him. The onus to prove such compelling reasons lies with the State (see State v Kennedy Ochieng Kisakwa [2013] eKLR).

44. The standard of proof that the reasons presented meet the compelling reasons test is on a balance of probabilities (see Walford Ngugi & 2 others v Republic [2017] eKLR and Republic v Ahmed Mohammed Omar & 6 others [2010] eKLR).

45. What in essence the State's applications seek is pre-charge detention, which in other jurisdictions is referred to as remand or preventative detention.

46. Under Article 49(1)(h) of *the Constitution*, the right of an arrested person to be released on bond on reasonable terms is the default position but with a rider that if there are compelling reasons that warrant denial thereof, then bond can be denied.

47. Article 49(1)(h), and Article 29(a) of *the Constitution* which provides 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, are anchored on the norms of the law of nations as restated in international instruments, to wit the International Convention of Civil and Political Rights and the African Charter on Human and Peoples' Rights.

48. Article 9(1) of the International Convention on Civil and Political Rights reads as follows:

> " Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance of such procedure as are established by law." (Emphasis).

49. Article 6 of the African Charter on Human and Peoples' Rights provides that:

> " Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested and detained." (Emphasis).

50. There is also Article 24 of *the Constitution* which provides thus:

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

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and 17 Constitution of Kenya

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

51. It is clear from *the Constitution* and the above international instruments that there are situations under which an individual may be deprived of his liberty or freedom and detained as consequence thereof, which however cannot be done arbitrarily but in accordance of such procedure as is established by law. As held in the case of Republic v Fredrick Ole Leliman & 4 others (supra) the availability of bail under Article 49 of *the Constitution* is not an absolute right

52. In our case an example of such law that is enacted pursuant to Articles 24 and 49(1)(h) of *the Constitution* and the above international instruments is Section 35(2) of POTA where the statute provides that some rights and fundamental freedoms may be limited for the purposes of ensuring the investigations of a terrorist act, the detection and prevention of a terrorist act and to avoid a situation where the enjoyment of the rights and fundamental freedoms of an individual would prejudice the rights and fundamental freedoms of others.

53. That then means that denial or deprivation of freedom or liberty on the basis of the above provisions of *the constitution* and statute, in this case Section 35(2) of POTA through the court process does not amount to detention without trial as per the argument proffered by Mr. Mureti.

54. Detention without trial, as I understand Article 29(b) of *the Constitution* to provide is a situation where one is detained without lawful detention orders (other than in a state of emergency) or without due process of the law being followed or in blatant abuse of the legal process.

55. Detention pursuant to an order of the court under Article 49(1)(h) of *the Constitution*, or under Section 35(2) of POTA does not amount to detention without trial. Such remand in custody vide a court order after due process, pursuant to lawful arrest is not unconstitutional. Needless to state, lawful deprivation of liberty or freedom does not constitute a pre-emptory or jus cogens norm under customary international law, as opposed to arbitrary deprivation of liberty which would constitute a jus cogens norm.

56. The question then that calls for an answer is whether the State has provided sufficient material to prove on a balance of probabilities that compelling reasons exist that warrant the remanding in custody of the Respondents on the basis of the following considerations, as set out in the cases of Republic v Danson Mgunya (supra) which are in essence the same as those set out in Alhaji Mahahid Dukubo-Asari v Federal Republic of Nigeria (supra) and Chiediebeze v S (supra)

a. The nature of the charges.

b. The strength of the evidence which supports the charge.

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

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

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

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

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

h. The probability of guilty.

i. Detention for the protection of the accused.

j. The necessity to procure medical or social reports pending final disposal of the case.

57. Any or a combination of the above, if proved to the required standards, would be a basis to detain the Respondents as per the holdings in the authorities above. Of course, the courts in the decisions above held that the above criteria is not exhaustive. Other factors not mentioned may be relevant to the determination of grant or refusal of bail to an accused person, considering the dynamic nature of society, such as national security (see Chiediebeze v S (supra) and public interest (see Hassan Mahati Omar & another (supra).

58. I have stated above that the grounds upon which one may be denied bond are the same grounds to be considered on an application for pre-charge detention, hence the relevance of the authorities above.

59. On the grounds of the nature of the charges and the gravity of the punishment in the event of conviction, Mr. Jami presented through the affidavits at least twelve different possible offences for which the Respondents are being investigated. I would agree regarding what transpired at Shakahola, which is a debate in the public domain, that unravelling the mystery as to the details of what led to the loss of lives of so many people is akin to solving a jigsaw puzzle that would require substantial time and immense resources to do. This is a pointer that the charges being investigated are complex in nature, which is by itself a compelling ground to detain the Respondents.

60. I have also considered, as I am required to do, the possible sentences that the charges under investigation would attract. Just to point out a few, the offence of murder attracts the capital sentence of death as the maximum punishment. The offences of attempted murder, doing grievous harm and aiding suicide all attract maximum sentences of life imprisonment. The maximum sentence for the offence of radicalization is thirty years imprisonment. There is no doubt, then, that offences for which the Respondents are under investigation generally attract very stiff penalties in the event of conviction. It does not help the Respondents that they are each being investigated for several of those offences. That, in my view provides fertile ground to the Respondents to be flight risks.

61. Looking at the ground of the probability that the Respondents may not surrender themselves for investigations or trial, no doubt, knowing that they are under investigations for serious offences of the nature stated above, and that if convicted they may face long sentences of imprisonment or even the capital sentence of death, there is every likelihood that such knowledge may be an incentive to the Respondents to flee and/or to fail to surrender themselves for investigations or trial. That is compounded by the fact that their true places of abode may not at this stage be known to the investigations team.

62. There is also the ground of the likelihood of the Respondents interfering with witnesses or that they may suppress any evidence that may incriminate them or otherwise interfere with or scuttle the investigations. As per the affidavits in support of the applications, whereas the children of some of the Respondents were rescued from Shakahola and are a rescue centre or centres, some other of their children are reported to be missing with fears that some of them may have died. The court was told that the process of identifying witnesses from those rescued is ongoing and that search and rescue operations are ongoing. I will read from the same page as the learned ADPP that on a balance of

probabilities, there is a likelihood that the Respondents may interfere with the witnesses, particularly their own children over whom by the very nature of their relationship, the Respondents have influence and/or control over as their parents.

63. Regarding the ground of detention for the protection of the Respondents and other persons, the State's submissions were that the Respondents have adopted an extreme belief or religious system whereby their pursuit to meet Jesus Christ and transition to heaven is by fasting to death. It is in the public domain that a number of those rescued from Shakahola, the Respondents being among them, were found to be gravely ill due to malnutrition caused by self-imposed fasts. All the Respondents before this court were committed to a rescue centre as a result where health and nutrition interventions were made. Indubitably, there is a danger that they may harm themselves and others (such as their children) if they are set at liberty.

64. Moreover, the submissions by the State that they may get hostile reception back at their homes is well founded. That is so because of the allegations that some of them may have led their children to death at Shakahola. One would shudder to imagine the type of reception a Respondent who left with his or her children, who then returns to his or her home to meet his or her relatives without an explanation of the whereabouts of those children, or with a report that they are deceased, would be accorded.

65. I will turn to the ground of the necessity to procure medical or social reports pending final disposal of the case. As stated earlier in this ruling, one of the prayers that was allowed by the consent of the parties herein on the applications by the State is that the Secretary of Probation and Aftercare Service was ordered to conduct social inquiries upon all the 66 Respondents and prepare individual reports to be filed in court within a period of 30 days. Another order that was granted was to the effect that the Respondents be accorded medical services including counselling services and nutritional diet on a health assessment basis. I do not think that it would be possible for those orders to be complied with or executed in respect of the 66 persons unless the Respondents are detained at designated places. Hence, the ground of procuring the reports is proved as a compelling reason.

66. We have seen above that under Section 35(2) of POTA, rights fundamental freedoms may be limited for purposes of preventing a terrorist act. Under Section 35(3)(b) of the same statute, the court can issue orders limiting rights and fundamental freedoms for purposes of preventing offences under the Act and for preserving national security. One of the offences that the Respondents are suspected to have committed and for which they are under probe is the offence of radicalization which is created under POTA and in respect of which, therefore, Sections 35(2) and 35(3)(b) would apply.

67. The State proffers the position that for prevention purposes, there is need to detain the Respondents, who are suspected to be radicalized, for purposes of deradicalization, disengagement, rehabilitation and reintegration. The State further urges that there is need to detain the Respondents as a measure of safeguarding national security as there is a likelihood that if they are not detained, the Respondents may proceed to radicalize other persons.

68. Needless to state, the unfolding events at Shakahola have received notoriety and resulted in great anxiety upon the general public, and I take judicial notice of that fact. National security as a compelling reason to detain the Respondents is in the premises well grounded.

G. Disposition.

69. Taking all the above circumstances into account and on the basis of my findings that there are compelling reasons that have been established by the State, to wit;

BULLETS

* That the offences for which the Respondents are under investigation are of a grave nature;

* That the sentences for the offences for which the Respondents are under investigations are severe and may include the death sentence;

* That there is the probability that the Respondents may not present or surrender themselves for investigations or trial.

* That there is a likelihood of the Respondents interfering with witnesses or suppressing evidence that may incriminate them.

* That there is need for the detention of the Respondents for their own protection and for the protection of other persons.

* That there is the necessity to procure the Respondents' social inquiry and medical reports.

* That there is need to preserve and safeguard national security.

I proceed to dispose of the States applications as follows:

a. That the Respondents shall be detained at Shimo La Tewa GK, Kilifi GK and Malindi GK Men and Women Remand respectively (as the capacities may allow) for a period not exceeding 30 days, which period shall run from 10th August, 2023, being the date the applications subject of which this ruling is made were heard, pending completion of investigations and the decision to charge respectively. For avoidance of doubt, the detention period ordered herein shall in this respect lapse on 11th September, 2023 at 0930hrs.

b. That at the commencement of the period of detention ordered herein, the Investigating Officer shall inform each of the 66 Respondents of their rights under Articles 49 and 51 of the Constitution by serving upon each of them photostat copies of the said Articles.

c. That the 66th Respondent to be accorded psychiatric treatment.

d. That this matter shall be mentioned on 11th September, 2023 at 0930hrs before the duty court for the State to appraise the court on the status of the investigations and for further orders.

e. Parties to be at liberty to apply for any other appropriate and/or relevant and/or desired orders.

f. Orders accordingly.

DELIVERED, DATED and SIGNED in open court this 18th day of August, 2023.

OMIDO, J.M.

SENIOR PRINCIPAL MAGISTRATE

Respondents: All present.

For State/Applicant: **Mr. Jami**, Assistant Director of Public Prosecutions.

For Respondents: **Mr. Mutegi**, Advocate.

Court Assistant: **Ms. Chepkurui.**