IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, OUKO, KIAGE, M'INOTI & MOHAMMED,

JJ.A.)

CIVIL APPEAL NO. 275 OF 2012

THE ATTORNEY GENERAL …….....……. FIRST APPELLANT

MINISTRY OF INTERNAL SECURITY ….....…. SECOND APPELLANT

AND

RANDU NZAI RUWA …….....……...……FIRST RESPONDENT

ROBERT CHARO TUKWATUKWA .....……. SECOND

RESPONDENT NYAE NGAO …….....…….…… THIRD RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at

Mombasa, (Mwera, Kasango & Tuiyott, JJ.) dated 25th July, 2012

in

MOMBASA HIGH COURT MISC APPL. NO. 468 OF 2010)

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JUDGMENT OF MUSINGA, J.A.

INTRODUCTION

1. In **Miscellaneous Application No. 468 of 2010** that was heard before Mwera, J. *(as he then was),* Kasango and Tuiyott, JJ. in the High Court of Kenya at Mombasa, the single issue for determination was whether or not the action of the Government of Kenya in proscribing a group that calls itself Mombasa Republican Council **(MRC)** vide Gazette Notice number 12585 published on **18thOctober, 2010***(the Gazette Notice)* was unconstitutional. The Gazette notice had declaredMRC, Republican Revolutionary Council *(RRC)* and 31 other groups organized criminal groups for the purposes of the **Prevention of organized Crimes Act***(POCA)* No. 6 of 2010.

2. In a considered judgment delivered on 25th July, 2012, the learned judges held,***inter alia:***

> **"Ultimately, this Court does hereby declare that the declaration published in Gazette Notice No. 12585 by the Minister of State for Provincial Administration and Internal Security that Mombasa Republican Council is an organized criminal group is unconstitutional and is hereby lifted."**

APPEAL

3. The Attorney General, being dissatisfied with that decision, preferred an appeal to this Court. The appeal raised 11 grounds which may be summarized as follows: the trial court erred in law and fact in failing to find that, (i) the decision by the minister in proscribing MRC was lawful as it was founded on reasonablejustification; (ii) that MRC, having engaged in criminal and unconstitutional activities, was disentitled to freedom of assembly and association as well as constitutional reliefs; (iii) that MRC's call for secession was unconstitutional and a threat to the territorial integrity of the Republic; (iv) the POCA having come into operation before the promulgation of the **Constitution** of **Kenya, 2010, Article 24** of the Constitution did not apply retrospectively to the ban of MRC.

4. The Attorney General further faulted the trial court for holding that MRC should be registered as a political party when it had neither prayed for such an order nor had it applied and had its registration denied by the Registrar of Political Parties.

PETITION BY MRC IN THE HIGH COURT

5. The three respondents, on their own behalf and on behalf of more than 32,000 other people belonging to a group that has branded themselves as "MRC", filed a Notice of Originating Motion on 24th November, 2010. They urged the court to declare that the issuing of the Gazette Notice proscribing MRC contravened the provisions of **Articles 36, 37, 38, 40** and **47** of the **Constitution of Kenya, 2010.**

6. The respondents also urged the court to make orders to prohibit the minister of Internal Security from interfering with the activities of MRC and such other orders as deemed appropriate for the purpose of enforcing and/or securing the proper administration of justice by the Government of the Republic of Kenya.

7. The originating motion was supported by a short affidavit sworn by the 1st respondent, a former Secretary General of MRC, who stated, ***inter alia,*** that MRC is *"a peace initiated group aimed at attaining our rights on matters of land, natural resources, economic and political freedom and advancement of the indigenous coastal people"* and that the group had been holding peaceful public meetings at various places within the coastal province. They were therefore surprised to read in one of the local newspapers that MRC had been proscribed.

THE GOVERNMENT?S RESPONSE

8. In response to the originating motion, the appellants filed two replying affidavits. They were sworn by **Mr. Francis Kimemia,** the then Permanent Secretary in charge of Provincial Administration and Internal Security, and the other one by **Mr. Mutea Iringo,** Mr. Kimemia's successor. The two deponents aforesaid stated, ***inter alia,*** that MRC is an active arm of an unregistered society that calls itself the Republican Revolutionary Council *(RRC);* that MRC was engaged in illegal activities including oathing and training of militia, as a result of which some of its members had been arrested and charged in court with various offences; that RRC was intent on having the Coast Province declared a Republic on its own, independent from the rest of Kenya; and that RRC was also intent on disenfranchising upcountry people living in theCoast Province. The appellants urged the court to dismiss the respondents' application.

DETERMINATION BY THE TRIAL COURT

9. Following lengthy submissions by counsel for the parties as well as **Katiba Institute** that appeared as

amicus curiae, the trial court identified two broad issues for determination as follows:

> **1) Whether the proscription restricted or limited the fundamental rights and freedoms of the respondents (the petitioners);**and
>
> **2) Whether the restriction or limitation was in compliance with the Constitution of Kenya, 2010.**

10. In determining the first issue, the court took into account the provisions of **Articles 36** and **37** of the Constitution which guarantee the freedom of association and assembly, as well as **Article 38** which guarantees political rights, including the right to form or participate in forming a political party and to campaign for a political party or cause. The court however observed that the aforesaid freedoms are not unbounded and that **Article 24** allows for the limitation of certain rights and fundamental freedoms. **Article 24** provides as follows:

> **"(1)A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –**
>
> **(a) the nature of the right or fundamental freedom;**
>
> **(b) the importance of the purpose of the limitation;**
>
> **(c) the nature and extent of the limitation;**
>
> **(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
>
> **(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."**

11. The court held that the State had not satisfactorily demonstrated that the proscription of MRC was justifiable or proportionate. The court further held that the proscription had unconstitutionally limited the fundamental rights and freedoms of the petitioners and those of over 32,000 followers of MRC.

12. Regarding the issue of secession of the Coast Province which MRC was openly championing, the court held that secession is a political agenda and thus concluded that MRC is a political movement. The court then stated as follows:

> **"We do accept that there would be legitimate concerns and apprehension if a movement of that size and agitating a controversial agenda was to operate as an informal and undefined organization. Democracy is not a licence to disorder or lawlessness. For this reason the court will give the petitioners an opportunity to fully enjoy their rights but they must do so in a context that is formal, orderly and permitted in law. A sure way, perhaps the only, is to have themselves organized and registered as a political party."**

SUBMISSIONS ON APPEAL

13. During the hearing of this appeal, **Mr. Mwangi Njoroge,** Deputy Chief Litigation Counsel, together with **Mr. David Fedha,** appeared for the appellants while **Mr. Kithi Ngombo** represented the respondents. **Mr. Waikwa Wanyoike** appeared for the *amicus curiae,* Katiba Institute.

14. Mr. Njoroge submitted that the learned judges of the High Court did not quite appreciate the cogentreasons for proscribing MRC that were advanced by the State through Mr. Kimemia and Mr. Iringo. There was therefore reasonable justification for the minister's action. Counsel submitted that

pursuant to the provisions of POCA, the minister was justified in banning MRC as it was a threat to security of the State. The depositions by Mr. Kimemia and Mr. Iringo were not controverted by the respondents, Mr. Njoroge asserted. In the circumstances, counsel added, the trial court had no basis for disbelieving that MRC was engaged in unlawful and unconstitutional activities.

15. Mr. Njoroge cited MRC's agenda of secession, which he submitted, was clearly contrary to the provisionsof **Articles 4** and **5** of the Constitution. The latter defines the extend of Kenya as consisting of the territory and territorial waters comprising Kenya as at 27th August, 2010 when the new Constitution was promulgated.

16. Mr. Ngombo submitted that there was no evidence that the respondents were engaged in any organized crime as alleged by the appellants so as to justify the proscription of MRC. The only incidents of criminal activity that were cited by the appellants in the affidavit sworn by Mr. Iringo allegedly occurred post the date of the ban; there was no evidence that they had been perpetrated by MRC, and could not therefore be relied upon to legitimize the ban, Mr. Ngombo added.

17. Regarding MRC's secession agenda, Mr. Ngombo submitted that it was not unconstitutional. Hecited **Article 255** of the **Constitution** which stipulates how the Constitution can be amended if the amendment relates to, inter alia, the territory of Kenya and the sovereignty of the people.

18. Mr. Wanyoike's lengthy written submissions in support of the decision by the High Court and in opposition to the ministerial ban of the MRC was premised on three broad arguments that:

> **i. The minister?s decision was arrived at through a process that violated Article 47 of the Constitution;**
>
> **ii. The minister?s decision violated the petitioner?s freedom of expression, assembly, association, political rights and the right to have any dispute resolved by a fair independent court under Article 50**; and
>
> **iii. The violations of the Constitution occasioned by the ban were not reasonable, they were not limited by law, and they cannot be justified in an open and democratic society.**

19. Article 47 stipulates that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It further states that if a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action, the person has a right to be given written reasons for the action. It was submitted that the minister did not give any heed to the provisions of that Article.

20. Mr. Wanyoike further submitted that the minister's decision to ban MRC in the manner he did amounted to a violation of their right to campaign for a political cause as guaranteed under **Article 38 (1) (c)**of the Constitution. MRC had stated that one of its political agenda is redress of past injustices and meaningful devolution and transfer of power to the coastal people. Counsel reiterated that MRC's call for secession was not unconstitutional. He added that such a campaign ought to be protected under the freedom of expression, as long as it is conducted within the constitutional confines of the freedom of expression.

21. Mr. Wanyoike also submitted that the minister's decision failed the proportionality test that is espoused by **Article 24** of the **Constitution** which expressly provides that 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 as well as the considerations set out under **Article 24 (1)** of the **Constitution.**

22. In summary, Mr. Wanyoike submitted that the High Court was right in holding that the minister's decision had limited several constitutional rights hitherto enjoyed by the respondents in a manner that could not be justified under **Article 24.**

DETERMINATION

23. I have anxiously considered the submissions made by counsel and perused the authorities availed to us. A matter of this nature calls for a very delicate balance between private rights and those of the general public by the court in its interpretation of the Constitution, bearing in mind that the Constitution itself stipulates how it should be interpreted.

> **Article 259 (1)** states that:
>
> **"(1) This Constitution shall be interpreted in a manner that –**
>
> **(a) promotes its purposes, values and principles;**
>
> **(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
>
> **(c) permits the development of the law; and**
>
> **(d) contributes to good governance."**

24. That the Constitution must be given a purposive liberal interpretation has been reiterated in a plethora of decisions in this country. In the case of

THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION [2011] eKLR, the Supreme Court stated:

> **"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a „mirror reflecting the national soul?;the identification of ideals and**
>
> **…aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion."**

25. Conscious of the aforesaid guidelines, I must start by considering the minister's justification in proscribing MRC against the respondents' constitutional rights and freedoms that were alleged to have been violated, courtesy of the ban. The minister exercised the powers conferred upon him by **section 22** of **POCA** to declare MRC, among other groups, to be an organized criminal group. The section states that:

> **"(1) Where the Minister has reasonable grounds to believe that a specified group is engaged in any organized criminal activity under section 3 of this Act, he may, on the advice of the Commissioner of Police, by notice, declare that specified group an organized criminal group for the purposes of this Act."**

26. Section 2 of **POCA** defines **"Organised criminal group"** as follows:

> **"organised criminal group" means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of –**
>
> **(a) committing one or more serious crimes; or**
>
> **(b) committing one or more serious crimes in order to obtain, directly or indirectly, financial or other material benefit, other advantage for the organized criminal group or any of the members of organized criminal group,and includes a group declared an organised criminal group under section 22 of this Act."**

27. What is an *"organized criminal activity?"* It is not expressly defined by the Act. However, **section 3** of the **Act** states that:

"A person engages in organised criminal activity where the person –

(a). is a member or professes to be a member of an organised criminal group;

(b). knowingly advises, causes, encourages or recruits another person to become a member of an organised criminal group;

(c). acts in concert with other persons in the commission of a serious offence for the purpose of obtaining material or financial benefit or for any other purpose;

(d). being a member of an organised criminal group, knowingly directs or instructs any person to commit a serious crime;

(e). threatens to commit or facilitate the commission of any act of violence with the assistance of an organised criminal group;

(f). threatens any person with retaliation in any manner in response to any act or alleged act of violence in connection with organised criminal activity;

(g). being a member of an organised criminal group with intent to extort or gain anything from any person, kidnaps or attempts to kidnap any person, threatens any person with injury or detriment of any kind;

(h). provides, receives or invites another to provide or receive instructions or training, for the purposes of or in connection with organised criminal activity;

(i). possesses an article for a purpose connected with the commission, preparation or instigation of serious crime involving an organised criminal group;

(j). possesses, collects, makes or transmits a document or records likely to be useful to a person committing or preparing to commit a serious crime involving an organised criminal group;

(k). provides, receives, or invites another to provide property and intends that the property should be used for the purposes of an organised criminal group;

(l). uses, causes or permits any other person to use property belonging to an organised criminal group for the purposes of the activities of an organised criminal group;

(m). knowingly enters into an arrangement whereby the retention or control by or on behalf of another person of criminal group funds is facilitated;

(n). being a member of an organised criminal group endangers the life of any person or causes serious damage to the property of any person;

(o).organises, attends or addresses a meeting for the purpose of encouraging support of an organised criminal group or furthering its activities."

28. The three respondents are members of MRC. In their originating motion they stated that MRC is *"a peace initiated group aimed at attaining our rights on matters of land, natural resources, economic and political freedom and advancement of the indigenous coastal people."*

They further averred that there existed no grounds upon which a reasonable suspicion could be based for alleging that MRC had committed any criminal offence.

29. Under **section 22 (1)** of **POCA,** the minister must have reasonable grounds that an organised group is engaging in organised criminal activity before he proscribes it. Mr. Francis Kimemia stated in his replying affidavit that according to intelligence reports, MRC was the active arm of RRC that was carrying out the objectives of RRC. He said that police investigations had revealed that MRC was undertaking activities that are a potential threat to the peace of the Republic of Kenya, including oathing and training of militia. Some of its members had even been charged with various criminal offences, he added.

30. Mr. Kimemia also cited the Report of the Commission of Inquiry into the Post-Election Violence *(CIPEV),* which corroborated the police evidence that RRC was intending to disenfranchise upcountry people living in the Coast Province and thereafter reclaim the land owned by the perceived *"outsiders."*That was in line with its secession agenda. He also cited several incidents and cases that occurred during the infamous post-election violence period in 2008.

31. The affidavit by Mr. Iringo deposed that members of MRC had physically attacked law enforcement officers and raided a mock polling station that had been set by the Independent Electoral and Boundaries Commission in preparation for the 2007 General elections. The basis of Mr. Iringo's depositions that it was MRC members who were behind the above criminal activities was press reports.

32. The respondents vehemently denied any linkage with RRC or any involvement in the alleged criminal activities. They contended that none of the people who had been arrested had been found to have been members of MRC and were all acquitted. They further stated that they all along operated openly, renting meeting venues and engaged in open discussion about their agenda. Thus the respondents denied that there was any basis for branding them *"an organised criminal group."*

33. In such circumstances, what should this Court's approach be in determining whether indeed the minister based his decision on *"reasonable grounds"* that MRC was an organised criminal group for carrying out organised criminal activities? In other words, how should a court go about the process of determining whether the minister's decision to limit the respondents' fundamental rights under **Articles 36, 37, 38, 40** and **47** of the **Constitution** was justified under the law?.

34. The appellants' counsel's submission on that issue was:

> **"As long as the minister was empowered by POCA to ban the organisations that were a threat to security and as long as he pleaded National Security in the Superior Court, which statement has not been controverted, he was justified".**

35. In support of that position, Mr. Njoroge cited the House of Lords decision in **COUNCIL OF CIVIL SERVICE UNIONS (C.C.S.U.) V MINISTER FOR THE CIVIL SERVICE [1985] 1 AC 374.** In that case, civil servants in the security sector were suddenly disallowed by the minister for Civil Service from participating in any union activities owing to perceived threat of national security that was likely to result from any possible strike action. The applicant sought judicial review of the minister's instructions. The trial court granted the applicants a declaration that the minister's instructions were invalid and of no effect. The Court of Appeal allowed an appeal by the minister. CCSU preferred a further appeal to the House of Lords.

36. Dismissing the appeal, Lord Fraser of Tullybelton delivered himself thus:

> **"The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security."**

37. Mr. Njoroge urged this Court to reason and decide likewise, positing that: *"national security matters are the preserve of the executive arm of Government. The Court cannot afford to be seen as passing judgment on the issue which is within the preserve of the executive arm of government."*

38. With great respect to Mr. Njoroge, I think that the suggested manner of interpretation of the law, where the court, in the present constitutional dispensation, ought not to question or interfere with any decision by the Executive, as long as such decision is based on national security, is completely unacceptable and has no place in our progressive Constitution. **Article 238**

> **2. (a)** of our Constitution is explicit that national security is subject to the authority of the Constitution and Parliament.
>
> **Article 238 (2) (b)** further stipulates that:
>
> **"national security shall be pursued in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms."**

39. Article 2 spells out the supremacy of the Constitution over all persons and all State organs at both levels of government, and no person may claim or exercise State authority, save as authorised and in the manner prescribed under the Constitution. Important as it is, national security has to be enforced and safeguarded within the confines of the Constitution. Under our current Constitution, the legality of executive or administrative decisions or actions, even in matters touching on national security, including Acts of Parliament, can be scrutinized by the Judiciary. Gone are the days when matters of *"national security"* were beyond question by anyone or entity outside the Executive.

40. Article 22 guarantees every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. In exercise of its constitutional mandate, the Judiciary is subject only to the Constitution and the law, not to any institution. The position that was taken by Lord Fraser in **C.C.S.U. V MINISTER FOR THE CIVIL SERVICE***(Supra)* that the decision on whether the requirements of national security outweigh the duty of fairness is for the Government and not for the courts, is not in conformity with the dictates of our Constitution and must therefore be rejected. The Judiciary must promote constitutionalism and the rule of law in its decision making processes.

41. In the matter that was before the High Court, the issue was not whether the minister had power under **section 11 (1)** of **POCA** to proscribe MRC, but rather whether he demonstrated respect and due regard to the appropriate constitutional principles in exercising the power accorded to him by statute. The rights and fundamental freedoms in the Bill of Rights are subject only to the limitations as spelt out by the Constitution under **Article 24** and neither the State nor any State functionary can take them away or limit their enjoyment except as provided under the Constitution.

42. I believe the right procedure for the court to adopt in determining whether the minister's decision was justified is spelt out by **Article 24** of the **Constitution**, and that is what the High Court did.The appellants contended that POCA predates the Constitution of Kenya, 2010 and therefore Article 24 of the Constitution ought not to have been applied retrospectively in determining the matter that was before the High Court. That submission is incorrect.

> Whereas POCA was assented to on 13th August, 2010, its date of commencement was 23rd September, 2010.The new Constitution came into operation on 27th August, 2010. POCA must therefore be interpreted in light of the provisions of Article 24 and any other relevant Article of the Constitution.

43. The High Court delivered itself as follows:

> **"48. The Minister acted pursuant to the provisions of a statute (POCA) whose constitutionality has not been questioned by this petition. What this court must do is to test**

whether the action of the Minister conforms to the limitation clause (Article 24). Our reading of Article 24 (1) is that not only must the law limiting a right or fundamental freedom pass constitutional muster but also the manner in which the law is effected or proposed. So both the law prescribing the limitation and the manner in which it is acted upon must satisfy the requirement of Article 24. 49. Under Article 24 (3) the State would have to bear the burden of justifying that the restriction imposed on MRC is in harmony with the limitation clause. That burden is expressed as follows:

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

44. In interpreting the provisions of **Article 24 (1)**, the High Court cited the decision by the Constitutional Court of South Africa in **SAMUEL MANAMELA & ANOTHER V THE DIRECTOR GENERAL OF JUSTICE, CCT 25/99,**where the court stated:

"It should be noted that the five factors expressly itemized in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.

…… Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of this legislative and social setting."

45. Did the trial court downplay the issue of state security as was submitted by Mr. Njoroge? I do not think so. This is how the trial court rendered itself on the issue:

"53. The position of the State is that it invoked the provisions of POCA in the interest of national security.It is appreciated that the executive arm of the Government is charged with the responsibility of ensuring national security. (Chapter 14 of the Constitution.) That arm of Government is therefore the best suited to make decisions in respect of matters of national security. What it says about national security must ordinarily be believed.And in these matters it must be given some margin of appreciation. Where, however, there is a complaint raised as in this petition, that national security has been wrongfully invoked to take away a fundamental right the court needs to be judicially satisfied that the action of the State is reasonable and justifiable. If this were not so, then the State could make any decision or take any action in the name of national security with the comfort that it will never be required to account for that action. The State could be tempted to use the blank cheque to overdraw!

46. The trial court examined the contents of the affidavits sworn by Mr. Kimemia and Mr. Iringo as well as the contents of *CIPEV* Report and found no evidence to connect RRC to MRC. The court held:

"we think that the State should have placed some evidence before this Court to demonstrate the link between RRC and MRC."

We agree with the trial court that the appellants did not sufficiently demonstrate that MRC was engaging in organized criminal activity.

47. The effect of proscribing MRC was to deny the over 32,000 professed members thereof the right to assembly under **Article 37,** the right to political rights under **Article 38,** the right to fair administrative action as guaranteed by **Article 47**, among others. I do not think that there were sufficient reasons for so doing.

SECESSION AGENDA

48. The appellants argued that as long as the agenda of MRC included a call for secession of the Coast Province, that was sufficient reason to ban MRC as secession is unconstitutional and a threat to the territorial integrity of the Republic of Kenya. Mr. Kimemia stated in his affidavit that the push for secession is a threat to peace and national security and has the potential of dismembering the country.

49. The High Court did not concur with that argument. The leaned judges held that although the Constitution does not contemplate or allow secession, freedom of expression is guaranteed under **Article 33** as long as it does not extend to propaganda for war; incitement to violence; hate speech; or advocacy for hatred. The court went on to state that "in a free and democratic society we are expected to put up with some defiance, dissent and controversy."

50. The learned judges added:

> **"Although it is the respondents? case that MRC advocates secession by violent means, the court, after examining the affidavits of the respondents? witnesses, is unable to find any evidence that supports that assessment. None of the criminal cases referred to in the affidavits involve offences connected to propaganda for war, incitement to violence itself, hate speech or advocacy of hatred."**

51. The issue of secession in all democratic States is a hot potato. In the context of this appeal, what calls for my consideration is whether it is unconstitutional for a group of people to openly advocate for secession of a region. What is secession in law and how is it viewed internationally? According to Glen Anderson, in his academic paper, **"Secession in International Law and Relations: What are we talking about?"**35 Loy. L.A. Int'l & Comp. L. Rev 342 (2013) available at: http://digitalcommons.lmu.edu/vol35/iss3/1,secessi on is the withdrawal of territory (colonial or non-colonial) from part of an existing State to create a new State.

The learned author states that:

> **"Secession is viewed negatively and is associated with chaos, schism, fragmentation and instability."**

52. International law neither explicitly permits nor recognizes the right to secession. Secessionists world over have complex series of claims. The struggle for secession may or may not lead to creation of a new State. Governments will always resist attempts by any group(s) of people or any part of a sovereign State to secede. The manner in which the secession agenda is pursued and how a government responds is what, in my view, determines whether there is breach of the Constitution.

53. It has been argued by the respondents that the Constitution of Kenya declares that the general rules of international law shall form part of the law of Kenyaand any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. See **Article 2 (5)** and **(6)** of the Constitution.

54. The **International Covenant on Civil and Political Rights (ICCPR)** and the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** stipulate that all people have the right of self-determination. They have a right to determine their political status and pursue their economic, social and cultural development.

55. Our Constitution declares that Kenya is a sovereign Republic and its territory consists of the territory and territorial waters that comprised Kenya as at 27th August, 2010, and any additional territory and

territorial waters as defined by an Act of Parliament.See **Articles 4 (1)** and **5** of the **Constitution**. That is a territorial definition. The preamble to the Constitution states, *inter alia*, that we the people of Kenya are proud of our ethnic, cultural and religious diversity, and are **"determined to live in peace and unity as one indivisible sovereign nation."**

56. However, **Articles 255, 256** and **257**of the **Constitution** provide for the amendment of the Constitution and the manner of effecting the proposed amendment. **Article 255 (1)** states as follows:

> **"A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause**
>
> **(2) by a referendum, if the amendment relates to any of the following matters-**
>
> **(a) the supremacy of this Constitution;**
>
> **(b) the territory of Kenya;**
>
> **(c) the sovereignty of the people;**
>
> **(d) the national values and principles of governance mentioned in Article 10 (2) to (d);**
>
> **(e) the Bill of Rights;**
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> **(f) …**
>
> **(g) …**
>
> **(h) …**
>
> **(i) …**
>
> **(j) …"**

57. There is therefore a constitutional way of seeking to amend the Constitution to define the territory of Kenya and the sovereignty of the people, among other issues. That in essence implies that we, the people of Kenya, in adopting, enacting and giving the new Constitution to ourselves and to our future generations, (as the preamble states), we recognised a constitutional right to secession. However, that can only be done in the manner stipulated under the Constitution and not otherwise.

58. In view of the foregoing, the appellants' contention that the respondents' agenda of secession is unconstitutional has no basis in law. The respondents have a constitutional right to demand secession but that can only be done within the confines of the Constitution as stipulated under **Articles 255, 256 and 257** of the **Constitution**. If the respondents wish to form a political party or movement to campaign for secession, **Article 38** of the Constitution, even without the uninvited advice by the High Court, guarantees that right. However, it is unlawful to pursue a Constitutional right in an unlawful manner. If a person breaches our penal laws in the course of pursuing a constitutional right, the government is at liberty to take appropriate action to punish for that breach. What the Government cannot do is to take away a constitutional right of a people under the guise of preservation of national security. The rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State or any government. See **Article 19 (3)**

(a)of the **Constitution**.

59. In **RE SECESSION OF QUEBEC** [1998] 2 S. C. R. 217 (Can), the Canadian Supreme Court held that Quebec or any other Canadian Province was able to secede constitutionally from Canada, provided a constitutional amendment effecting the secession was passed.

60. While I believe that we the people of Kenya are better off living in unity as one sovereign State, we must realize that the unity cannot be preserved by force, either by the government or communities. It is not unconstitutional for a community to agitate for secession in a constitutional and peaceful manner. On the other hand,it is a violation of the Constitution for the government to use force or proscribe an organization, (even though I recognize that MRC is not a registered society), for pursuing an agenda of secession.

61. President James Buchanan of the United States of America, in his 4th Annual message to Congress on the state of the Union in December 3, 1860 said:

> **"The fact is that our union rests upon public opinion, and can never be cemented by the blood of its citizens shed in civil war. If it cannot live in the affections of the people, it must one day perish. Congress possesses many means of preserving it by conciliation, but the sword was not placed in their hand to preserve it by force."**

62. Having carefully considered the record of appeal and the elaborate submissions by counsel, for which I commend them, I am persuaded that the High Court came to the right conclusion that the proscription of MRC by the Minister of State for Provincial Administration and Internal Security was unconstitutional.

63. In the circumstances, as Ouko, Kiage, M'Inoti andMohammed, JJ.A. agree, the order of the Court is that this appeal is dismissed. Parties shall bear their own costs.

Dated at Nairobi this 8th Day of July, 2016.

D. MUSINGA,

JUDGE OF APPEAL.

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF OUKO, J.A.

I had the advantage of reading, in draft form, the judgment prepared by Musinga, JA and entirely agree with the conclusion that there were no justifiable grounds for the declaration by the appellants that Mombasa Republican Council was an organized criminal group. I therefore agree that this appeal is to be dismissed as ordered by Musinga, JA.

Dated at Nairobi this 8th day of July, 2016.

W. OUKO

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JUDGE OF APPEAL.

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF KIAGE, J.A.

I have had the advantage of reading in draft the judgment of my learned brother Musinga JA. I am in full agreement that in the context of our current constitutional dispensation, the power of Government to ban, proscribe and otherwise limit the enjoyment and exercise of the rights spelt out in the Bill of Rights must be strictly construed. The Constitution itself spells out the manner in which limitation of rights must be gone about to be constitutionally permissible. I am far from satisfied that the proscription of the Mombasa Republican Council (MRC) passes constitutional muster and for that reason the High Court was right to quash it.

I am too keenly aware of the great potential for abuse that lies in the appellant's argument that in matters of national security the word of the Executive is final, to grant it judicial sanction. In the end, the law and enlightened common sense demand that the actions of the Minister under the Prevention of Organized Crimes Act be interrogated on the objective test of reasonableness, in a judicial setting. In this instance the ban failed the test and was properly quashed by the High Court.

Accordingly, and without hesitation, I too find that this appeal is devoid of merit, and would dismiss it along the lines proposed by Musinga JA.

Dated at Nairobi this 8th day of July, 2016

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF M'INOTI, JA.

I have had the advantage of reading in draft the judgement of my brother, D. K. Musinga, JA. I agree with his decision and the orders that he has proposed.

Dated and delivered at Nairobi this 8th day of JULY, 2016

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF J. MOHAMMED, J.A.:

I have had the advantage of reading in draft the Judgment of my brother,

Musinga, J.A. I concur with his decision and the orders that he has proposed.

Dated and delivered at Nairobi this 8th day of July, 2016.

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR