



## Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya

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**ABSTRACT:-** Terrorism is a global crime that threatens state security, life and property of the people. In the recent past, several incidences labeled as terrorist attacks have resulted into loss of life and property in different parts of Kenya, mainly Nairobi, Mombasa and Garissa. Citizens have expressed feelings of increased insecurity and fear. They have called upon the government to step up the fight against terrorism. Several individuals have been arrested and arraigned in court on different charges of terrorism. The suspects were granted bail pending trial as required by Article 49(1) (h) of the Constitution of Kenya 2010. While on bail, some suspects are alleged to have participated in subsequent terror attacks in the country. This revelation has generated the debate as to whether terrorist suspects should be granted bail as a constitutional right, at the expense of state security, or whether their right to bail can be limited. This paper analyses the balance between state security and terrorist suspects' rights to bail. The paper is presented in seven parts. Part one introduces the paper. Part two examines chronological incidences of terrorism attacks in Kenya since independence in 1963 to date. Part three discusses what constitutes terrorism. Part four examines terrorism and its effects on the rights of citizens and state security. Part five examines the role of the Kenyan government (Parliament, Executive and Judiciary) in protecting life and property of all people, including those suspected of terrorism. Part six examines bail, terrorism and security in comparative jurisdictions. Part seven provides a conclusion for the paper while part eight contains the recommendation of the paper. Whereas parliament is obligated to deliberate and legislate on issues of national importance such as terrorism, such legislation must be consistent with Article 2(1) and (4) of the Constitution of Kenya 2010 as the supreme law of the land. The Executive arm of the government, in enforcing laws to protect citizens and the Republic of Kenya, must ensure that programs, strategies and policies conform to national values and principles of governance as provided by Article 10 of the Constitution of Kenya 2010. The Judiciary, while making decisions on bail matters, exercises judicial authority on behalf of the people of Kenya and therefore has a duty to ensure that granting bail to terrorism suspects does not jeopardize state security and the safety of the people of Kenya. The paper concludes that bail is a constitutional right, but is not an absolute right under the Constitution of Kenya 2010. The courts can therefore limit the right to bail to suspects in cases where the Executive, through the Director of Public Prosecution, presents evidence that amounts to compelling reasons why the suspects should not be granted bail. There is however no guideline or Act of Parliament that regulates bail. The paper recommends the enactment of Bail Act to detail how and when the right to bail can be limited.

**KEYWORDS:-** bail, balance, human rights, terrorism, security

### I. INTRODUCTION

In the recent past, Kenya experienced several incidences of violent attacks in which several lives were lost and property worth millions of Kenya Shillings destroyed. The worst hit parts of the country include Nairobi, the capital city, Mombasa, a major tourist destination and the northern part of Kenya which is home to many refugees from neighbouring war torn countries such as Somalia and Sudan. The attacks have been referred to generally as terrorist attacks. Examples include the Mpeketoni attacks in June 2014, the Mandera attacks of September and December 2014, the Kikambala bombings of 2002 and the 1998 bombing of the embassy of the United States in Nairobi.

The consequences of the violence have included increased fear and a feeling of insecurity amongst many people in the country. It is not unusual today, especially after an attack, to see a reduced number of shoppers in hitherto frequented shopping malls, recreational and business centers. Many public and private

institutions have had to increase their expenditure on security. Public transport has not been spared by the violent attacks. On 4<sup>th</sup> May 2014, an attack on Thika highway targeted two public service commuter vehicles and left three people dead and about sixty two injured. Similarly, on 16<sup>th</sup> May 2014, explosions targeted at a public service commuter vehicle in Gikomba, Nairobi led to the loss of about ten lives and left many others injured.

Foreign countries such as Britain, America and Australia have reacted to the violence by issuing travel warnings and bans to their citizens living and or working in Kenya or visiting as tourists. In the month of May 2014, a tourism peak period in Kenya, Britain evacuated her nationals who were on holiday, from the coastal part of Kenya due to fears of possible terrorist attacks. The evacuation of tourists from hotels negatively impacted on tourism in Kenya. Several hotels had bookings cancelled and workers laid off. The effect is a reduction of revenue from tourism. The tourism sector is notably a major foreign exchange earner for Kenya.<sup>1</sup> Such kind of violence as experienced in Kenya is certainly a threat to the peace, security and existence of the people of Kenya, as expressed in the preamble of the Constitution of Kenya 2010.<sup>2</sup>

## II. CHRONOLOGICAL INCIDENCES OF TERRORISM ATTACKS IN KENYA SINCE INDEPENDENCE IN 1963 TO DATE

According to the Global Terrorism Database, there have been three hundred and thirty one (331) terrorist related incidences in Kenya since Kenya became independent in 1963.<sup>3</sup> Out of the 331 incidents, Al Shabaab is suspected to have been behind a third of the attacks or to have carried out over 100 attacks.<sup>4</sup> Other groups which have been suspected to be behind other terrorist attacks and incidences in Kenya include, *inter alia*, the Oromo Liberation Front, Al Qaeda, Saboti Land Defence Forces, the Popular Front for the Liberation of Palestine, the Maskini Liberation Front and the Mombasa Republican Council.<sup>5</sup> It is important to point out the fact the Global Terrorism Database definition of terrorism is much broader and as such its list includes incidences which may have not have been regarded as terrorist incidences under the domestic law of Kenya. For instance, while the Baragoi Massacre of September 2013<sup>6</sup> was not regarded as a terrorist attack under Kenya's laws, it is listed as such in the global terrorism database. This section focuses on the major terrorist attacks in the country since independence. It will not highlight those attacks which are not regarded as terrorist attacks under the laws of Kenya.

Kenyan has fallen victim to a number of terrorist attacks over the years. The first major terrorist attack in the post independent Kenya occurred in 1975.<sup>7</sup> The attack involving the bombing of a nightclub, a travel bureau and on a bus in Nairobi. Over thirty lives were lost in the attack and several other people were left injured.<sup>8</sup>

The second major terrorist attack on Kenyan soil was the 1980 New Year's evening bombing of the Norfolk Hotel in Nairobi.<sup>9</sup> The attack resulted in the death of over 20 people and left over eight people injured.<sup>10</sup> There was a lull in the attacks until 1998 when Kenya was struck by what is perhaps the single most brutal attack in the history of terrorist attacks in the country thus far. This was the 7<sup>th</sup> August 1998 bombing of the Embassy of the United States in Nairobi by Al-Qaeda operatives.<sup>11</sup> The attack left over 200 people dead and

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<sup>1</sup>Manson Katrina, "Kenya's Tourism Industry Faces Renewed Threat from Al-Shabaab" (*Financial Times*, 2014) <<http://www.ft.com/cms/s/0/f51cc380-f5fb-11e3-83d3-00144feabdc0.html#axzz3Ppd9onqK>> accessed January 25, 2015.

<sup>2</sup> The Constitution of Kenya 2010 Promulgated on the 27<sup>th</sup> August 2010. Published in Kenya Gazette Supplement No.55.

<sup>3</sup>University of Maryland, "Global Terrorism Database" (2014) <[http://www.start.umd.edu/gtd/search/Results.aspx?expanded=no&casualties\\_type=&casualties\\_max=&success=yes&country=104&ob=GTDID&od=desc&page=1&count=100#results-table](http://www.start.umd.edu/gtd/search/Results.aspx?expanded=no&casualties_type=&casualties_max=&success=yes&country=104&ob=GTDID&od=desc&page=1&count=100#results-table)> accessed January 25, 2015.

<sup>4</sup>Ibid.

<sup>5</sup>Ibid.

<sup>6</sup>Kipng'eno Boaz, "Baragoi Massacre: Kenya Government yet to Recover Guns Stolen from Slain Officers" (*Standard Digital Media*, 2013).

<sup>7</sup>Githahu Mwangi, "History of Terror Attacks in Kenya" (*The Star*, 2011) <<http://www.the-star.co.ke/news/article-44019/history-terror-attacks-kenya>> accessed January 25, 2015.

<sup>8</sup>Ibid.

<sup>9</sup>Kiruga Morris, "20 Killed in Bomb Attack on Norfolk" (*Daily Nation*, 2013) <<http://mobile.nation.co.ke/lifestyle/-/1950774/1993444/-/format/xhtml/-/91mmanz/-/index.html>> accessed January 25, 2015.

<sup>10</sup>Ibid.

<sup>11</sup>"U. S Embassies in East Africa Bombed" (*History Channel*) <<http://www.history.com/this-day-in-history/us-embassies-in-east-africa-bombed>> accessed January 25, 2015.

over 4000 injured.<sup>12</sup> Even though some of those who lost their lives or were injured were American citizens, a significant majority of the victims were Kenyan citizens.<sup>13</sup>

The next major attack was the Kikambala bombing of November 28 2002. This was an attack on the Kikambala Hotel in the Coastal region of Kenya which occurred just after some sixty visitors to the hotel, all who were Israelis, had checked into the hotel.<sup>14</sup> The attack left about thirteen people dead.<sup>15</sup> Among the dead were ten Kenyans who worked at the hotel. Over 80 people were left injured by the attack.<sup>16</sup> At the same time that the hotel was under attack, two missiles were fired at an Israeli Airliner which had just taken off from the Mombasa International Airport.<sup>17</sup> Fortunately, the missiles missed their intended target thus the attack failed. The next major wave of terrorist attacks in the country occurred after Kenya sent its military into Somalia in 2010. Most of these attacks were carried out by suspected Al-Shabaab operatives. The attacks were believed to be retaliatory attacks against Kenya for sending its troops into Somalia.

On 13<sup>th</sup> June 2010 during a rally which was being held at Uhuru Park to drum up support against the then proposed constitution, a petrol bomb was hurled into the crowd.<sup>18</sup> The bomb resulted in the death of five people and left about 75 others injured.<sup>19</sup>

During the 2011-2012 period, there were over 17 attacks in various parts of Kenya. The attacks mainly involved use of grenades and improvised explosive devices (IEDs). Cumulatively, the attacks left about 50 people dead and over 200 others injured.<sup>20</sup> Majority of these attacks (9) occurred in the former North Eastern province of Kenya.<sup>21</sup> Both Mombasa and Nairobi were victims of four attacks each.<sup>22</sup> The attacks were targeted at diverse areas which ranged from churches, religious gatherings, police stations and police vehicles among others.<sup>23</sup> One of the most brazen of these attacks was on two churches in Garissa on 1<sup>st</sup> July 2012 which left over 17 people dead and 50 others maimed.<sup>24</sup> On 30<sup>th</sup> September 2012, suspected Al-Shabaab sympathizers hurled grenades at the Sunday School of St. Polycarps Church in Nairobi. One child died in the attack and several others suffered various injuries.<sup>25</sup>

On September 21, 2013, terrorists struck again at the heart of Nairobi. This was an attack by suspected Al-Shabaab gunmen who opened fire on shoppers and other persons at the Westgate Shopping Mall in the Westlands area of Nairobi.<sup>26</sup> The attack led to the loss of over seventy lives and left about 200 individuals with various injuries.<sup>27</sup>

Between April and June 2014, Kenya fell victim to about six terrorist attacks. The first of these attacks occurred on 1<sup>st</sup> April 2014. This attack occurred in Eastleigh area of Nairobi. It involved the detonation of

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<sup>12</sup>Ibid.

<sup>13</sup>Ibid.

<sup>14</sup>Theuri Caroline, "2002: Terrorists Hit Kikambala Hotel after Elaborate Planning" (*Daily Nation*, 2013) <<http://mobile.nation.co.ke/lifestyle/-Terrorists-hit-Paradise-Hotel-after-elaborate-planning/-/1950774/2067670/-/format/xhtml/-/cygh6tz/-/index.html>> accessed January 25, 2015.

<sup>15</sup>Ibid.

<sup>16</sup>Ibid.

<sup>17</sup>Ibid.

<sup>18</sup>Pflanz Mike, "Explosion at Kenyan Referendum Rally Kills Five" (*The Telegraph*, 2010) <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/7825446/Explosion-at-Kenyan-referendum-rally-kills-five.html>> accessed January 25, 2015.

<sup>19</sup>Ibid.

<sup>20</sup>Wafula Paul, "Kenya Has Experienced 100 Terror Related Attacks in Three Years" (*Standard Digital Media*, 2014) <<http://www.standardmedia.co.ke/article/2000131848/370-killed-in-terror-attacks-in-kenya-since-2011>> accessed January 25, 2015.

<sup>21</sup>Ibid.

<sup>22</sup>Ibid.

<sup>23</sup>Ibid.

<sup>24</sup>Gettleman Jeffrey, "At Least 15 Die in Kenya Church Attacks" (*The New York Times*, 2012) <[http://www.nytimes.com/2012/07/02/world/africa/at-least-15-dead-in-attacks-on-2-churches-in-kenya.html?\\_r=0](http://www.nytimes.com/2012/07/02/world/africa/at-least-15-dead-in-attacks-on-2-churches-in-kenya.html?_r=0)> accessed January 25, 2015.

<sup>25</sup>"Children Killed in Kenyan Church Attack" (*Al Jazeera*, 2012) <<http://www.aljazeera.com/news/africa/2012/09/201293083628417301.html>> accessed January 25, 2015.

<sup>26</sup>Howden Daniel, "Terror in Westgate Mall: The Full Story of the Attacks That Devastated Kenya" (*The Guardian*, 2013) <<http://www.theguardian.com/world/interactive/2013/oct/04/westgate-mall-attacks-kenya-terror#undefined>> accessed January 25, 2015.

<sup>27</sup>Ibid.

bombs simultaneously which left over 6 people dead and several others injured.<sup>28</sup> Three weeks later on the 23<sup>rd</sup> of April 2014, a car that had been laden with explosives exploded at the Pangani Police Station resulting in the death of four people, two of whom were police officers.<sup>29</sup> Hardly two weeks later on the third of May 2014, twin attacks in Mombasa in the coastal region of Kenya resulted in the death of three persons and left several others injured.<sup>30</sup> On 16<sup>th</sup> May 2014, there were two explosions in Gikomba market in Nairobi City County which left over 10 people dead and several others injured.<sup>31</sup> A week later in Mombasa, a grenade was hurled at a police vehicle which was transporting two terrorist suspects.<sup>32</sup> Two people were injured in the attack. About three weeks later on the 16<sup>th</sup> of June 2014, suspected Al-Shabaab gunmen stormed into the coastal town of Mpeketoni and killed over fifty people and left several others injured.<sup>33</sup> On 21<sup>st</sup> November 2014, suspect Al-Shabaab militants hijacked a Nairobi bound bus near the border of Kenya and Somalia and killed 28 of the travellers. All those killed were non-Muslims. Just about two weeks later still within the Manderu region of northern Kenya, suspected Al-Shabaab gunmen stormed a quarry and executed 36 people.<sup>34</sup> The 36 were workers at the quarry and were executed while sleeping in their tents by the quarry.<sup>35</sup> This was the last major terrorist attack on Kenyan soil as at the time of writing of this paper.

### III. WHAT CONSTITUTES TERRORISM?

There is no universally agreed definition of the term terrorism. There exist several dimensions of construction of what constitutes terrorism and terrorist activities. This paper however adopts the legal construction.

Attempts towards a universal definition of terrorism have not achieved a complete consensus. However, there are areas of consensus in terms of the devastating effects of terrorist activities.

Various efforts towards a consensus on what constitutes terrorism to arrive at a universal definition of terrorism. However, these efforts are yet to yield any fruits. The first attempts at arriving at a universal definition of terrorism were after the massacre in the 1972 Munich Olympics. Efforts by the United Nations to provide a universally acceptable definition of terrorism were resisted by some countries especially in Africa, Asia and the Middle East. The concerned countries refused to brand as terrorist groups organizations whose aims they supported. Such organizations which risked being branded as terrorist groups if the definition of terrorism as proposed by the United Nations were to see the light of day included the African National Congress and the Nicaraguan Contras as well as other organizations which were fighting for the liberation of their countries.

The United Nations has adopted various conventions on terrorism. These include the International Convention for the Suppression of Terrorist Bombings which was adopted 15<sup>th</sup> December 1997, the International Convention for the Suppression of the Financing of Terrorism which was adopted on 9 December 1999 and the International Convention for the Suppression of Acts of Nuclear Terrorism New York which was adopted on 13<sup>th</sup> April 2005. None of these conventions defines the word terrorism. In 2001, the United Nations came up with an interim draft definition of the term terrorism. The definition that acts of violence would constitute terrorism if they are “resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or abstain from doing any act”.<sup>36</sup> This definition was never adopted. As a result of the lack of

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<sup>28</sup>“Kenyan Nairobi Explosions Kill Six in Eastleigh” (*BBC NEWS AFRICA*, 2014) <<http://www.bbc.com/news/world-africa-26827636>> accessed January 25, 2015.

<sup>29</sup>“Kenya Car Bomb Kills Four in Nairobi’s Pangani Quarter” (*BBC News Africa*, 2014) <<http://www.bbc.com/news/world-africa-27134695>> accessed January 25, 2015.

<sup>30</sup>“Three Dead, Several Injured in Twin Bomb Attacks in Mombasa, Kenya” (*Australian Broadcasting Corporation*, 2014) <<http://www.abc.net.au/news/2014-05-04/kenya-bomb-attacks-hotel-grenade-bus/5428760>> accessed January 25, 2015.

<sup>31</sup>“Kenya’s Nairobi Hit by Twin Bomb Blasts in Gikomba Market” (*BBC News Africa*, 2014) <<http://www.bbc.com/news/world-africa-27443474>> accessed January 25, 2015.

<sup>32</sup>Sunday Nation Team, “Blood and Tears as Blasts Rock Mombasa” (*Sunday Nation*, 2014) <<http://mobile.nation.co.ke/news/Blood-and-tears-as--blasts-rock-Mombasa/-/1950946/2303194/-/format/xhtml/-/apuk6fz/-/index.html>> accessed January 25, 2015.

<sup>33</sup>“Kenya Attack: Mpeketoni near Lamu Hit by Al-Shabab Raid” (*BBC News Africa*, 2014) <<http://www.bbc.com/news/world-africa-27862510>> accessed January 25, 2015.

<sup>34</sup>“Gunmen Kill Dozens in Attack on Kenya Mine” (*Al Jazeera*, 2014) <<http://www.aljazeera.com/news/africa/2014/12/killed-attack-north-kenya-201412243646688620.html>> accessed January 25, 2015.

<sup>35</sup>Ibid.

<sup>36</sup> UN Ad Hoc Committee on Terrorism 2001 Informal texts of article 2 of the draft comprehensive convention

universally agreed definition of terrorism, various countries have developed their own specific definitions of terrorism and what constitutes acts of terrorism.

In 2002, in response to the September 11 2001 terrorist attacks on the World Trade Centre and the Pentagon, the United States of America enacted the Homeland Security Act in 2002. Section 15 of the Act defines the term terrorism to mean:

“ any activity that is dangerous to human life or potentially destructive of critical infrastructure or key resources, is a violation of the criminal laws of the United States or of any state or other subdivision of the United States and which appears to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion or to affect the conduct of a government by mass destruction, assassination or kidnapping”.

According to the Terrorism Act 2000 of the United Kingdom, terrorism is defined to mean:

the threat or use of action where the action involves serious damage to property, serious violence against a person, endangers a person’s life other than that of the person committing the action, creates a serious risk to the health or safety of the public or a section of the public or is designed seriously to interfere with or disrupt an electronic system.<sup>37</sup>

The Act also defines terrorism to mean the use or threat of action where the use or threat is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public or where the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.<sup>38</sup>

The Criminal Code Act of 1995 of Australia does not define terrorism. It however defines a ‘terrorist act’ as:

‘an act or threat, intended to advance a political, ideological or religious cause by coercing or intimidating an Australian or foreign government or the public. This action must cause serious harm to people or property, create a serious risk to the health and safety to the public, or seriously disrupt trade, critical infrastructure or electronic systems.’

The Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 of South Africa also does not define terrorism. It however provides a more robust definition of what constitutes a terrorist activity. Section 1 of the Act defines a terrorist activity to mean any activity that is conducted inside or outside the republic which involves or is aimed at certain objectives as outlined in the Act,<sup>39</sup> or which is intended directly or indirectly to: threaten the unity and territorial integrity of the Republic, intimidate or cause feelings

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Document A/C.6/56/L.9. 2001 session of the Working Group of the Sixth Committee.

<sup>37</sup> Section 1(1) as read with section 1(2) of the Terrorism Act 2000.

<sup>38</sup> Section 1(1) of the Terrorism Act 2000.

<sup>39</sup> Outlines terrorist activities to include any acts committed in or outside the republic which

- (i) involves the systematic, repeated or arbitrary use of violence by any means or method;
  - (ii) involves the systematic, repeated or arbitrary release into the environment or any part of it or distributing or exposing the public or any part of it to:
    - (aa) any dangerous, hazardous, radioactive or harmful substance or organism;
    - (bb) any toxic chemical; or
    - (cc) any microbial or other biological agent or toxin;
  - (iii) endangers the life, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of any person, or any number of persons
  - (iv) Causes serious risk to the health or safety of the public or any segment of the public.
  - (v) causes the destruction of or substantial damage to any property, natural resource, or the environmental or cultural heritage, whether public or private;
  - (vi) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service, facility or system, whether public or private, including, but not limited to-
    - (aa) a system used for, or by, an electronic system, including an information system
    - (bb) a telecommunication service or system;
    - (cc) a banking or financial service or financial system;
    - (dd) a system used for the delivery of essential government services;
    - (ee) a system used for, or by, an essential public utility or transport provider;
    - (ff) an essential infrastructure facility; or
    - (gg) any essential emergency services such as police, medical or civil defence services
  - (vii) causes any major economic loss or extensive destabilization of an economic system or substantial devastation of the national economy of a country.
  - (viii) creates a serious public emergency situation or a general insurrection in the republic
- Republic,

of insecurity within the public or a segment of the public with regard to its security or which is aimed at unduly compelling or inducing a person, government, the general public or a segment of the public, a domestic or international organization to do or abstain from doing any act.

The Act also defines a terrorist activity to mean any act which is committed directly or indirectly for the purpose of advancement of an individual or collective political, religious, ideological or philosophical objective.

Proclamation No 652/2009 of 2009 (Anti-Terrorism Proclamation) of Ethiopia does not define the term terrorism. It, however, defines a terrorist organization as a group, association or organization which is composed of not less than two members with the objective of committing acts of terrorism or plans, prepares, executes or cause the execution of acts of terrorism or assists or incites others in any way to commit acts of terrorism.<sup>40</sup> The Proclamation also does not define terrorist acts. However, under Section 3 which is under the heading terrorist acts, it enumerates a number of acts where if one is found culpable of committing any of them then they shall be subject to rigorous imprisonment from 15 years to life or with death. The section specifically provides that : Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country: causes a person's death or serious bodily injury; creates serious risk to the safety or health of the public or section of the public; commits kidnapping or hostage taking; causes serious damage to property; causes damage to natural resource, environment, historical or cultural heritages; endangers, seizes or puts under control, causes serious interference or disruption of any public service is punishable with rigorous imprisonment from 15 years to life or with death.

The Proclamation also provides a number of penalties for terrorism related offences. It, however, does not define any of these offences. The offences include: planning, preparation, conspiracy, incitement and attempt of terrorist act, rendering support to terrorism, encouragement of terrorism, participation in a terrorist organization, possessing or using property for terrorist act, false threat of a terrorist act and failure to disclose terrorist acts.

The Prevention of Terrorism Act 2012 of Kenya, which aims at addressing various matters regarding terrorism, does not define terrorism. However, the Act defines a terrorist act as an act or threat of action:

a) which: involves the use of violence against a person, endangers the life of a person, other than the person committing the action, creates a serious risk to the health or safety of the public or a section of the public, results in serious damage to property, involves the use of firearms or explosives, involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment, interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services, interferes or disrupts the provision of essential or emergency services, prejudices national security or public safety and

(b) which is carried out with the aim of: intimidating or causing fear amongst members of the public or a section of the public or intimidating or compelling the Government or international organization to do, or refrain from any act or destabilizing the religious, political, Constitutional, economic or social institutions of a country, or an international organization.

According to Cynthia Combs, there are two specific characteristics that must be present for an act to qualify as a terrorist act.<sup>41</sup> The first feature focuses on violence, audience and a mood of fear.<sup>42</sup> Under this feature, terrorist acts are inherently violent acts. They are acts which are characterized by use of or the threat of use of violence. In addition, Combs argues that terrorist acts are not necessarily targeted at the victims.<sup>43</sup> They are instead targeted at the audience. Put differently, the aim of the terrorist is the effect that the terrorist act will have on other people who are not victims of the attack. In this regard, the primary aim of terrorist when carrying out terrorist attacks is to instill a 'mood of fear' among the larger public. At this point, it is important to make a distinction between a victim of terrorism and the audience targeted by terrorists or terrorist activities. Whereas a terrorist activity may result into few or many victims, the focus of the terrorists is not so much the number or magnitude of the injury but the fear and apprehension that the terrorist activities and its effect instill in the audience. In this respect the audience refers to the community, the citizens, the people within the area that is targeted for terrorist activities. Victims are likely to be part of the larger audience that is the target of the terrorist activities. In some cases, the audience targeted by terrorist activities may be a government/state whereas the victims are innocent civilians who have nothing to do with grievances of the perpetrators of terrorist activities. As an example, the al-Shabaab attacks are said to be targeting the Kenyan government so as to withdraw its troops from Somalia but the victims of the terrorist attacks in Kenya have been innocent civilians

<sup>40</sup> Section 2(4) of the Proclamation.

<sup>41</sup> Combs Cynthia, *Terrorism in the Twenty First Century* (7th edn, Pearson 2012) 3.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

and police officers who are not in essence the government decision makers but only law enforcement authorities who carry out orders given by the state.

The second characteristic of terrorist acts as argued by Combs relates to the victims.<sup>44</sup> Combs argues that for an act to qualify as a terrorist act, then the victims must be civilian non-combatants.<sup>45</sup> The notion of civilian non-combatants as victims is what distinguishes terrorist acts from other acts such as guerrilla warfare and insurgencies.

Apart from the two characteristics discussed above, Combs argues that terrorist acts must also have a political motive or goal.<sup>46</sup> However, there exist divergent views on the argument that terrorist acts must have a political motive or goal.

Other scholars have argued that terrorist acts are motivated by other reasons such as religion.<sup>47</sup> As such, terrorist acts are not necessarily motivated by political motives or goals.

According to Feliks Gross, there are five typologies of terrorism namely: mass terror, dynastic association, random terror, focused random terror and tactical terror.<sup>48</sup> Mass terror is terror by a state, where the regime coerces the opposition in the population, whether organized or unorganized, sometimes in an institutionalized manner.<sup>49</sup> It is also known as state terror on its people or terrorism perpetrated by the state. Dynastic association is an attack upon a head of state or a ruling elite.<sup>50</sup> Random terror involves the placing of explosives where people gather to destroy whoever happens to be there.<sup>51</sup> Focused random terror restricts the placing of explosives, for example, to where significant agents of oppression are likely to gather.<sup>52</sup> Lastly, tactical terror is directed solely against the ruling government as a part of a "broad revolutionary strategic plan".<sup>53</sup>

#### **IV. TERRORISM AND ITS EFFECTS ON THE RIGHTS OF CITIZENS AND STATE SECURITY.**

Terrorism and acts that constitute terror negatively impact on state security of the nation or country that is targeted. Under the social contract theory,<sup>54</sup> the most important role of any state is to secure its borders and protect its subjects or citizens and their property. In return, the citizens, are obligated to pay their taxes to the state so as to facilitate it to render basic services which include security.<sup>55</sup> Acts of terrorism are therefore not only a threat to the existence of a state but more importantly threaten the continued stay of a government in power. Once citizens feel that the state is unable to deal with threats to terrorism and acts that constitute terrorism, they are most likely to call on the government to step down. Terrorist activities therefore challenge and test the ability of a government in power to discharge its obligation of securing the country's borders and its people. Terrorism threatens a people's right to peaceful co-existence. Innocent civilians and citizens are more likely to all upon the state to arrest, prosecute and jail those suspected to engage in acts that amount to terrorism. In this respect, terrorism therefore creates a situation where there is perceived need to limit basic human rights of the suspects such as freedom of association, movement, expression and fair trial rights amongst many others. In an attempt to control or pre-empt terrorist threats or activities, it is not uncommon to find that states deliberately ignore the rule of law and due process so as to protect the larger population of innocent civilians while violating the fundamental rights and freedoms of those suspected to engage in or perpetrate terrorism. In Kenya, following several incidences of alleged terrorist attacks in the country in 2013 and 2014, after extensive consultations within the executive, President Uhuru Kenyatta instructed parliament to amend security laws so as to enable the government deal with terrorism in the country.<sup>56</sup>

Terrorism creates an atmosphere or environment of insecurity which negatively impacts on people's freedom to move freely, associate and carry on business and other activities towards development. In this

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<sup>44</sup>Ibid.

<sup>45</sup>Ibid.

<sup>46</sup>Ibid.

<sup>47</sup>Jackson Richard and others, *Terrorism: A Critical Introduction* (Palgrave Macmillan 2011) 20.

<sup>48</sup>Gross Feliks, *Violence in Politics: Terror and Political Assassination in Eastern Europe and Russia* (Mouton 1973) 24.

<sup>49</sup>Ibid.

<sup>50</sup>Ibid.

<sup>51</sup>Ibid.

<sup>52</sup>Ibid.

<sup>53</sup>Ibid.

<sup>54</sup>Rousseau Jean-Jacques, *The Social Contract* (Cole G translator, Reprint, Cosimo Inc 2008 2008) 3.

<sup>55</sup>Ibid.

<sup>56</sup>President Uhuru speaking on a pre-recorded address to the nation on the 19<sup>th</sup> of December 2014 upon signing the controversial and disputed Security Laws (Amendment) Act 2014.

respect, terrorism hampers a people's ability to realize their full potential. The constant state of fear in itself affects psychological and emotional well-being of the affected audience. Terrorism therefore violates the basic fundamental freedoms and rights to be enjoyed by citizens of a nation.

Terrorism results into loss of life, injuries, loss of limbs, disability and loss of loved ones. In addition, terrorism results in untold suffering and destruction of property which may have taken a long time to develop and cost extensive amounts of resources. In this respect, terrorism is a devastating crime that can reduce a country with established infrastructure, institutions and an able human resource to a devastating level.

Terrorism negatively impacts on a country's economy and has the great potential of stagnating growth and development. Terrorism can result in instability of a country if not contained at the right time.

## **V. THE ROLE OF THE KENYAN GOVERNMENT (PARLIAMENT, EXECUTIVE AND JUDICIARY) IN PROTECTING LIFE AND PROPERTY OF ALL PEOPLE, INCLUDING THOSE SUSPECTED OF TERRORISM**

The Government of Kenya, which comprises of Parliament, the Judiciary and the Legislature, must exercise their authority, as provided by the Constitution to protect the lives and property of every person in Kenya. Protection of life and property is indeed the core function of any government.<sup>57</sup> Under the principle of collective responsibility, all the three arms of government must work together to discharge their mandate of protecting life and property of all persons within its jurisdiction.<sup>58</sup> However, the three arms of government must be guided by the Constitution of Kenya 2010 as the supreme law of the land.<sup>59</sup>

### **i. PARLIAMENT**

Whereas Parliament, which consists of the National Assembly and the Senate, is tasked with enacting laws that protect the lives and property of all persons in Kenya, such laws must be consistent with the constitution<sup>60</sup>. In case of any inconsistency, the law passed shall be declared null and void, and not enforceable to the extent of the inconsistency.<sup>61</sup>

In the year 2012, parliament passed the Prevention of Terrorism Act 2012 to provide measures for the detection and prevention of terrorist activities; to amend the Extradition (Commonwealth Countries) Act and the Extradition (Contiguous and Foreign Countries) Act.<sup>62</sup> There are arguments as to whether or not, the Prevention of Terrorism Act is consistent with the Constitution of Kenya 2010.

In 2014, the National Assembly passed the Security Laws (Amendment) Act 2014. Laws enacted by the legislature to deal with terrorism, must conform to the constitution and safeguard the rights and freedoms of all persons in Kenya, including those suspected of terrorist activities. The National Assembly has a constitutional mandate to deliberate and resolve issues of concern to the people, and to legislate on the issues.<sup>63</sup> Terrorism is an issue that is of concern to the people. The National Assembly must thus enact laws that address terrorism. This includes the outlawing of terrorism, defining what conduct amounts to terrorism and providing penalties for terrorist activities. In this respect, the National Assembly is obligated to provide for the limitation of the rights and freedoms of those suspected and or convicted of terrorism. Any such limitation must, however, be within the constitutional limits and must follow the due process and the rule of law.

In a televised speech from State House on the 19<sup>th</sup> of December 2014, immediately after signing into law the controversial Security Laws (Amendment) Bill, less than 24 hours after its disputed passing by parliament, Kenya's President Uhuru Kenyatta stated that after the terrorists executed 64 Kenyans in November 2014, extensive consultations within the Executive kick started the process of amending the security laws. The legislative process was characterized by acrimony in parliament, exhibited by the major political divisions in the country namely, Jubilee and CORD. Whereas the Jubilee side of the National Assembly comprises parliamentarians who are perceived to support the current government and have the numbers to enable them pass any law by a majority, the CORD parliamentarians are those on the opposition side with fewer numbers than their Jubilee counterparts. Although the CORD members of Parliament did oppose the Bill, they did not have the numbers to ensure that the Bill does not go through at the voting stage. The Bill therefore sailed through but the process was characterized by acrimony that had never been witnessed in the history of

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<sup>57</sup>Larrabee Frank, *Functions of Government: A Development of Principles That Necessitate the Existence of Government* (Digitized, Kimball & Storer Company, Printers 1897) 35.

<sup>58</sup>Ibid.

<sup>59</sup> Article 2(1) of the Constitution of Kenya 2010.

<sup>60</sup> Article 94(5) and Article 95(2),(3) of the Constitution of Kenya 2010.

<sup>61</sup> Article 2(4) of the Constitution of Kenya 2010.

<sup>62</sup> Preamble to the Prevention of Terrorism Act 2012.

<sup>63</sup> Article 94 of the Constitution of Kenya 2010.



parliament in Kenya. During the process, parliamentarians from both the political divisions fought openly in parliament and engaged in uncivilized behaviour that made objective debate on the bill not possible.

Although the bill was finally passed by a majority of the members of parliament, the question is whether the parliamentarians really addressed their minds to the issues of security or whether they were influenced by their side of the political affiliations in terms of objecting or supporting the bill. Security is a major national concern which ought to be debated objectively irrespective of one's political affiliation. Security matters concern everyone irrespective of their origin, status, race, ethnicity, religion, gender, sex, age, educational level etc.

The signing into law of the Security Laws Amendment Bill elicited mixed reactions from several Kenyans. While some people supported the law as a move to improve the nation's security,<sup>64</sup> some strongly criticized it arguing that the law is a drawback to gains made in the promulgation of the Constitution 2010 as far as guaranteeing fundamental freedoms and rights of citizens are concerned.<sup>65</sup>

The arguments for the passing of the law included the following: while supporting his assent to the law, President Uhuru, in a press statement immediately after signing the law said, '...for the first time, a law that focuses on prevention and disruption of threats is in place'.<sup>66</sup>

In addition, the president argued that the law sets a higher threshold for any public or state officer tasked with the responsibility of protecting Kenyans. Further, the President argued that the law addresses emerging crimes that reinforce terrorism such as foreign fighters, radicalization, cross border crimes like poaching and trafficking, which were becoming more sophisticated.<sup>67</sup> The President's main argument was that the law will improve state capacity to detect, deter and disrupt threats to Kenya's security. In addition, the President lauded the law for giving security actors a firm institutional framework for coherent co-operation and synergy within the national counter-terrorism centre.<sup>68</sup>

The Security Laws (Amendment) Act 2014, argued the President, allows for the application of technology in successful prosecution of suspects. While arguing that Kenya is still at war and vulnerable to terrorist attacks, the President called on all Kenyans to support the law and give relevant information to security officers in combating terrorist crimes.<sup>69</sup>

Of particular importance to this paper is the President's argument that the Security Laws (Amendment) Act 2014 does not infringe on the rights of Kenyans, but is intended to protect the lives and property of all Kenyans.<sup>70</sup> Indeed, this is the paramount responsibility of any government. The President confidently stated that the law does not contravene the Bill of Rights or any provision of the constitution.

While the President's views represent the official government position and those who support the law, the views of those opposed to the law are captured by the position of the official opposition, led by Wiper Party Leader Stephen Kalonzo Musyoka,<sup>71</sup> and Senate Minority Leader, Moses Wetangula.<sup>72</sup>

Critics of the Security Law (Amendment) Act 2014 challenge the Act on the basis of insufficient public participation as required by the constitution.<sup>73</sup> They argue that the law was rushed through the National Assembly and the public did not have sufficient time to participate in the debate. This they argue contravenes the constitutional principle of public participation. The law was signed by the president, less than 24 hours after being rushed through parliament. The process through which the law was passed has been challenged for failing to comply with legal requirements of procedural justice and fairness in debating national issues and has been termed a travesty.<sup>74</sup> The process portrayed the Speaker of the National Assembly as acting on the behest of the Executive. Although Members of Parliament have a constitutional obligation to debate national issues, the process through which the Security Laws Amendment Act passed through denied Members of Parliament the opportunity due to its acrimonious nature. The critics say that the law is an onslaught on the freedom of the press.

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<sup>64</sup> For instance Hon. Aden Duale, the leader of Majority in the National Assembly.

<sup>65</sup> For instance Njonjo Mue, Vice –Chair, International Commission of Jurists Kenyan Section.

<sup>66</sup> In a Televised speech aired by Kenya Broadcasting Corporation on the 19<sup>th</sup> of December 2014.

<sup>67</sup> *ibid*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> A lawyer by profession and career diplomat, having worked for several years in the government as a Minister for Education and Foreign Affairs.

<sup>72</sup> Also a lawyer and a former Minister for Foreign Affairs.

<sup>73</sup> Article 118 (1) (b) of the Constitution of Kenya 2010.

<sup>74</sup> Njonjo Mue, a human rights activist, and an international law expert-Daily Nation of 20<sup>th</sup> December 2014.

### **Prevention of Terrorism Act 2012**

Section 32 provides that a person arrested on suspicion of being a member of a terrorist organization shall not be held for more than twenty four hours after his arrest unless the suspect is produced before a Court and the Court has ordered that the suspect be remanded in custody or the twenty-four hours end outside ordinary court hours or on a day that is not an ordinary court day. Section 32 as read together with Section 33 of the Act recognizes the constitutional right of a suspect of terrorism not to be held for more than 24 hours upon arrest. However, the section appreciates the fact that there may be reason to hold the suspect in custody for more than the constitutional limit of 24 hours and provides that in such circumstances, the suspect must however still be produced in court after the 24 hours and an application be made by the state in court as to why the suspect should continue to be held in custody beyond twenty four hours. The suspect will therefore have an opportunity to reply to such an application and the court makes a decision based on the facts before it. The Court may: (a) release the suspect unconditionally, (b) release the suspect subject to such conditions as the Court may impose to ensure that the suspect:

- (i) Does not, while on release, commit an offence, interfere with witnesses or the investigations in relation to the offence for which the suspect has been arrested.
- (ii) Avails himself 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 suspect stands accused; and
- (iii) Appears 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.

Section 33 (5) provides the conditions upon which the court may order that a terrorist suspect be remanded in custody and therefore not admitted to bail. The section echoes the provisions of the constitution in Article 49(1)(h) that bail can only be limited where the court is convinced that there are compelling reasons to do so. Specifically, section 33(5) states that such compelling reasons include situations where: there are compelling reasons for believing that the suspect shall not appear for trial, interfere with witnesses or the conduct of investigations, or commit an offence while on release or that it is necessary to keep the suspect in custody, for the protection of the suspect, or where the suspect is a minor, for the welfare of the suspect or where the suspect is already serving a custodial sentence or where the suspect, having been arrested in relation to the commission of an offence that relates to terrorism under the Act, has breached a condition upon which he was admitted to bail.

Article 24 of the Constitution of Kenya 2010 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, 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. The limitation of bail in this respect is only for the purpose of ensuring that: the suspect or any witness is protected, the suspect avails himself for examination or trial or does not interfere with the investigations, or the prevention of the commission of an offence under the Act and the preservation of national security.

Section 35 of the Prevention of Terrorism Act 2012 provides for limitation of certain rights of terrorist suspects. The limitation is therefore within the limit of the constitution since they are provided for by an Act of Parliament namely the Prevention of Terrorism Act 2012. The Act goes on further to explain under section 35(2) that a limitation of a right or fundamental freedom under the Act shall apply only for the purposes of ensuring: the investigations of a terrorist act, the detection and prevention of a terrorist act or that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others.

The limitation of a fundamental right or freedom of any terrorist suspect shall relate to the right to privacy to the extent of allowing a person, home or property to be searched, possessions to be seized or the privacy of a person's communication to be investigated, intercepted or otherwise interfered with.<sup>75</sup>

The Act provides for a limitation of the fundamental rights and freedoms that relate to freedom of expression, the media and of conscience, religion, belief and opinion to the extent of preventing the commission of an offence under the Act.<sup>76</sup> These limitations are constitutional since they are not protected from derogation under Article 25 of the Constitution.

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<sup>75</sup> Section 35(3) of the Prevention of Terrorism Act 2012.

<sup>76</sup> Section 35 (3)(c) of the Prevention of Terrorism Act 2012.

Section 35(3)(d) and (e) further limit the fundamental rights and freedoms of individuals that relate to freedom of security of a person and the right to property to the extent of detaining or confiscating any property used in the commission of a terrorist related offence so as to allow investigations in terrorist related cases.

The limitation of the fundamental rights and freedoms under the Prevention of Terrorism Act 2012 which includes limitation of the right to bail are constitutional and attempt to strike a balance between individual freedom and state security in cases of suspected terrorist attacks or threats.

### **Amendments introduced by the Security Laws Amendment Act 2014**

Although the Security Laws Amendment Act targets security as a concern and therefore amends various legislation, this article examines the security amendment law in two sections. The first part examines the amendments that are specific to the issue of bail. Part two examines the amendments that relate to security and other fundamental freedoms enshrined in the constitution of Kenya 2010.

#### **Part I**

Section 15 of the Security Laws Amendment Act 2014 amends section 36 of the Criminal Procedure Code by importing the words of Section 33 of the Prevention of Terrorism Act 2012. The amendment formulated in the same words as the Prevention of Terrorism Act provides that pursuant to Article 49(1) (f) and (g) of the Constitution, a police officer shall present a person who has been arrested in court within twenty-four hours after being arrested. However, where a police officer has reasonable grounds to believe that the detention of a person arrested beyond the twenty-four hour period is necessary, the police officer shall- (a) produce the suspect before a court; and (b) apply in writing to the court for an extension of time for holding the suspect in custody.<sup>77</sup> Section 36A (5) provides that a court shall not make an order for the remand in custody of a suspect unless there are compelling reasons for believing that the suspect shall not appear for trial, may interfere with witnesses or the conduct of investigations, or commit an offence while on release; (b) it is necessary to keep the suspect in custody for his protection, or, where the suspect is a minor, for his welfare; (c) the suspect is serving a custodial sentence; or (d) the suspect, having been arrested in relation to the commission of an offence, has breached a condition for his release.

#### **Part II**

The Security Laws Amendment Act makes a number of amendments to legislation governing terrorism in Kenya. This section examines the amendments in relation to the constitutional provisions.

The Security Laws Amendment Act has amended Section 9 of the Prevention of Terrorism Act by expanding conduct that amounts to terrorist acts. Under this amendment, advocating, promoting, advising or facilitating with intent to commit a terrorist act is an offence punishable by a term of imprisonment not exceeding twenty years. In addition, being found in possession of weapons for terrorist purposes is an offence. This is a strict liability offence because it does not add that the possession must be unlawful therefore mere possession of the weapons for terrorist purposes is an offence. Section 12A(2) makes the unlawful possession of improvised explosive devices, assault rifles, rocket propelled grenades or grenades is presumed to be for terrorist or criminal purposes. The effect of the amendment is that the prosecution must prove that the possession is unlawful. In the alternative, if the suspect can prove that the possession is lawful, then it does not amount to an offence. The presumption is that the possessed materials are for terrorist or criminal purposes. It is therefore the responsibility of the suspect to provide evidence to the contrary or to rebut the presumption.

Section 12B makes it an offence to be in possession of weapons in places of worship, institutions or public places. Under Section 12C, a person who is in charge of a public place, institution or any premises within which illegal weapons are recovered shall be deemed to be in possession of such weapons and shall be liable to imprisonment for a term not exceeding thirty years. Of special importance public safety is the amendment under Section 12 C which imposes a responsibility and a legal duty on anyone in charge of a public place, institution or any place within which illegal weapons are recovered, such a person is deemed to be in possession of such weapons and therefore liable to imprisonment for a term not exceeding thirty years. This provision is good in terms of enhancing security and making owners of property and people charged with the care of any institution or place with the onus of ensuring the safety and security of such places or risk being imprisoned for a term not exceeding thirty years.

Radicalization is expressly prohibited by Section 12 D. adopting or promoting an extreme belief system for the purpose of facilitating ideologically based violence to advance political, religious or social change is criminalized and attracts a punishment upon conviction to a term of imprisonment not exceeding thirty years.

Section 64 of the Security Laws Amendment Act amends Section 30 of the Prevention of Terrorism Act by making it an offence to publish or utter a statement that is likely to be understood as directly or

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<sup>77</sup> Section 36A (2) of the Criminal Procedure Code.

indirectly encouraging or inducing another person to commit or prepares to commit an act of terrorism. The conduct of the offence is punishable by imprisonment for a term not exceeding fourteen years.<sup>78</sup> This section is very vague and does not meet the specificity required of a definition of a crime. The use of words like likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism. The question is what is the test that is to be applied? It does not say that the author must intend to directly or indirectly encourage or induce another person to prepare or commit an act of terrorism. By whose standard is the phrase 'likely to be understood supposed to be measured'. This creates a loophole in which the state may interpret and prosecute an individual under this section yet the question of the intention of the publisher or the author of the words or statement is expressly missing here.

Section 30B of the Prevention of Terrorism Act criminalizes the training or receiving of instructions for purposes of terrorism whether done inside or outside Kenya. This is an important amendment which has the effect of enhancing state security.

In addition, the Act makes it an offence to travel to country designated by the Cabinet Secretary to be a terrorist country without passing through designated immigration entry or exit points.<sup>79</sup> Section 30D provides that a person who is not a Kenyan citizen who enters or passes through Kenya for purposes of engaging in terrorist activities in Kenya or elsewhere commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding thirty years. Section 30 E makes it an offence to aid or abet the commission of an offence under the Prevention of Terrorism Act.

Of particular importance is Section 30F (1) which makes it an offence to broadcast any information which undermines investigations or security operations relating to terrorism without authority from the National Police Service. This is an important provision which aims at enhancing the administrative aspects of investigation and ensure that such information is protected so as to enable full investigations. The question however is who determines and what level would one say that the broadcast of information may undermine investigations and security operations related to terrorism. This is a provision that needs clear guidelines from the National Police Service in consultation with the media council.

Section 30 F(2), makes it an offence to publish or broadcast photographs of victims of a terrorist attack without the consent of the National Police Service and of the victim. Whereas this section is important in protecting the members of the public scenes that would traumatize them, when a terrorist attack is reported people would want to know the situation. There is need for consultation between the National Police Service and the Media Council of Kenya on how to strike a balance between giving information to the public on terrorist attacks and showing the scenes of terrorist attacks and also ensuring that the public is protected from trauma which obviously has devastating effects.

Section 69 of the Security Laws Amendment Act 2014 amends section 36 of the Prevention of Terrorism Act by inserting a new section which empowers the national security organs to intercept communication for the purposes of detecting, deterring and disrupting terrorism in accordance with procedures to be described by the Cabinet Secretary.<sup>80</sup> Section 36 A (3) provides that right to privacy under Article 31 of the Constitution shall be limited under this section for the purpose of intercepting communication directly relevant in the detecting, deterring and disrupting terrorism. The limitation of the right to privacy under this part of the Security Amendment Laws is constitutional since the right to privacy is not protected from non-derogation. What is important is that the limitation must be solely for the purpose of detecting, deterring and disrupting terrorism.

The Security Laws Amendment Act amends Section 40 of the Prevention of Terrorism Act by inserting section 40A which establishes the National Counter Terrorism Centre as the institute responsible for the coordination of national counter-terrorism efforts in detecting, deterring and disrupting terrorism acts. This is a commendable amendment as there is need to coordinate activities towards detecting, deterring and disrupting terrorist acts. What is not clear is whether the centre is an authority, how it will be managed and its relation to the security agencies. This needs to be clearly spelt out so as to avoid situations of power conflict and situation of roles. A clear command of the coordination needs to be spelt out.

Section 42 of the Criminal Procedure Code is amended by inserting a new section 42A (i) which provides that pursuant to Article 50(2)(i) of the Constitution, the prosecution shall inform the accused person in advance of the evidence that the prosecution intends to rely on and ensure that the accused person has reasonable access to that evidence. This amendment simply restates the provisions of the constitution.

Section 42 A (ii), however, provides that under the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act and the Counter-Trafficking in Persons Act, the prosecution may, with leave of

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<sup>78</sup> Section 30A of the Prevention of Terrorism Act 2012.

<sup>79</sup> Section 30 C of the Prevention of Terrorism Act 2012.

<sup>80</sup> Section 36A (1) of the Security Laws Amendment Act.

court, not disclose certain evidence on which it intends to rely until immediately before the hearing: (a) if the evidence may facilitate the commission of other offences; (b) if it is not in the public interest to disclose such evidence; (c) where there are grounds to believe that disclosing such evidence might lead to an attempt being improperly made to persuade a witness to make a statement retracting his original statement, not to appear in court or otherwise to intimidate him.

It is important to appreciate the fact the provisions of Article 50 (2)(i) of the constitution are not absolute. Although the accused person has a right to the evidence that the prosecution wishes to rely on, Section 42 A (ii) does not completely take away the right to information by the accused person. Like in bail applications, it simply demands that the application to withhold such application by the accused person be heard by the court and the accused person must be given an opportunity to respond. Subsequently then the court having heard the application and the response can grant the leave or not but the court must give its reasons. Such court decision is however subject to appeal. Had the drafters of the constitution found it necessary to make the right to receive evidence from the prosecution in preparation of the defence absolute, nothing would have stopped them from including this right under article 25 of the constitution of Kenya 2010 which clearly states that the non-derogable rights and fundamental freedoms are: freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*.

## ii. EXECUTIVE

The Executive arm of the government has the greatest responsibility in protecting the lives and property of the people. The Executive power is derived from and exercised on behalf of the people. The National Executive power is vested on the President, the Deputy President and the rest of the Cabinet.<sup>81</sup> Any action or directive by the Executive towards addressing terrorism can only be lawful, if it meets the threshold of constitutional compliance and consistency.

The enforcement of laws by the Executive must therefore be in the interest, and for the protection of the people of Kenya. The governance structure and system needs to be consistent with the Constitution of Kenya 2010.<sup>82</sup> The exercise of executive authority must be compatible with the national values and principles of governance<sup>83</sup> and for the well-being and benefit of the people.<sup>84</sup> The Executive, in enforcing laws passed by Parliament in this regard, must ensure compliance with the above mentioned national values and principles of governance. Government policies, directives, programs, strategies and any action towards dealing with terrorism, must therefore promote and protect the national values and principles of governance. In protecting the people, the Executive may face challenges in balancing the rights of individuals or groups suspected of terrorism, and the obligation to protect all people and the Republic of Kenya. This gives rise to a conflict situation where the executive appears to violate constitutional rights and freedoms of those suspected of terrorism, who are nevertheless entitled to equal protection of the law and safeguards of their human rights.

The Kenya government's strategy on combating terrorism and terrorism related activities appears to be multifaceted. It has entailed various measures such as enacting legislation such as the Security Laws Amendment Act 2014, adoption of stern methods to deal with refugees and the giving of more powers to the police. The issue of enactment of legislation has been canvassed in other sections of this paper. As such, this section will highlight the methods that have been employed to deal with refugees and directives given to the police.

After the spate of terrorist attacks in 2014, the government embarked on rounding up of persons of a particular ethnic community.<sup>85</sup> The persons were taken to Moi International Sports Centre Kasarani Stadium where they were 'vetted'. Those found without the necessary documentation to prove that they were Kenyans

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<sup>81</sup> Article 130 of the Constitution of Kenya 2010.

<sup>82</sup> Article 129(1) and (2) of the Constitution of Kenya 2010.

<sup>83</sup> Article 10 of the Constitution of Kenya 2010 provides these as, patriotism, national unity, and the rule of law, democracy, sharing and devolution and participation of the people. Others include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency, accountability and sustainable development.

<sup>84</sup> Article 129 of the Constitution of Kenya 2010.

<sup>85</sup> Nyongesa Joan, "The Plight of Refugees in Kenyan Cities" (*Kituo cha Sheria Legal Advice Centre*) <<http://kituochasheria.or.ke/in-the-thick-of-an-insecurity-complex-the-plight-of-refugees-in-kenyan-cities/?lang=en>> accessed January 20, 2015.

were repatriated back to their countries.<sup>86</sup> Refugees who could not produce documents to show that they were in Kenya legally were taken to refugee camps in Daadab and Kakuma.<sup>87</sup>

After the attacks at a Church in Mombasa, the Mombasa County Commissioner, Nelson Marwa issued 'shoot to kill' orders to the police so as to deal with the terrorist attacks.<sup>88</sup> The sentiments of the County Commissioner received support from the pronouncements of the Deputy President when he visited Likoni and said:<sup>89</sup>

'We have given all our security men and women permission to use their arms well whenever Kenyans lives are being threatened. Terrorists must face equal force to the one they are using to terrorize Kenyans.'<sup>90</sup>

Following the assassination of some Muslim clerics who were under investigation for suspected involvement in terrorist activities, some have argued that the assassinations were carried out by the state in furtherance of shoot to kill orders.<sup>91</sup> According to a documentary by Al-Jazeera Television Network,

The Executive criticism for granting bail to terrorism suspects highlights the perception of the Executive on bail matters in terrorism cases. This is evident from comments by both the President and Deputy President<sup>92</sup> on bail for terrorist suspects. In his first State of the Nation Address delivered in the National Assembly on 27<sup>th</sup> March 2014, President Uhuru Kenyatta argued that the lack of effective collaboration between various institutions in the criminal justice system had greatly hampered efforts to combat terrorism. In comments that were widely interpreted as a criticism on how the judiciary handles the issue of bail for suspects of terrorism and terrorist related activities, the President stated that:

Across our criminal justice system –from law enforcement, to our prosecutors, the judiciary and our correctional services – there has been too little effective collaboration. Too many crimes have been improperly processed, leaving suspects and culprits at large in our communities.<sup>93</sup>

The sustained pressure from the Executive regarding the issue of bail for terrorist suspects resulted in the establishment of a taskforce by the Chief Justice to evaluate the application of bail and bond terms in court.<sup>94</sup> The eight member taskforce is headed by Lady Justice Lydia Achode of the High Court of Kenya.

### iii. JUDICIARY

When conflict arises in the enforcement of laws, the Judiciary, upon whom judicial authority is vested, is called to interpret the laws and resolve the dispute.<sup>95</sup> Judicial authority is derived from and exercised on behalf of the people of Kenya.<sup>96</sup> The exercise of judicial authority must however be guided by the principles set out by the Constitution of Kenya 2010.<sup>97</sup> These include justice to all, irrespective of status, justice without delay or

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<sup>86</sup> Ibid.

<sup>87</sup> BBC, "Kenya Orders Somali Refugees to Go to Daadab" (2012) <<http://www.bbc.com/news/world-africa-20768955>> accessed December 20, 2014.

<sup>88</sup> Mbaka James, "Activists Condemn Nelson Marwa's Shoot to Kill Order" (*Standard Digital*, 2014) <<http://www.standardmedia.co.ke/the-counties/article/2000107960/activists-condemn-shoot-to-kill-order>> accessed January 20, 2015; K24 TV, "Mombasa County Commissioner Issues Shoot-To-Kill Order Against Terror Suspects," *K24 TV* (2014) <<https://www.youtube.com/watch?v=omqzBJRHxw>>.

<sup>89</sup> Mghenyi Charles, "Ruto Gives Police Greenlight to Shoot Terrorists" (*The Star*, 2014) <<http://allafrica.com/stories/201403310798.html>> accessed January 20, 2015.

<sup>90</sup> Ibid.

<sup>91</sup> Howden Daniel, "Kenyan Rights Groups Accuses Anti-Terror Police of Unlawful Killings" (*The Guardian*, 2013) <<http://www.theguardian.com/world/2013/nov/19/kenya-human-rights-anti-terror-police-killings>> accessed January 20, 2015.

<sup>92</sup> Koinange Machua and Ombati Cyrus, "Deputy President William Ruto Confirms Mombasa Terrorists Were out on Bond" (*Standard Digital Media*, 2014) <[http://www.standardmedia.co.ke/?articleID=2000111062&story\\_title=ruto-confirms-mombasa-terrorists-were-out-on-bond/](http://www.standardmedia.co.ke/?articleID=2000111062&story_title=ruto-confirms-mombasa-terrorists-were-out-on-bond/)> accessed January 20, 2015; "DP William Ruto Faults Judiciary Over Bail Awarded to Terror Suspects" (2014) <<https://www.youtube.com/watch?v=kXh9gCEIOJI>>.

<sup>93</sup> President Uhuru Kenyatta, "State of The Nation Address March 27th 2014" (2014) 4 <[http://www.apsea.or.ke/index.php/documents/cat\\_view/24-president-speeches](http://www.apsea.or.ke/index.php/documents/cat_view/24-president-speeches)> accessed January 20, 2015.

<sup>94</sup> Nation Correspondent, "CJ Forms Team to Review Bail Terms" (*Daily Nation*, 2014) <<http://mobile.nation.co.ke/news/CJ-forms-team-to-review-bail-terms/-/1950946/2332362/-/format/xhtml/-/9vt2m7z/-/index.html>> accessed January 20, 2015.

<sup>95</sup> See generally Chapter 10 of the Constitution of Kenya 2010.

<sup>96</sup> Article 159(1) of the Constitution of Kenya 2010.

<sup>97</sup> Article 159(2) of the Constitution of Kenya 2010.

undue regard to technicalities and the protection and promotion of the purpose and principles of the Constitution of Kenya 2010.<sup>98</sup>

Of particular relevance to this paper is the purpose and principles of the Constitution of Kenya 2010 which must guide the courts in the exercise of judicial authority. The purpose of the Constitution of Kenya 2010 is expressed in the Preamble of the Constitution in two ways. The first is the commitment by the people of Kenya to nurture and protect the well-being of the individual, the family, communities and the nation. In making decisions as to whether to grant or deny bail to suspects of terrorism, the courts must therefore take into account the possible effect of the court order on the well-being of individual suspects, their families, their communities and the larger community which is the nation called Kenya.

The drafters of the Constitution of Kenya 2010, in their wisdom must have had a basis for including such a provision in the preamble. Indeed, the denial of bail to suspects of crime generally implies being confined to custody in the prison holding facilities, which are often overcrowded with the potential of health risks.<sup>99</sup> The result is often a threat to the well-being of the suspect. This is against the purpose of the Constitution 2010. The Kenyan media has reported interviews with members of families of terrorism suspects, showing how denial of bail negatively affects the family psychologically and emotionally.<sup>100</sup>

When majority of suspects arrested for terrorism suspicion appeared to be from one community, political leaders from that community were reported to be concerned that their community was targeted.<sup>101</sup> Such kind of perception is obviously not healthy for the fight against terrorism and the courts must be able to balance the scales of justice towards fairness to all parties affected by the dispute before it. Kenya has about 43 ethnic communities.<sup>102</sup> When one community feels that the fight against terrorism discriminates against them, such perception may jeopardize efforts towards peaceful co-existence and unity of the country, as the determination of all Kenyans, expressed in the preamble of the Constitution.

The crime of terrorism has peculiarities, which result into serious issues of national security, peace and unity. The granting or denial of bail to individuals arrested on suspicion of terrorist activities, thus calls on the courts to exercise care and due diligence when making such orders so as to strike a balance between the freedoms and rights of suspects and state security. In the following paragraphs, the article examines the right to bail and the balance between state security and individual freedoms of suspects of terrorism by the judiciary in selected cases.

### **The Role of the Judiciary in Balancing State Security and The Right to Bail of Suspects of Terrorism.**

Bail is a constitutional right under the Constitution of Kenya 2010 Article 49(1)(h) which states that 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.

Bail is therefore a right that an accused person does not need to ask for as it is their entitlement. Upon being arraigned in court therefore, it should be automatic that the courts grant bail to suspects charged in court. However, where there are compelling reasons that warrant the limitation of these rights, the prosecution on behalf of the state must, convince the court of the existence of the compelling circumstances before the right to bail can be limited. Once the prosecution makes the application to limit the right to bail, the court needs to address this matter through a full hearing on the issue of bail. During such proceedings, the prosecution opens the case by stating the reasons as to why the accused person's right to bail should be limited. Such a proceeding must be conducted in the presence of the suspect, in a language that he or she understands and the suspect must be accorded legal representation by the state if he or she cannot afford one. This is important because the bail hearing is an important procedure that determines whether or not the right to bail can be curtailed. The accused person and his legal representative must not only be present at the bail hearing, but must be accorded an opportunity to, listen, understand and interrogate the evidence presented in favour of limiting the right to bail. The prosecution arguments in this case must not be mere suspicion but facts which must be proved under such proceedings. Both sides must be allowed the opportunity to present and interrogate witnesses. It is only after

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<sup>98</sup> Ibid.

<sup>99</sup> Sarkin Jeremy, "Prisons in Africa: An Evaluation from a Human Rights Perspective" [2011] International Journal on Human Rights <[http://www.surjournal.org/eng/conteudos/getArtigo9.php?artigo=9,artigo\\_sarkin.htm](http://www.surjournal.org/eng/conteudos/getArtigo9.php?artigo=9,artigo_sarkin.htm)>.

<sup>100</sup> "Kenya Denies Bail to Suspects over Mall Raid" (*Al Jazeera Africa*, 2013) <<http://www.aljazeera.com/news/africa/2013/12/kenya-denies-bail-suspects-over-mall-raid-2013124124149447928.html>> accessed January 25, 2015.

<sup>101</sup> K24Tv, "Muslim MPs Protest Use Of Kasarani As A Holding Area For Suspects Arrested In Security Swoops" (2014) <<https://www.youtube.com/watch?v=lqLzBy5dFTE>> accessed 25 January 2015.

<sup>102</sup> Richard and others (n47).

such thorough hearing that the court can make a decision as to whether or not the right to bail for terrorism suspects should be limited.

It is important to recognize that any trial of terrorism suspects must be conducted under the rule of law and the due process while ensuring the fair trial rights of the accused person are respected. In this respect, Article 25(c) of the Constitution of Kenya is very specific on the fact that fair trial rights of accused persons in Kenya are non-derogable. Any attempt therefore by either the Executive, Parliament or indeed the Judiciary to limit fair trial rights of terrorism suspects will be a contravention Article 25(c) of the Constitution of Kenya 2010 and therefore null and void to the extent of the inconsistency. Such fair trial rights as stipulated in the Constitution of Kenya under Article 50 include: the right to be presumed innocent until the contrary is proved, to be informed of the charge, with sufficient detail to answer it, to have adequate time and facilities to prepare a defence, to a public trial before a competent court, to an efficient trial without undue delay, to be present at one's trial unless the conduct of the accused person makes it impossible for the trial to proceed, the right to choose and be represented by legal counsel and to be informed of this right promptly before the proceedings begin. Where it is necessary that the accused person be represented and where lack of legal representation may result into substantial injustice then the accused person has a right to a legal counsel paid by the state. In addition, the accused person has a right to be informed of this right before the trial begins. The accused person also has a right to remain silent and is protected against self-incrimination. The article also obligates the prosecution to inform the accused person in advance of the evidence that the prosecution intends to rely on. In addition, the accused person has a right to have reasonable access to that evidence so as to prepare for his trial.

Further, the accused person has a right to adduce and challenge evidence given against him/her. Where the accused person does not understand the language of trial, he or she has a right to the services of an interpreter at the expense of the state. An accused person cannot be convicted for an act or omission that was not an offence in Kenya or a crime under international law at the time when it was alleged to have been committed or omitted. The accused person is protected from double jeopardy. In cases where the prescribed punishment for an offence has been changed between the time that the offence was committed and the time of sentencing, then the accused person has a right to the benefit of the least of the severe punishment. If convicted, the accused persons have a right to appeal or apply for review by a higher court. Any evidence intended for use by the prosecution that is obtained in a manner that violates the fundamental freedoms in the Bill of Rights is inadmissible as it would render the trial unfair. The accused person has a right to the record of the proceedings. The fair trial rights are meant to ensure fairness in the conduct of the proceedings against any suspect including terrorism suspects. Whereas the above fair trial rights cannot be limited, Article 49(1)(h) permits the limitation of bail. The question therefore is under what circumstances can bail be limited in terrorism cases?

#### **Decided court decisions on bail in terrorism cases in Kenya.**

In *Abdikadir Aden Alias Tullu & 2 Others vs. Republic*,<sup>103</sup> the applicants had been charged in the lower courts with possessing articles connected with a terrorist offence. They applied for bail but their application was denied. They consequently moved to the High Court seeking to be admitted to bail pending the determination of their case at the lower court. The prosecution opposed their application on the ground that the offence which the applicants had been charged with was severe and therefore is a compelling reason upon which the accused person's right to bail should be limited. In granting the applicants bail, the court stated that Article 49(1) (h) requires the demonstration of compelling reasons why bail should not be granted. The prosecution had failed to discharge this obligation and did not convince the court of the existence of any compelling reasons why the applicants' right to bail should be limited. The appeal was allowed and the applicants admitted to bail.

In *Aboud Rogo Mohammed & another vs. Republic*,<sup>104</sup> the applicants had been charged with the offence of engaging in an organized criminal activity by being members of the Al-Shabaab contrary to Section 3(3) as read with Section 4(1) of the Prevention of Organized Crimes Act, 2010. The applicants moved the High Court for bail pending trial after their application for bail was rejected by the lower court on the ground that they had been charged with terrorist related offences. The applicants argued that all offences were bailable in Kenya and that additionally, the right to bail was anchored in Article 49(1)(h) of the Constitution of Kenya 2010. On the other hand, the respondents argued that the right to bail as provided for in the constitution was not absolute but was subject to denial if there are compelling reasons for such denial. The respondents further contended that there was a high likelihood of the applicants absconding if they were granted bail. In determining the application, the court held that the prosecution failed to prove that there existed compelling reasons as to why the applicants' rights to bail should be limited. The court argued that the main consideration in determining an application for bail pending trial is whether or not the accused person will voluntarily and readily present himself to the trial court. The application was allowed and the accused persons were granted bail.

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<sup>103</sup> Criminal Case no 16 of 2014.

<sup>104</sup> Criminal Case no 793 of 2010 [2011]eklr.



In *Hassan Mahati Omar and another v Republic*,<sup>105</sup> the applicants were denied bail by the lower court. They moved to the High Court under Section 362 of the Criminal Procedure Code and asked the court to overturn the decision of the lower court and grant them bail pending trial. The state opposed this application on the basis that the grenades which were used in the attacks in Eastleigh on 7<sup>th</sup> December 2012 belonged to the applicants. The state argued that the applicants were a threat to national security and therefore should not be granted bail. The court held that the right to bail applies to all persons who come before the courts without discrimination. The court, however, observed that the right to bail as enumerated in article 49(1)(h) of the Constitution of Kenya 2010 is not couched in absolute terms. Consequently, the court stated that the granting of bail entails the balancing of a balance of proportionality in considering the rights of the applicant who enjoys the presumption of innocence on the one hand, and the public interest on the other. The court further observed that denial of bail when justified in accordance with the law does not amount to the applicants' loss of their right to the presumption of innocence or to a fair hearing. In arguing that the interest of justice must be served, the court denied bail to the first applicant on the ground that he had previously been charged with terrorism related offences. The court, however, granted bail to the second applicant on the basis that this was the first time he faced terrorism related offences. In this case, the court established the fact that one of the compelling reasons to deny a suspect bail is the likelihood of committing the offence again.

In *Republic vs. Francis Kariko Kimani*,<sup>106</sup> the accused persons applied to the court to be released on bail pending trial. In the case, the court stated that the grounds stated in section 123 of the Criminal Procedure Code<sup>107</sup> provide compelling reasons such as those envisaged in Article 49(1) (h) for which bail would not be granted. The court stated that acts of terrorism could also be added to that list and that as such, persons charged with committing various acts of terrorism should not be entitled to bail. Subsequently, the court denied the bail application and held that the accused person be held in custody pending the trial. In this case, the court exercised its law making function.

In *Republic vs. Ahmad Abolafathi Mohamed & another*,<sup>108</sup> this was an application by the state seeking the reversing of the orders by a lower court which had granted bail to the respondents. The respondents were two Iranians who had led police to a place where they recovered 15 kilograms of explosive material. This was after intelligence reports from the National Intelligence Service showed that 100kgs of explosive material had been shipped into the country through the port of Mombasa. The police had tracked the movements of the two respondents who after being arrested led the police to the recovery of the 15kilograms of explosives, leaving about 85 kilograms still unaccounted for. The state argued that the lower court had on two occasions refused to grant the applicants bail as they had no fixed abode, had no known hosts in Kenya and were likely to escape from the country. However, on making a third application for bail, the lower court granted the respondents bail despite the fact that the reasons for not granting them bail initially were still present. The high court reversed the decision of the lower court and denied the respondents bail. The high court agreed that the reasons provided by the state were compelling enough to deny the accused persons bail. Justice Achode asserted that while the respondents had a right to enjoy their fundamental rights and freedom, Kenyans and aliens of good will also had a right to the quiet enjoyment of their rights, and to go about their daily business without threat to life or limb, and without being placed in harm's way.<sup>109</sup> She further stated that:

I take judicial notice of the circumstances prevailing at the time of the arrest of the respondents, when there were explosions going off in various parts of the country injuring, maiming and even killing people. I also note that the recovery of the 15kg of explosive material was made possible by the respondents, and their arrest was as a result of intelligence reports which showed that 100kg of dangerous explosive material had been shipped into the country from Iran through the Port of Mombasa. This lends credence to the intelligence report which indicates that a consignment of 85 kg of explosives remains unrecovered and may be accessed and used by the respondents to harm innocent Kenyans.<sup>110</sup>

The fact that the respondents had led police to recover 15 kilograms of explosives while another 85 kilograms was still missing was a compelling reason to deny the respondents bail.

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<sup>105</sup> High Court Criminal Revision No 31 of 2014, [2014] eklr.

<sup>106</sup> Criminal Case no 100 of 2010 [2010] eklr.

<sup>107</sup> Provides that hat no accused charged with the capital offences of murder, treason, robbery with violence and attempted robbery with violence may be released on bond/bail.

<sup>108</sup> High Court Criminal Revision no. 373 of 2012 [2013] eklr.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

In *Mahadi Swaleh Mahadi v Republic*,<sup>111</sup> the applicant had been charged with sixty counts of murder contrary to section 203 of the Penal Code Cap 63 Laws of Kenya in relation to the attacks in Lamu during the period of 15<sup>th</sup> to 17<sup>th</sup> June 2014. The applicant sought to be released on bond pending trial and relied on Article 49(1)(h) of the constitution. The applicant argued that the fact applicant had been charged with capital offences was not a compelling reason to deny him bail. He argued that denial of bail would amount to a breach of the presumption of innocence since his guilt or innocence was yet to be determined. On its part, the state argued that releasing the accused person on bail would embolden other suspects who were still at large. The state urged the court ought to balance the rights of an individual against the rights of the society. In denying the accused person bail, the court argued such a denial does not necessarily mean that the court has already made a decision that the accused person is guilty as charged. The court argued that there were compelling reasons not to grant the accused person bail under Article 49(1)(h). The compelling reasons according to the court were the likelihood of the accused absconding bail if granted as the charges that he faced were very grave and their punishment was death.

In *Republic vs. Issa Timamy*,<sup>112</sup> the state applied to the court to be granted an extra fourteen days to hold the respondent in custody until investigations were complete. The state argued that if granted bail, the suspect was to interfere with investigations and was a threat to witnesses. The application of bail was premised on the fact that the applicant was being investigated in connection with murder, forcible transfer of population and other terrorism related offences within Lamu County. The court declined the application and stated that the investigating agencies already had enough time to carry out investigations and were not limited in their investigations in the future. Consequently, the court admitted the accused person to bail as there were no compelling reasons why he should continue being held in custody.

In the next paragraphs, this article examines how various jurisdictions have handled the issue of bail, terrorism and security.

## **VI. BAIL, TERRORISM AND SECURITY IN COMPARATIVE JURISDICTIONS**

### **Australia**

As a legislative measure in the fight against terrorism, the Australian authority enacted the Anti-Terrorism Act 2004 and the Bail Amendment (Terrorism) Act 2004 which had the effect of reversing the presumption in favour of bail in terrorism cases. The amendment also introduced section 15AA of the Crimes Act which provides that, where a person is charged with certain terrorism offences, bail must not be granted unless the bail authority is satisfied that exceptional circumstances exist to justify granting bail.

This provision reverses the presumption in favour of granting bail, and creates a presumption against granting bail where a person is charged with a terrorism offence. In terrorism cases therefore, granting of bail is not automatic. The accused must convince the court of the existence of exceptional circumstances that warrant the granting of bail, to the satisfaction of the prosecution

### **The USA**

Amendment No8 of the Constitution of the United States of America provides that while bail may be imposed, the bail shall not be excessive. The United States Code 3142 on Release or Detention of Defendant Trial Pending Trial provides that

(a) IN GENERAL.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

- (1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;
- (2) released on a condition or combination of conditions under subsection (c) of this section;
- (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or
- (4) detained under subsection (e) of this section.

(b) Release On Personal Recognizance Or Unsecured Appearance Bond.—The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C.14135a), unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

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<sup>111</sup> Criminal Case no 23 of 2014 [2014] eklr.

<sup>112</sup> Criminal Miscellaneous case no 52 of 2014 [ 2014] eklr.

(c) The court may release the accused on the following conditions, if the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community;

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); and

(B) Subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community.

The constitutionality of the Bail Reform Act was raised in the case of *United States v Salerno*<sup>113</sup>The Act allowed the denial of bail and detention of suspects whose pretrial pose a danger to the community. Suspects were therefore presumed innocent but bail determined based on flight risk. The majority ruling held that prospective danger to the community could be used to as a criteria to deny bail. The effect of the ruling was to deny suspects bail by limiting their right to liberty in guaranteeing public safety. The war on terrorism is therefore seen as changing the legal arena. According to Chief Justice William Rehnquist;

The Government regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom it believes to be dangerous. Even outside the exigencies of war, we have found that sufficiently compelling government interests can justify detention of dangerous persons.<sup>114</sup>

Justice Marshall however dissented and stated that;

The coercive power of authority to imprison upon prediction...poses a danger to the cherished liberty of a free society.<sup>115</sup>

The USA PATRIOT Act allows the Attorney General to designate an alien as a terrorist threat and to be subsequently detained for 6 months without a limit of the number of times one is send to detention. Further, the 1<sup>st</sup> Judiciary Act 1789 allows material witness(with crucial information about a case) to be detained-deprived of liberty because of the information they are seized of in terrorism cases, not because they are suspects.They can be detained indefinitely until the criminal justice system is done with them. The above cases show that terrorism is definitely changing the legal landscape.

### **United Kingdom**

The United Kingdom enacted the Bail Act in 1976 to govern matters touching on bail. Section 4 of the Act provides for the general right to bail of accused persons. All persons covered under Section 4 are entitled to bail except those who fall under the exceptions provided under the Act whose right to bail may be limited. Section 2 of the First Schedule of the Act provides exceptions to the right to bail. It provides that the court need not grant the defendant bail if there exists substantial grounds for believing that the defendant if released on bail would fail to surrender to custody, commit an offence while on bail or interfere with witnesses or otherwise obstruct the course of justice.

Section 2A of the First Schedule to the Act further provides that the defendant need not be granted bail if the offence is an indictable offence or an offence triable either way or where it appears to the court he was on bail in criminal proceedings on the date of the offence. Under Section 3, the defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare. Under Section 5, the defendant need not be granted bail where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this Part of the Schedule for want of time since the institution of the proceedings against him.

In the case of *A(FC) and Others(FC) v Secretary of State for the Home Department*<sup>116</sup>the House of Lords held that threats of terror may constitute public emergency but measures taken by the member state of the European Union in derogating its obligation to the European Convention on Human Rights should not exceed the limits of what is statutorily required of exigency situation. The court ruled that in this case the circumstances did not justify denial of bail and detention without trial of non-British nationals.

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<sup>113</sup> 481 U.S 739 (1987)

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> 2004 UHHL 60

## **South Africa**

Chapter Nine of the Criminal Procedure Act 51 of 1977 of South Africa contains provisions governing bail in the country. Section 60(1)(a) of the Act provides that An accused who is in custody in respect of an offence shall be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

Section 60(1)(4) provides reasons for denial of bail to include; 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 the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or 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 jeopardise 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. Sections 60(5), 6, 7, 8, 8A and provide factors that the court may take into account in determining whether to grant bail. They include: the degree of violence towards others implicit in the charge against the accused, the prevalence of a particular type of offence, the means, and travel documents held by the accused, which may enable him or her to leave the country, the nature and the gravity of the charge on which the accused is to be tried, the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial and the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her.

## **Uganda**

Article 23 of the 1995 Constitution of Uganda provides that where a person is arrested in respect of a criminal offence, the person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable.

Under Article 23 (6)(b), the accused person has a right to be released on bail, if the person has been on remand for sixty (60) days before trial, in respect of an offence that is triable by the High Court or subordinate court (Magistrate's court).

Article 23(6)(c) gives the accused person the right to be released on bail if he or she has spent one hundred and eighty days (180) on remand in respect of an offence only triable by High Court. However, such accused person must fulfill the conditions set by the court.

There are various Acts of Parliament in Uganda which govern bail. These include: the Magistrate Court Act, the Trial on Indictment Act, the Police Act and the Criminal Procedure Code Act.

The Magistrates Courts Act provides for situations and circumstances when a person who is under detention pending trial may be granted bail. Among others, these include where the defendant is not being tried for any of the following offences: acts of terrorism, cattle rustling, defilement among others. The import of this provisions is that persons who are being tried for any of the offences enumerated in the section cannot be granted bail by the Magistrate Courts. For Section 77 of the Act provides for factors which the Magistrate Courts should consider in determining whether to grant the accused person bail. These, *inter alia* include: The nature of the offence or accusation against the accused, the severity of the punishment which conviction might entail and whether the accused has a fixed place of abode, which is a permanent residence or home within the jurisdiction of the court.

The Trial Indictment Act provides for circumstances when a person who is under detention may be released on bail by the High Court.<sup>117</sup> The section provides that The High Court may grant bail to an accused upon the accused proving exceptional circumstances that entitle him/her to be granted bail and also showing that he or she will not abscond when released. The section defines exceptional circumstances to include: where the accused is suffering from a grave or serious illness, where the accused produces a Certificate of No objection signed by the Director of Public Prosecutions (DPP) or where the accused shows that he or she is either an infant, or of advanced age. Under the Trial Indictment Act, an accused person will be entitled to mandatory bail if he or she has been remanded in custody before the commencement of his or her trial (a) in respect of any offence punishable by death and life imprisonment, for a continuous period exceeding 180 days or (b) in respect of any other offence, for a continuous period exceeding 60 days.

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<sup>117</sup>Section 15 of the Trial Indictment Act.

## **Ethiopia**

Article 19 (6) of the Constitution of Ethiopia provides that all arrested persons have the right to be released on bail. The article equally empowers the courts, in exceptional cases as prescribed by law, to deny bail or demand adequate guarantee for the conditional release of the arrested person.

## **VI. CONCLUSION**

Whereas Parliament is obligated to deliberate and legislate on issues of national importance such as terrorism, such legislation must be consistent with Article 2(1) and (4) of the Constitution of Kenya 2010 as the supreme law of the land. In this respect, the Security Laws (Amendment) Act 2014 and the Prevention of Terrorism Act 2012 that seek to limit some fundamental freedoms and rights of suspects of terrorism, must be confined to the constitutional provisions. Such limitations should only occur to the extent and for the purpose allowed by the constitution. Any provision contrary to the constitution risks being declared null and void by the courts of law. The Security Laws Amendment Act 2014 has been challenged in this respect and the matter is pending determination by the High Court. The contested provisions have been suspended awaiting the substantive hearing and determination of the case.

The Executive arm of the government, in enforcing laws to protect citizens and the Republic of Kenya, must ensure that programs, strategies and policies conform to national values and principles of governance as provided by Article 10 of the Constitution of Kenya 2010. Any violation of the constitution in this respect renders the action null and void, to the extent of the inconsistency. Government directives must be lawful and consistent with the constitution. Pronouncements that amount to 'shoot to kill' orders are therefore unconstitutional. The arrest, prosecution and determination of terrorist suspects must follow the due process of the law and the suspects must be accorded equal protection by the law without discrimination whatsoever. However, where the state has evidence to the effect that the liberty of the suspect is likely to endanger public safety, the application must be made in court and the suspect given a chance to respond. The decision to limit the right to liberty must not be left to the executive, must be a subject of hearing before an impartial and competent court of law.

The Judiciary, while making decisions on bail matters, exercises judicial authority on behalf of the people of Kenya. Therefore judicial officers have a duty to ensure that granting bail to terrorism suspects does not jeopardize state security and the safety of the people of Kenya. Likewise, limiting suspects rights to bail must be lawful and within legal limits

Bail is a constitutional right, but is not an absolute right under the Constitution of Kenya 2010. The courts can therefore limit the right to bail to suspects in cases where the Executive, through the Director of Public Prosecution, presents evidence that amounts to compelling reasons why the suspects should not be granted bail. There is however no guideline or Act of Parliament that regulates bail.

## **RECOMMENDATION**

The paper recommends the enactment of a comprehensive Bail Act to detail how and when the right to bail can be limited. Currently inadequate provisions as regards bail can be found in the Anti Terrorism Prevention Act 2012 and the Security Laws Amendment Act 2014. This is however not comprehensive enough to address the various emerging issues in balancing the rights of terrorism suspects and public safety.

## **BIBLIOGRAPHY**

- [1]. BBC, "Kenya Orders Somali Refugees to Go to Daadab" (2012) <<http://www.bbc.com/news/world-africa-20768955>> accessed December 20, 2014
- [2]. Boaz K, "Baragoi Massacre: Kenya Government yet to Recover Guns Stolen from Slain Officers" (*Standard Digital Media*, 2013)
- [3]. Caroline T, "2002: Terrorists Hit Kikambala Hotel after Elaborate Planning" (*Daily Nation*, 2013) <<http://mobile.nation.co.ke/lifestyle/-Terrorists-hit-Paradise-Hotel-after-elaborate-planning/-/1950774/2067670/-/format/xhtml/-/cygh6tz/-/index.html>> accessed January 25, 2015
- [4]. Charles M, "Ruto Gives Police Greenlight to Shoot Terrorists" (*The Star*, 2014) <<http://allafrica.com/stories/201403310798.html>> accessed January 20, 2015
- [5]. "Children Killed in Kenyan Church Attack" (*Al Jazeera*, 2012) <<http://www.aljazeera.com/news/africa/2012/09/201293083628417301.html>> accessed January 25, 2015
- [6]. Cynthia C, *Terrorism in the Twenty First Century* (7th edn, Pearson 2012) 3
- [7]. Daniel H, "Kenyan Rights Groups Accuses Anti-Terror Police of Unlawful Killings" (*The Guardian*, 2013) <<http://www.theguardian.com/world/2013/nov/19/kenya-human-rights-anti-terror-police-killings>> accessed January 20, 2015
- [8]. —, "Terror in Westgate Mall: The Full Story of the Attacks That Devastated Kenya" (*The Guardian*, 2013) <<http://www.theguardian.com/world/interactive/2013/oct/04/westgate-mall-attacks-kenya-terror#undefined>> accessed January 25, 2015
- [9]. Feliks G, *Violence in Politics: Terror and Political Assassination in Eastern Europe and Russia* (Mouton 1973) 24
- [10]. Frank L, *Functions of Government: A Development of Principles That Necessitate the Existence of Government* (Digitized, Kimball & Storer Company, Printers 1897) 35

- [11]. “Gunmen Kill Dozens in Attack on Kenya Mine” (*Al Jazeera*, 2014) <<http://www.aljazeera.com/news/africa/2014/12/killed-attack-north-kenya-201412243646688620.html>> accessed January 25, 2015
- [12]. James M, “Activists Condemn Nelson Marwa’s Shoot to Kill Order” (*Standard Digital*, 2014) <<http://www.standardmedia.co.ke/the-counties/article/2000107960/activists-condemn-shoot-to-kill-order>> accessed January 20, 2015
- [13]. Jean-Jacques R, *The Social Contract* (Cole G ed, Reprint, Cosimo Inc 2008) 3
- [14]. Jeffrey G, “At Least 15 Die in Kenya Church Attacks” (*The New York Times*, 2012) <[http://www.nytimes.com/2012/07/02/world/africa/at-least-15-dead-in-attacks-on-2-churches-in-kenya.html?\\_r=0](http://www.nytimes.com/2012/07/02/world/africa/at-least-15-dead-in-attacks-on-2-churches-in-kenya.html?_r=0)> accessed January 25, 2015
- [15]. Jeremy S, “Prisons in Africa: An Evaluation from a Human Rights Perspective” [2011] *International Journal on Human Rights* <[http://www.surjournal.org/eng/contendos/getArtigo9.php?artigo=9,artigo\\_sarkin.htm](http://www.surjournal.org/eng/contendos/getArtigo9.php?artigo=9,artigo_sarkin.htm)>
- [16]. Joan N, “The Plight of Refugees in Kenyan Cities” (*Kituo cha Sheria Legal Advice Centre*) <<http://kituochasheria.or.ke/in-the-thick-of-an-insecurity-complex-the-plight-of-refugees-in-kenyan-cities/?lang=en>> accessed January 20, 2015
- [17]. K24 TV, “Mombasa County Commissioner Issues Shoot-To-Kill Order Against Terror Suspects,” *K24 TV* (2014) <<https://www.youtube.com/watch?v=omqznzJRHXw>>
- [18]. K24TV, “Muslim MPs Protest Use Of Kasarani As A Holding Area For Suspects Arrested In Security Swoops” (2014) <<https://www.youtube.com/watch?v=lqLzBy5dFTE>>
- [19]. Katrina M, “Kenya’s Tourism Industry Faces Renewed Threat from Al-Shabaab” (*Financial Times*, 2014) <<http://www.ft.com/cms/s/0/f51cc380-f5fb-11e3-83d3-00144feabdc0.html#axzz3Ppd9onqK>> accessed January 25, 2015
- [20]. “Kenya Attack: Mpeketoni near Lamu Hit by Al-Shabab Raid” (*BBC News Africa*, 2014) <<http://www.bbc.com/news/world-africa-27862510>> accessed January 25, 2015
- [21]. “Kenya Car Bomb Kills Four in Nairobi’s Pangani Quarter” (*BBC News Africa*, 2014) <<http://www.bbc.com/news/world-africa-27134695>> accessed January 25, 2015
- [22]. “Kenya Denies Bail to Suspects over Mall Raid” (*Al Jazeera Africa*, 2013) <<http://www.aljazeera.com/news/africa/2013/12/kenya-denies-bail-suspects-over-mall-raid-2013124124149447928.html>> accessed January 25, 2015
- [23]. “Kenya’s Nairobi Hit by Twin Bomb Blasts in Gikomba Market” (*BBC News Africa*, 2014) <<http://www.bbc.com/news/world-africa-27443474>> accessed January 25, 2015
- [24]. “Kenyan Nairobi Explosions Kill Six in Eastleigh” (*BBC NEWS AFRICA*, 2014) <<http://www.bbc.com/news/world-africa-26827636>> accessed January 25, 2015
- [25]. Machua K and Cyrus O, “Deputy President William Ruto Confirms Mombasa Terrorists Were out on Bond” (*Standard Digital Media*, 2014) <[http://www.standardmedia.co.ke/?articleID=2000111062&story\\_title=ruto-confirms-mombasa-terrorists-were-out-on-bond/](http://www.standardmedia.co.ke/?articleID=2000111062&story_title=ruto-confirms-mombasa-terrorists-were-out-on-bond/)> accessed January 20, 2015
- [26]. Mike P, “Explosion at Kenyan Referendum Rally Kills Five” (*The Telegraph*, 2010) <<http://www.telegraph.co.uk/news/worldnews/africaandindianocan/kenya/7825446/Explosion-at-Kenyan-referendum-rally-kills-five.html>> accessed January 25, 2015
- [27]. Morris K, “20 Killed in Bomb Attack on Norfolk” (*Daily Nation*, 2013) <<http://mobile.nation.co.ke/lifestyle/-/1950774/1993444/-/format/xhtml/-/91mmanz/-/index.html>> accessed January 25, 2015
- [28]. Mwangi G, “History of Terror Attacks in Kenya” (*The Star*, 2011) <<http://www.the-star.co.ke/news/article-44019/history-terror-attacks-kenya>> accessed January 25, 2015
- [29]. Nation Correspondent, “CJ Forms Team to Review Bail Terms” (*Daily Nation*, 2014) <<http://mobile.nation.co.ke/news/CJ-forms-team-to-review-bail-terms/-/1950946/2332362/-/format/xhtml/-/9vt2m7z/-/index.html>> accessed January 20, 2015
- [30]. Paul W, “Kenya Has Experienced 100 Terror Related Attacks in Three Years” (*Standard Digital Media*, 2014) <<http://www.standardmedia.co.ke/article/2000131848/370-killed-in-terror-attacks-in-kenya-since-2011>> accessed January 25, 2015
- [31]. President Uhuru Kenyatta, “State of The Nation Address March 27th 2014” (2014) 4 <[http://www.apsea.or.ke/index.php/documents/cat\\_view/24-president-speeches](http://www.apsea.or.ke/index.php/documents/cat_view/24-president-speeches)> accessed January 20, 2015
- [32]. Richard J and others, *Terrorism: A Critical Introduction* (Palgrave Macmillan 2011) 20
- [33]. Sunday Nation Team, “Blood and Tears as Blasts Rock Mombasa” (*Sunday Nation*, 2014) <<http://mobile.nation.co.ke/news/Blood-and-tears-as--blasts-rock-Mombasa/-/1950946/2303194/-/format/xhtml/-/apuk6fz/-/index.html>> accessed January 25, 2015
- [34]. “Three Dead, Several Injured in Twin Bomb Attacks in Mombasa, Kenya” (*Australian Broadcasting Corporation*, 2014) <<http://www.abc.net.au/news/2014-05-04/kenya-bomb-attacks-hotel-grenade-bus/5428760>> accessed January 25, 2015
- [35]. “U. S Embassies in East Africa Bombed” (*History Channel*) <<http://www.history.com/this-day-in-history/us-embassies-in-east-africa-bombed>> accessed January 25, 2015
- [36]. University of Maryland, “Global Terrorism Database” (2014) <[http://www.start.umd.edu/gtd/search/Results.aspx?expanded=no&casualties\\_type=&casualties\\_max=&success=yes&country=104&ob=GTIDID&od=desc&page=1&count=100#results-table](http://www.start.umd.edu/gtd/search/Results.aspx?expanded=no&casualties_type=&casualties_max=&success=yes&country=104&ob=GTIDID&od=desc&page=1&count=100#results-table)> accessed January 25, 2015
- [37]. “DP William Ruto Faults Judiciary Over Bail Awarded to Terror Suspects” (2014) <<https://www.youtube.com/watch?v=kXh9gCEIOJI>>