



**Small Five Veterinary Clinic Ltd & 2 others v Inspector General of Police & 5 others; Kenya Veterinary Association & another (Interested Parties) (Constitutional Petition 10 of 2019) [2023] KEHC 21160 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21160 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CONSTITUTIONAL PETITION 10 OF 2019**

**SN MUTUKU, J**

**JULY 27, 2023**

**IN THE MATTER OF THE CRIMINAL CASE NO. 439  
OF 2019 AT THE MAGISTRATE'S COURT IN NGONG**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 19,20,21,22,25,27,28, 29,  
40, 43,46,49, 50 AND 51 OF THE CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF CONTRAVENTION OF PART 2 (7)(B) OF THE  
FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF CONTRAVENTION OF ARTICLE  
185, 186, 209(5) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF CONTRAVENTION OF ARTICLE 2, 3,  
10, 238 AND 244 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 5,32(2) AND 33 OF THE KAJIADO  
COUNTY GOVERNMENT INSPECTORATE SERVICE ACT 2018**

**IN THE MATTER OF SECTION 5, 6, 13 AND 87 OF THE COUNTY GOVERNMENTS ACT**

**BETWEEN**

**SMALL FIVE VETERINARY CLINIC LTD ..... 1<sup>ST</sup> PETITIONER**

**DR. GABRIEL OUMA ..... 2<sup>ND</sup> PETITIONER**

**DENNIS MAUBE LUMUMBA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**THE INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> RESPONDENT**



COUNTY ASSEMBLY OF KAJIADO ..... 3<sup>RD</sup> RESPONDENT  
KAJIADO COUNTY CLERK ..... 4<sup>TH</sup> RESPONDENT  
KAJIADO COUNTY GOVERNOR ..... 5<sup>TH</sup> RESPONDENT  
THE COUNTY GOVERNMENT OF KAJIADO ..... 6<sup>TH</sup> RESPONDENT

AND

KENYA VETERINARY ASSOCIATION ..... INTERESTED PARTY  
UNION OF VETERINARY PRACTITIONERS KENYA ..... INTERESTED PARTY

## JUDGMENT

### Introduction

1. The Petitioners herein have filed this matter claiming violation of their constitutional rights by the Respondents. They claimed that on April 26, 2019, officers of the 6<sup>th</sup> Respondent stormed into the 1<sup>st</sup> Petitioner's premises and demanded proof of payment of a Single Business Permit from the 3<sup>rd</sup> Petitioner; that the 3<sup>rd</sup> Petitioner, the doctor on duty at the time, informed the officers that the Petitioners were exempted from paying for business permits because they pay annual subscriptions to the Kenya Veterinary Board and asked the officers to leave.
2. It is alleged by the Petitioners that an altercation ensued, leading to manhandling of the 3<sup>rd</sup> Petitioner who was eventually arrested after the matter was reported at Ongata Rongai Police Station through Occurrence Book (OB) No 98/26/04/19. He was charged in Criminal Case No 439 of 2019 at Ngong Law Courts to which he pleaded not guilty.
3. It is the events of April 26, 2019, as narrated above, that gave rise to this Petition.

### Petitioners' Case

4. It is the case for the Petitioners that the 6<sup>th</sup> Respondent's Inspectorate Officers acted illegally, unlawfully and unconstitutionally in demanding for a Single Business Permit from the Petitioners; that the 3<sup>rd</sup> Petitioner's freedom from cruel, inhuman or degrading treatment and the right to have his inherent dignity respected and protected was violated contrary to the *Constitution*. It is their case that the actions of the 6<sup>th</sup> Respondent's officers were illegal and unconstitutional and that demanding for payment of a Single Business Permit from the Petitioners amounted to double taxation given that the Petitioners also pay for license from the Kenya Veterinary Board.
5. It is their case that the arrest, detention and charging of the 3<sup>rd</sup> Petitioner with a criminal offence are illegal and unconstitutional; that the County Inspectorate Officers had no authority under the law to arrest and detain any person without sufficient ground; that the arrest, detention and charging of the 3<sup>rd</sup> Petitioner was orchestrated by improper motive and that it amounts to abuse of court process.
6. The Petitioners seek the following reliefs:
  - i. A declaration that the arrest and detention of the 3<sup>rd</sup> Respondent violated his rights under Articles 22, 25, 28, 29, 40, 43, 46, 49 and 51 of the *Constitution* and was therefore, unconstitutional.



- ii. An order of certiorari to bring to the High Court for purpose of quashing the trial of Criminal (Republic -versus Dennis Maube Lumumba).
- iii. That this Honorable Court be pleased to issue an order of prohibition prohibiting the Respondents from prosecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in the Criminal Case No 439 of 2019, Chief Magistrates Court at Ngong so far as they relate to the 3<sup>rd</sup> Petitioner.
- iv. That the Order of Prohibition do issue directed to the County Government of Kajiado, the County Inspectorate service, their officers, agents and or servants howsoever to prohibit and/or prevent them from demanding, seeking or receiving applications for single Business Permits or fees for such application or permit or license from Veterinary Surgeons duly registered by the Kenya Veterinary Board.
- v. A declaration that the process of legislation the Kajiado County Inspectorate Service Act, 2018 is unconstitutional.
- vi. An order compelling the County Government of Kajiado to compensate the 3<sup>rd</sup> Petitioner Exemplary damages and General damages for injuries sustained and emotional anguish and pain, and economic loss as a result of the said violation of his rights.
- vii. An order compelling the County Government of Kajiado to compensate the 1<sup>st</sup> Petitioner Exemplary damages and General damages for economic loss as a result of the said violation of rights.
  - viii. An order compelling the County Government of Kajiado to compensate the 1<sup>st</sup> Petitioner for the damage and loss of property amounting to Kshs 500,000/- as a result of the said violation.
  - ix. Costs incidental to the Petition in entirety be borne by the Respondents.
  - x. Any other or further relief that this Honourable Court may deem fit and just to grant.

### **Respondent's case**

7. The 1<sup>st</sup> Respondent's case was made through the affidavit dated October 25, 2019 sworn by Sammy Kisiang'ani Saenyi, a police officer of the rank of corporal at Rongai Police Station. He deposed that a case of obstructing an officer of Inspectorate Service in due execution of official duty, contrary to Kajiado County Inspectorate Service Act 2018 Part(iv) of section 32 (2) (a) punishable under section 33, was made by Richard Seki and Elijah Kotem on behalf of Kajiado County Government Inspectorate Officials vide OB No 60/26/4/2019; that he undertook independent investigations and established that the offence was committed bearing in mind that the officers were on duty and that the said officers upon entering the 1<sup>st</sup> Petitioner's Clinic were locked in by the 3<sup>rd</sup> Petitioner and that they had to call for reinforcement before the door was opened.



8. It was his averment that he compiled a file and forwarded the same to the Director of Public Prosecutions (DPP) with the proposed charge. That the same was analysed by the DPP and the charge was admitted. It was his case that the charges against the 3<sup>rd</sup> Petitioner were founded upon strong evidence arising from an independent investigation after an offence had been committed.
9. The 2<sup>nd</sup> Respondents on October 22, 2019 raised grounds of opposition against the petition in the following terms:
  - i. That the application is misconceived and an abuse of the court process.
  - ii. That the 2<sup>nd</sup> Respondent made a decision to charge based on the evidence, but the petitioners want this court to overturn the decision without reasonable cause.
  - iii. The petitioners want this court to conduct trial of facts, whereas the allegations made by them can be determined by the trial court.
  - iv. The 2<sup>nd</sup> Respondent has no control over the actions of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents and hence cannot be called upon to answer for any alleged breaches committed by them.
  - v. The petitioners cannot seek to excuse their crime merely because they allege their rights were infringed upon by any other party other than the 2<sup>nd</sup> Respondent.
  - vi. Under section 214 of *Criminal Procedure Code* the trial court has powers to order amendment of the charge on its own motion or by the application of the 2<sup>nd</sup> Respondent.
  - vii. The framing of the charge under section 254(b) and not 253(a) of the *Penal Code* does not require a remedy by this court.
10. The 4<sup>th</sup> Respondents' case was made through the affidavit of Leboo Saisa the County Clerk dated August 21, 2019 in which he deposed that the County Assembly has no power to employ county askaris and therefore the persons who committed the alleged actions are not the employees of the County Assembly; that the office of the DPP is in charge of drafting charge sheets and prosecuting the criminal cases; that the Kajiado Inspectorate Act 2018 provides for the establishment of Inspectorate Service of the County Government of Kajiado and for its organization, operations, functions, powers and for connected purposes; that the County Assembly was involved in the drafting and passing into law of the said Act and that public participation was undertaken and that the Petition lacks merit and should be dismissed.

#### **Interested Parties' case**

11. The 1<sup>st</sup> Interested Party's case was made through the affidavit of Dr Samuel Kahariri, Chairperson of the 1<sup>st</sup> Interested Party dated July 29, 2019. He deposed that as an association they are aware of the unfortunate incident which occurred on April 26, 2019 at the 1<sup>st</sup> Petitioner's Veterinary Clinic; that the incident did not only amount to gross violation of human and constitutional rights of victims but also posed a threat to the veterinary profession's dignity, public health and animal welfare; that the veterinary surgeons are members of the veterinary profession created under Veterinary Surgeons and Veterinary Para-professional Act; that doctors are statutorily or by law exempted from paying county business permit since they are already remitting levies to the government through the regulatory authority; that a letter from the Ministry of Local Government reference No 2401/Ty/23 dated September 28, 2009 exempted them from the single business permit and that the demand for single business permit by some Counties including Kajiado is not only unlawful but amounts to



double jeopardy by subjecting a section of Kenyans to payment of two parallel licenses in respect of professional practice.

12. The 2<sup>nd</sup> Interested Party's case was made through an affidavit dated July 29, 2019 sworn by Dr Kibore Kimutai, Chairperson of the 2<sup>nd</sup> Interested Party. He shared the similar sentiments as the 1<sup>st</sup> Interested Party and stressed that being veterinary surgeons they are exempted from paying for a single business permit. He condemned the actions of the Respondents which he claimed amounted to gross violation of the Petitioner's constitutional rights.

### **Oral Evidence**

13. Dennis Maube Lumumba testified that on April 26, 2019 while at the Veterinary Clinic, officers from Kajiado County government approached the clinic and demanded for a single business permit; that he explained to them that being veterinary surgeons they were exempted from the same; that the officers became agitated and started manhandling him, slapping him and destroying property; that they roughed him up and dragged him through the stairs, took him to their offices and confiscated his phone; that they later took him to Ongata Rongai Police Station where he was later released on a cash bail of Kshs 10,000.
14. He testified that he was taken to hospital by Moses, his manager; that he reported the assault at Rongai Police Station after which he went to Ngong-sub county hospital where he was attended to and his P3 form filled. On cross examination, he stated that he was not aware that clinics within Kajiado county pay single business permits and that he was also not aware that the County Inspectorate Bill has become law. He stated that the officers who raided their clinic were from the County Government; that he did not know the names, but the CCTV cameras captured the incident. He reiterated that they are exempted from taking out single business permit as they remit money annually to the veterinary board.
15. Dr. Gabriel Ouma (PW2) testified that on April 26, 2019 he was away from the Clinic when he received a call from Dr Dennis who was on duty at the clinic; that he was informed that officers from the County Government were demanding a single business permit; that he informed the Dr Dennis to show the officers the licence from the Board but through his phone he could access the CCTV footage and saw the officers manhandling the 3<sup>rd</sup> Petitioner. When he returned on April 29, 2019 he found their items in the clinic destroyed and reported the matter to the police.
16. On cross examination he stated that the County Assembly makes laws and regulations; that they are responsible for their problems; that he was aware of a notice on public participation for the County Inspectorate Bill. He stated that in 2018 he was forced to pay for single business permit because one of their members of staff was arrested. He stated that he would be able to identify the officers who destroyed his property if they were produced. He told the court that he is seeking damages for the economic loss he has suffered.
17. Moses Ochieng, PW3, adopted his affidavit dated November 11, 2019 as his evidence and stated that he was not present when the incident took place, but he found the office destroyed.
18. Emmanuel Baraka, PW4, also adopted his affidavit dated November 11, 2019.
19. Dr Benson Kibore, PW5, the Chairperson of Union of Veterinary Practitioners of Kenya, testified that he was informed of the incident that involved one of their members who was injured and arrested by County Officers and that the services they offer are protected by the Veterinary Board. On cross examination he stated that the County Clerk violated the rights of their members; that they are professionals and that they are exempt from paying the single business permit.



20. Dr Samuel Kahariri, PW6, the Council Chairman for Kenya Veterinary Association argued, in his testimony stated that his interest in this matter is due to the incident of manhandling of their member by Kajiado County officials. He stated that section 26 of the Veterinary Act requires all surgeons to have practicing license for every year upon which they become eligible to practice. On cross examination he stated that as professionals they are paying for licenses and should not therefore be subjected to the single business permit as it amounts to double payment. He stated that they offer their services through prescribing drugs either physically or through prescription but do not sell foods and that the clinic is licensed as a veterinary clinic.

### Respondents Evidence

21. The Respondents called Josiah Leboo Saisa, DW1, the Clerk to the County Assembly as their witness. He took the court through the stages through which a Bill goes through before it becomes law. He explained that it is essential to undertake public participation by inviting members of the public to give their views which views are considered. He testified that the County Assembly and the County Clerk do not interpret the laws of the County, nor do they employ officers or collect fees for permits. It was his case therefore that 3<sup>rd</sup> and 4<sup>th</sup> Respondents should not have been included as parties to this petition.

### Submissions

22. The Petitioners filed their submissions dated November 11, 2019. They have raised eight issues for determination.

That the Kajiado County Government Inspectorate officers acted illegally, unlawfully and unconstitutionally in demanding for a business permit from the Petitioners.

23. On this issue they argued that the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners are duly registered Veterinary Surgeons and are exempt from paying for Single Business Permit by both the Law and the then Ministry of Local Government Letter Reference No 2401/TY/23 dated September 28, 2009; that Article 209 gives county Governments the powers to impose taxes but Article 209(5) of the Constitution states that such taxing powers should not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the mobility of goods, services and capital or labour; further that, the Fourth Schedule Part 2 Clause 7(b) provides for services that are devolved to the County Governments which include Trade Licensing (except regulation of professions).
24. The petitioners cited Republic -vs- the City Council of Nairobi & another ex parte (2014) eKLR, where a decision requiring practicing advocates to take out single business permit was successfully challenged. Court found that such a decision to levy single business permits could not be made without concurrence of the minister. Further, they cited Peter Ndungu Mumbua & 39 others -vs- County Assembly of Nyandarua & 2 others Wendoh. J citing the Republic -vs- City Council of Nairobi ex parte Law Society of Kenya and Republic- vs- The Municipal Council of Thika Misc Appl 782/2000, stated that:
- ' No doubt the applicants being professionals are regulated by the professional bodies. Their functions are regulated by the National Government where they pay the said bodies in order to be issued with an annual practicing certificate confirming that they are qualified for the year in question in order to carry out their activities for the year.'
25. They submitted that Article 210 of the Constitution provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. There is no such legislation allowing the County to impose taxes on veterinary surgeons by way of single business permit.



That the 3<sup>rd</sup> Petitioner's freedom from cruel, inhuman or degrading treatment and the right to have his inherent dignity respected and protected was violated contrary to Articles 19,20,22,25,27 and 29 of the t Constitution.

26. They argued that the actions of the county inspectorate officers in the treatment of the 3<sup>rd</sup> Petitioner was reckless, negligent, cruel and inhuman and was in complete disregard of his fundamental right to security of person and human dignity. They cited S -vs- Makwanyane as cited in MWK & another -vs- Attorney General & 3 others, to emphasize the importance of right to dignity.

That the Arbitrary arrest, Detention, charging and Taking of Plea of the 3<sup>rd</sup> Petitioner are illegal and unconstitutional.

27. On this issue, they argued that a person's liberty should be guarded unless reasons are provided under Article 24 for limiting that right and relied on *Republic- vs- Danson Mgunya & Another [2010] eKLR* which is cited in *Michael Rotich-vs- Republic [2016] eKLR* to the effect that liberty is precious and no one's liberty should be denied without lawful reasons and in accordance with the law and that liberty should not be taken for granted.

28. They argued that at the time of the arrest, the 3<sup>rd</sup> Petitioner was not informed of the reasons for the arrest contrary to Article 49(1)(a)(i) of the Constitution; that after the arrest, he was also denied access to medical services in contravention of Article 43(1)(a) and 43(2) of the Constitution.

The provisions on which the charges are founded are a nullity, unrecognized and thus unconstitutional rendering the on-going prosecution of the 3<sup>rd</sup> petitioner in CR No 439 of 2019 at the Chief Magistrate Ngong a gross abuse of the court process.

29. They submitted that though the Director of Public prosecution is independent, the process of charging someone can be challenged as it is an administrative action that must conform with the provisions of the Constitution; that the 3<sup>rd</sup> Petitioner was charged on May 6, 2019 with the offence of Obstructing an officer of Inspectorate Service in due Execution of officers' duty contrary to Kajiado County Inspectorate Service Act 2018 part(iv) of section 32(2) punishable under section 33; that there was a second charge sheet from the Kenya Police of Willingly obstructing a county inspectorate officer contrary to section 253(b) of the Penal code. They submitted that the second charge was defective as there is no such offence under the Penal Code and therefore the charge was a nullity and should not be sustained. They submitted that the 3<sup>rd</sup> Petitioner cannot prepare the defence on a charge that is non-existent in law and as a result any further proceedings will be an infringement of the right to fair hearing.

30. The Petitioners relied on *Henry O Edwin-vs- Republic [2015] eKLR*, where the Court of Appeal stated that:

' It is trite law that an accused person must be charged with an offence that is known in law. Particularizing the charge enables the accused person know the offence with which he is charged, and the likely sentence that he would get should he be convicted. This is information that enables the accused person to adequately prepare his defence.'

That the arbitrary arrest, detention and charging of the 3<sup>rd</sup> Petitioner was Orchestrated for an improper motive and amounts to abuse of court process.

31. On this issue, the Petitioners submitted that the improper motive in charging the 3<sup>rd</sup> Petitioner is evidenced by the conflicting information on the trumped-up charges contained in the crime and incident report and the charge sheets. They argued that the fact that the crime and incident report is



dated March 8, 2019 whilst the actual incident occurred on April 26, 2019 is prima facie evidence that there was no basis for the arrest.

That the Constitution contemplates certain minimum rights to guarantee fair trial. These rights include the right to be informed of the details of the charge and the evidence that relates to the charge in order that the accused can take an informed plea.

32. On this issue they submitted that the right to fair trial under Article 50(2) cannot be limited in any manner whatsoever as provided under Article 25 of the Constitution. It was further submitted that it is in the interest of justice and in the public interest that the petition herein be heard and determined as soon as possible.
33. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their submissions dated February 20, 2020. It is their submission that it is upon the petitioners to show that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were ultra-vires, unlawful or in bad faith; that the petitioners have not shown that their fundamental rights and freedoms have been violated and that the actions of preferring criminal charges against the 3<sup>rd</sup> Petitioner was upon sufficient evidence gathered, culpability of the accused person and the relevant laws.
34. They argued that the matters raised in the Petition are for consideration by a trial court during full hearing and upon which the guilt or otherwise of the petitioner shall be determined. They argued that the discretionary powers of the 2<sup>nd</sup> Respondent should not be fettered unless proved that their actions were irrational, unreasonable, disproportionate, been out of irrelevant considerations actuated by spite, malice or ill will. They relied on a number of cases including the case of the *Republic-vs- Royal Media Services JR Case No 221 of 2013* where the court cited the case of Francis Anyango Juma-vs-DPP and Anor petition 160 of 2012 that:  
  
' Clearly, the intention under the Constitution was to enable the Director of Public Prosecution to carry out his constitutional mandate without interference from any party. This Court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate unless there was clear evidence of violation of a party's right under the Constitution or violation of the Constitution itself
35. On the aspect of the Charge Sheet they submitted that the Office of the DPP having analyzed the file, recommended the amendments of the charge to be under section 253 (b) of the Penal Code. It was their submissions that the matter herein lacks merit and was brought purely to paralyze the lawful mandate of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in relation to Criminal Case No 439 of 2019.
36. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their submissions dated September 23, 2019 and raised two issues for determination; namely, powers of the County Assembly under Article 209(4) of the Constitution and whether there was public participation in the enactment of the impugned Act.
37. On the first issue, they submitted that the legislative authority of the county assemblies is provided for under Article 185 of the Constitution; that Article 185(2) provides that County Assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule; that Article 209(4) provides that the National and County governments may impose charges for the services they provide; that Article 209(5) further provides the taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour and that Article 210 provides that, no tax or licensing fee may be imposed, waived or varied except as provided by legislation



38. On establishing whether the petitioners are professionals who should be excluded from the Single Business Permit, as per the fourth schedule of the Constitution, they relied on the case of Okenyo Omwasa George and Another-vs- Attorney General and 2 others. It was their argument that the fees paid by the petitioners to their professional body is a professional levy paid to their professional bodies and has no correlation to the trading components of the shops selling dog feeds within the establishment. They further quoted the case of *Kenya Pharmaceuticals Association & another-vs-Nairobi City County Government and another 2017 eKLR*, where it was stated that:

' Regulation means 'the state of being controlled or governed.' The preamble to the Pharmacy and Poisons Act provides that it is 'An Act of Parliament to make better provision for the control of the profession of pharmacy and the trade in drugs and poisons. 'The act in my view controls the profession of pharmacy and trade in drugs so that unqualified persons do not engage in the profession and trade of selling drugs.

To 'regulate' means to 'control by law or rules'. That merely means that the Petitioners must have a certificate from the professional body that they are qualified for the year in question to be issued with a licence to carry out the prescribed activities for the period or year in question. The payment of a fee for the grant an Annual Practicing Certificate by the petitioners is not a bar to any other legitimate charges that may be imposed by a County Government. In other words what a County Government is prohibited from doing is the issue of a Regulatory Licence. The trade licensing fee is paid for trading in the County.'

39. It is their submission that the veterinary surgeons would have passed the threshold of professionals however they were selling goods in terms of dog feed and medicine and therefore were practicing a trade and that their claim of a circular exempting them from paying the Single Business Permit has also been overtaken by events in *Kenya Union of Savings and credit cooperatives (KUSCCO) Limited -vs-Nairobi City Council (now Nairobi city county & 2 others [2015] eKLR*.

40. On the second issue they argued that public participation is a major pillar and bedrock of our democracy and good governance and cited a number of authorities on the importance of public participation as outlined on the face of their submissions. They argued that they carried out public participation before enacting the County Inspectorate Bill that is now an Act; that the County Assembly put out a notice on the Standard Newspaper calling for public participation and that a meeting was held on September 10, 2018 at Ongata Rongai where members of the public aired their views on the said Bill, which views were considered while drafting the Bill. In that regard therefore the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were not in contravention of any law or process and therefore the petition against them is ill informed and should be dismissed.

41. The 5<sup>th</sup> Respondent filed submissions on October 25, 2019 and submitted on two issues; namely whether the 5<sup>th</sup> Respondent was rightfully sued/enjoined as a party to this petition and whether or not the petitioners should be entitled to the remedies/reliefs sought for in the petition.

42. It is their case that they were not rightfully enjoined for the reasons that the Governor solely executed his executive constitutional mandate under section 30 of the County Government Act; that the County Executive only executes Laws passed and legislated by the 3<sup>rd</sup> Respondent; that in terms of sections 4(5) & 4(6) of the *Government proceedings Act*, no cause of action shall be brought against the county Government where such actions or breach has been caused by its servants lawfully exercising their roles as prescribed in Law.

43. It was submitted that under Kajiado County Finance Act, it is a mandatory requirement to pay for a trade license and that veterinary personnel who sell vet products and drugs are not exempted; that



the Petition should be dismissed as it is defective in substance and lacks merit. That in this regard the petitioners are not entitled to the remedies sought.

### **Analysis and Determination**

44. I have considered the petition, the evidence adduced in court, the affidavits, the authorities relied on by the parties and the submissions. I understand the petitioners to be stating that they are exempted from paying Single Business Permit; that the Kajiado County Government Inspectorate officers acted illegally, unlawfully, and unconstitutionally in demanding for a business permit from them and that the arrest and prosecution of the 3<sup>rd</sup> Petitioner are illegal and unlawful and thus violated his constitutional rights.
45. Captured differently, the question being raised is whether the actions of the officers of the 6<sup>th</sup> Respondent were outside the law. To determine this issue in the positive leads to the outcome that favours the Petitioners. The opposite holds true that to determine this issue in the negative will favour the Respondents.
46. The Petitioners claimed exemption from paying for Single Business Permit. They cited the law and the then Ministry of Local Government Letter Reference No. 2401/TY/23 dated September 28, 2009. I have read the entire file in this Petition. I have found a letter dated April 14, 2010 authored by one Dr HK Kirigia, Executive Officer of Kenya Veterinary Board. The letter reads as follows:

TO ALL LICENCED VETERINARY SURGEONS

RE: SINGLE BUSINESS PERMITS

'Enclosed herewith please find a photocopy of the above letter the Permanent Secretary, Office of Prime Minister and Ministry of Local Government ref. No 240/Ty/(23) dated September 28, 2009 for you to note the contents.

It is now official that the local authorities will not be charging single business licences so long as you have paid the licence for your veterinary practice as indicated in the last paragraph of the said letter.

47. The referenced letter is not attached to the Petition. I did not find such a letter in the records of this file. This court is not aware of the contents of that letter. The closest I have come to getting an idea what that letter stated is by reading Kenya Union of Savings and Credit Cooperatives (KUSCCO) Limited v Nairobi City Council (now Nairobi City County & 2 others[2015] eKLR in paragraph 10 (5) where the Respondents submitted in support of their case, partly, as follows:

'The judgment delivered and order issued in Nairobi HC JR No 596 of 2008 was apparently so delivered and issued pursuant to the provisions of Trade Licensing Act (Cap 497) Laws of Kenya, whose Second Schedule exempted only professionals from payment of single Business Permits. Members of the Applicant were and still are not professionals capable of exemption from payment of single business permits as can be vividly discerned from the Circular No 2401/TY/26 dated September 28, 2009 from the Ministry of Local Government to the Town Clerk, City Council of Nairobi which identified exempted professionals as only being:

- a. Architects and Quantity Surveyors;
- b. Pharmacists;
- c. Doctors & Dentists;



- d. Nurses; e. Surveyors;
- f. Veterinary Surgeons;
- g. Auctioneers;
- h. Engineers;
- i. Accountants;
- j. Estate Agents;
- k. Certified Public Secretaries; and
- l. Advocates

48. The above case was a Judicial Review matter seeking to have Nairobi City Council (now Nairobi City County, the County Secretary of Nairobi City County and the Chief Licensing Officer of the Nairobi City County held in contempt of court for charging single business permit fee from KUSCCO members. The court had quashed orders requiring single business permit fee to be paid for the KUSCCO Members (Co-operatives) to Nairobi City Council on July 28, 2009 and prohibited the City Council from demanding single business permit fee from KUSCCO and its members. However, with the coming into force of the new constitution and the Nairobi City County replacing the City Council of Nairobi in running the functions of the City of Nairobi, demands for single business permit fees started being made upon KUSCCO members.
49. In the absence of the letter under reference, this court is not able to confirm its contents. The case cited above was in respect of Nairobi City County. In it the court was aware that the Constitution empowers counties to enact legislation to entitle the county to impose fees for single business permits and other licenses and permits. Indeed, Article 209 gives county governments powers to impose taxes, with Article 209(5) of the Constitution providing that such taxing powers should not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the mobility of goods, services and capital or labour.
50. On the issue as to whether the Kajiado County Government Inspectorate Officers acted illegally, unlawfully and unconstitutionally in demanding for a business permit from the Petitioners, the main point being raised by the petitioners is that they are professionals and are therefore exempted from single business permit as they pay levies to their regulatory bodies and therefore it would amount to double taxation if they were to pay for the single business permit. On the same issue, the 3<sup>rd</sup> and 4<sup>th</sup> Respondent contend that the issue touches on the trade aspect in that the Petitioners were selling dog food within the establishment and therefore they should pay the single business permit.
51. The law under Article 209(3) of the Constitution allows counties to impose property rates, entertainment rates and any other tax that it is authorized to impose by an Act of Parliament. It is therefore clear that the 3<sup>rd</sup> respondent is allowed to impose taxes if there is an Act of Parliament sanctioning the same. The 3<sup>rd</sup> respondent has relied on its Kajiado County Finance Act which is the law governing the imposition of taxes within the county and which, they state, does not exempt professionals from paying trade licenses. The said Act under section 3(1) provides that a person shall not carry out any business or provide the services specified in the First Schedule without a valid license issued by the government. The First schedule does not exclude the professionals.
52. This issue has been addressed in various authorities, one such authority is Petition 9 of 2016 Kenya pharmaceutical Association of Kenya Vs Nairobi County Government and 46 Other County



Governments where the court was faced with the question as to whether pharmacists are liable to pay trade licenses. The court held that they are liable to pay trade licenses because they sell pharmaceutical goods. The court in that case expressed itself as follows:

' I find that functions of County Governments include trade development and regulation (Excluding regulation of professions). As stated earlier, pharmacy is a profession but to the extent that it also involves selling of pharmaceutical products, it is a trade as opposed to professions such as law and architecture which render services only. By being asked to pay trade licenses for their business premises, the County Governments cannot in any manner be said to be regulating or controlling the profession.'

53. Similarly, in the case of *Republic v Kisii County Assembly & 4 others Ex parte John Aboko Kumenda & another; Kisii County Secretary & 2 others (Interested Parties) [2021]* eKLR the court held that:

' It is my considered view, that medical practitioners practicing their professions are exempt from levies by County Governments. However, in instances where they engage in the bartering goods or services that do not come within the meaning of a profession, they are obliged to pay any levies, charges or fees prescribed by County Governments.'

54. In our instant suit the Petitioners contended that they offer veterinary services and that they do prescribe drugs either physically or by prescription. The Respondents have claimed that the Petitioners also sell dog food. The Petitioners have confirmed, in their evidence, that they do indeed prescribe drugs but are silent on whether they sell those drugs or other products like dog food thereby failing to rebut the evidence that they are also engaged in selling dog food.

55. The Kajiado County Finance Act does not exempt any professional from paying the levy to the county. I find no evidence that this law has been declared unconstitutional. It means, therefore, that the law is applicable to all professionals without any exemptions.

56. On the allegations by the 3<sup>rd</sup> Petitioner that his rights were violated on the account of his unlawful arrest, detention and prosecution for the offence of 'obstructing an officer of inspectorate service in due execution of officer's duty contrary to Kajiado County Inspectorate Service Act 2018 part(iv) of section 32(2) punishable under section 33', it was submitted that unnecessary force and violence was used to arrest him; that he was roughed up and was denied medical attention and that the unlawful arrest deprived him of his right to liberty.

57. The 3<sup>rd</sup> Petitioner further stated that he was not informed of the reason for his arrest. He also claims that there were two sets of charge sheets, the first charge was for the offence of 'obstructing an officer of inspectorate service in due Execution of officer's duty contrary to Kajiado County Inspectorate Service Act 2018 part(iv) of section 32(2) punishable under section 33' and the second charge sheet from the Kenya Police was for 'Willingly obstructing a county inspectorate officer contrary to section 253(b) of the Penal code. They submitted that the same was defective as there is no such offence under the Penal Code'.

58. The 2<sup>nd</sup> Respondent in their submissions explained that having analyzed the file, it recommended the amendments of the charge to be under section 253 (e) of the Penal Code.

59. I have considered these issues. In determining whether the arrest of the 3<sup>rd</sup> Petitioner was unlawful, it is essential to establish whether the Respondents had reasonable grounds to believe the Petitioners had



committed an offence. The words 'probable and reasonable cause' were defined in *Hicks v Faulkner*, (1878), 8 QBD 167 at para 171 as follows:

' Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.'

60. From the evidence tendered by the Respondents, the officers, while carrying out their duties, demanded proof of payment of a single business permit from the 3<sup>rd</sup> Petitioner. When he failed to produce the same, they arrested him. The officers were on official duty and by asking the 3<sup>rd</sup> Petitioner to produce the single business permit, they were acting legally by confirming whether the Petitioners had complied with the law. I am therefore persuaded that the officers had reasonable and probable cause to arrest the 3<sup>rd</sup> Petitioner for failure to produce the permit. It is my view that they were motivated by an honest belief that the arrest was deserved given that the 3<sup>rd</sup> Petitioner did not produce a current permit as asked to.
61. The 3<sup>rd</sup> petitioner also stated that he was roughed up and assaulted during the arrest. The law places the burden on the person who alleges existence of certain facts and who wishes the court to find in his favour to prove those facts. There is evidence that the Petitioners had paid the 2018 single business permit, although they claimed that they paid in order to have a member of staff from their clinic released after he had been arrested.
62. I have noted, from the evidence, that the 3<sup>rd</sup> Petitioner alleged that he was manhandled, and that he sustained soft tissue injuries as a result. Moses, his manager, stated that he took 3<sup>rd</sup> Petitioner to hospital. The 3<sup>rd</sup> Petitioner attached, to his pleadings, treatment notes and a P3 form showing that he sustained the injuries. But these were not produced as exhibits. The doctor or clinical officer who filled the P3 form did not testify. There was no attempt by the 3<sup>rd</sup> Petitioner to produce those treatment notes and P3 form in evidence. As the record stands, there is no evidence of injuries suffered by the 3<sup>rd</sup> Petitioner or P3 form produced. It is only oral evidence unsupported by exhibits to prove injuries.
63. To rebut the evidence of injuries suffered by the 3<sup>rd</sup> Petitioner, the Respondents stated that the 3<sup>rd</sup> Petitioner was resisting arrest resulting in a scuffle.
64. I note, from the record, that the Petitioners placed reliance on the CCTV footage that they state captured the events of April 26, 2019. CCTV footage is electronic evidence. Although these images were attached to the pleadings, they were not produced as exhibits. The issue is whether the Petitioners followed the law in adducing electronic evidence?
65. Section 106B 1 of the [Evidence Act](#) provides that:

' Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as 'computer output') shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.'



66. Further Section 106 B (4) of the said Act provides that:

'In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

- (a) Identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) Dealing with any matters to which conditions mentioned in subsection (2) relate; and
- (d) Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.'

67. Electronic evidence must be produced in strict adherence to the above sections. In *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR, the court, while discussing the application of Section 106 (B) observed that:

' Section 106B of the *Evidence Act* states that electronic evidence of a computer recording, or output is admissible in evidence as an original document 'if the conditions mentioned in this section are satisfied in relation to the information and computer.'

In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced'.

68. Further, in *John Lokitare Lodinyo -vs- IEBC and 2 Others* [2018] eKLR, the Court of Appeal in reiterating its above decision analyzed the process electronic evidence is subjected to before printing and stated that:

' Essentially, the sections provide that electronic evidence which is printed out shall be treated like documentary evidence and will be admissible without production of the computer used to generate the information. It is at this juncture that the provisions of Section 106B of the *Evidence Act* come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do.'

69. Clearly the procedure laid down under the above sections of the *Evidence Act* was not followed. There was no attempt to produce the CCTV footage in whatever form it was in. It seems as if the Petitioners acted under the belief that by annexing that evidence in whatever format it was in to their



pleadings, they had fulfilled the requirements of the law in producing the same. That is not the law. The Petitioners testified in court and called Interested Parties to also testify in their favour. But none of these witnesses produced this evidence.

70. As the record remains, this court has not evidence to show the injuries suffered by the 3<sup>rd</sup> Petitioner, if any, nor does it have images showing the alleged damage caused in the Petitioners' clinic. This is a fatal shortcoming in the Petitioners' case.
71. There is the issue of the on-going prosecution of the 3<sup>rd</sup> Petitioner in Criminal Case No. 439 of 2019 at the Chief Magistrate Court at Ngong and whether the same is a gross abuse of the court process. Article 157 of the Constitution establishes the Office of the Director of Public Prosecutions with power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct. The Office of Director of Public Prosecutions Act No 2 of 2013 (hereinafter referred to as 'the ODPP Act' gives effect to Articles 157 and 158 of the Constitution.
72. The 3<sup>rd</sup> Petitioner claims to have been charged illegally on a non-existent charge as there is no offence of willfully obstructing a county inspectorate officer contrary to section 253(b) of the Penal Code. I have considered submissions in respect of this issue. I have also noted that the Court of Appeal in *Sigilani -vs- Republic (2004) 2 KLR, 480* held as follows: -
- ' The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence'.
73. It is my considered view that the Petitioners, specifically the 3<sup>rd</sup> Petitioner, will have a chance to ventilate whatever issues he may have about the legality or lack thereof, of the charges before the trial court. In *Republic v Grace Wangari Bunyi (Sued as the Administrator of the Estate of the Late Obadiab Kuira Bunyi) & 7 others Exparte Moses Kirruti & 28 others [2018] eKLR*, the Court held that:
- ' It is important to note that the discretion given to the Director of Public Prosecutions to undertake investigation and prosecute criminal offences is not to be taken for granted or lightly interfered with and must be properly exercised. In the same respect, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions. The mere fact that there are high chances of success as regards the intended on ongoing criminal proceedings does not count, it not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with merits of the case but to address defects in decision making process by a decision-making body. However, the court may only intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence and the justice system such as with a view to forcing a party to submit to a concession of a civil dispute, the court will not hesitate to bring such proceedings to a court.'
74. From the above authority, this court cannot interfere with the discretion of the DPP unless the same is exercised unlawfully or in bad faith. I have no evidence from the Petitioners to demonstrate that the ODPP exercised its discretion to charge and prosecute the 3<sup>rd</sup> Petitioner unlawfully or his actions were motivated by bad faith. This court cannot therefore make a finding that the ongoing criminal case is unlawful or amounts to abuse of the court process.



75. I have considered all the allegations made against the Respondents and the issues raised for determination. I have considered the rival submissions and the authorities cited. It is my considered view that the Petitioners have failed to tender evidence to persuade this court that the Kajiado County Government Inspectorate Officers acted illegally, unlawfully and unconstitutionally in demanding for a single business permit from the Petitioners.
76. On the allegations that the 3<sup>rd</sup> Petitioner's freedom from cruel, inhuman or degrading treatment and the right to have his inherent dignity respected and protected was violated, I find no evidence to support that. The allegations he has made against the county inspectorate officers have been countered and explanations made to water down the evidence. The standard of proof in civil cases is on a balance of probabilities and in my view, the Petitioners have not met that threshold.
77. I do not find the arrest, detention, charging of the 3<sup>rd</sup> Petitioner and the taking of the plea illegal or unconstitutional. The arrest was made after the officers asked to be shown a single business permit and the failure of the 3<sup>rd</sup> Respondent to produce one. I have stated that the Petitioners had paid for this permit in the year preceding the time of the arrest. After his arrest, the 3<sup>rd</sup> Petitioner was handed over to the police who detained him as they investigated the matter. I have left the issue of the two charges to the trial court to determine. I have also left the issue of the legality of the provisions on which the charges facing the 3<sup>rd</sup> Petitioner are founded to the trial court to determine.
78. I have found no evidence from the petitioners of improper motive in arresting and charging the 3<sup>rd</sup> Petitioner. Further, by failing to produce the single business permit which led to the arrest, detention and charge, it was clear to the 3<sup>rd</sup> Petitioner that he was being arrested for failure to produce that document. It is at the trial court that the 3<sup>rd</sup> Petitioner ought to have raise the issue that he has not been provided with statements by the prosecution.
79. Among the reliefs sought by the Petitioners is a 'declaration that the process of legislation the Kajiado County Inspectorate Service Act, 2018 is unconstitutional'. The Respondents, through the evidence of Josiah Leboo Saisa, explained the process this legislation went through before it became law. I have considered the allegations that this piece of legislation is unconstitutional, I find no evidence supporting that allegation.
80. After my careful analysis of the evidence presented before me by all the parties, it is my finding that the Petitioners have failed to prove their case on a balance of probabilities. Consequently, none of the prayers sought in this Petition can issue. This Petition is hereby dismissed with costs to the Respondents.
81. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 27<sup>TH</sup> DAY OF JULY 2023.**

**S. N. MUTUKU**

**JUDGE**

