REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CONSTITUTIONAL PETITION NO. 14 OF 2017

(FORMERLY NAIROBI HIGH COURT PETITION 533 OF 2016)

IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 24, 28, 48, 50, 51, 165 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS ARTICLES 27, 29, 39, 47 AND 49 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF : THE PERSONS DEPRIVED OF LIBERTY ACT (ACT NO. 23 OF 2014) LAWS OF KENYA.

AND

IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT (CAP.84) LAWS OF KENYA.

AND

IN THE MATTER OF: INDEPENDENT POLICING OVERSIGHT AUTHORITY ACT (ACT NO 35 OF 2011) LAWS OF KENYA.

AND

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE (CAP. 75) LAWS OF KENYA.

AND

IN THE MATTER OF: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.

AND

IN THE MATTER OF: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.

AND

IN THE MATTER OF: UNLAWFUL ARRESTS HARASSMENT AND INCARCERATION OF THE PETITIONERS HEREIN ON THE NIGHT OF 4TH/ 5TH JUNE, 2016 WITHIN ONGATA RONGAI TOWN OF KAJIADO COUNTY BY KNOWN POLICE OFFICERS BASED AT ONGATA RONGAI POLICE STATION.

BETWEEN

MOHAMED FEISAL.....1ST PETITIONER

JOHN MUGWE NGURE.....2ND PETITIONER

DAVID MUNGAI MBURU.....3RD PETITIONER

LYDIAH MUTHEU.....4TH PETITIONER

KELVIN MUKAE ANGWENYI .....5TH PETITIONER

ALEX MAKORI MOGAKA.....6TH PETITIONER

KALVIN MBUGUA.....7TH PETITIONER

JUSTINE RIUNGU MATI.....8TH PETITIONER

KENNEDY MBARU.....9TH PETITIONER

ESAU KIMANI.....10TH PETITIONER

JOHN GITONGA..... 11TH PETITIONER

ERICK NYAKUNDI CHARLES.....12TH PETITIONER

KAREN GITAU KATHURE.....13TH PETITIONER

SHAD JACKSON GERALD.....14TH PETITIONER

PATRICK MUTISYA.....15TH PETITIONER

JOHN NDARUKA KINYUA .....16TH PETITIONER

JOHN MARE WARUTERE.....17TH PETITIONER

ISAAC CHERULE .....18TH PETITIONER

JAMES MUTURI MUTUKU.....19TH PETITIONER

STEVEN NZAKU …….…….....20TH PETITIONER

-VERSUS-

HENRY KANDIE, CHIEF INSPECTOR OF POLICE, OCS,

ONGATA RONGAI POLICE STATION.....1ST RESPONDENT

DAVID NDIEMA, INSPECTOR OF POLICE, DEPUTY OCS,

ONGATA RONGAI POLICE STATION .....2ND RESPONDENT

ELIUD NJAGI, CORPORAL,

ONGATA RONGAI POLICE STATION.....3RD RESPONDENT

ZEDEKIAH NYANGOYE, POLICE CONSTABLE,

ONGATA RONGAI POLICE STATION .....4TH RESPONDENT

TERESIAH WANJUE, POLICE CONSTABLE,

ONGATA RONGAI POLICE STATION..... 5TH RESPONDENT

SIMON NAMSHURUHI, POLICE CONSTABLE,

ONGATA RONGAI POLICE STATION ..... 6TH RESPONDENT

DIANA KIRUI, POLICE CONSTABLE,

ONGATA RONGAI POLICE STATION.....7TH RESPONDENT

THE ATTORNEY GENERAL …….....8TH RESPONDENT

AND

NATIONAL POLICE SERVICE COMMISSION.....1ST INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTION.....2ND INTERESTED PARTY

JUDGEMENT

INTRODUCTION

The Petitioners' who are all adult Kenyan citizens of sound mind originally commenced these proceedings by way of a Petition dated 19th December 2016 and Supported by the affidavits of Mohammed Feisal, John Mugwe Ngure and Steven Nzaku Sworn on even date. The Petition was amended on 17th July 2017. The Amended Petition was accompanied by a supplementary affidavit by Steven Nzaku sworn on 17th July 2017.

A replying affidavit sworn by Henry Kandie, the 1st Respondent, on the 2nd July 2018 was filed in response. In addition, witness statements by the 2nd and 4th Respondents all dated 2nd July and filed on 3rd July accompanied the affidavit. The matter proceeded by viva voce hearing and in the end the Petitioners and the Respondents filed written submissions dated 7th August 2018 and 14th August 2018 respectively. The Interested Parties did not take part in the Proceedings despite being served by the Petitioners' Advocate.

THE PETITIONERS' CASE

The Petitioners filed this petition against the Respondents, claiming that by unlawfully arresting and detaining them, the Respondents breached their fundamental Rights and Freedoms guaranteed by the Constitution. As a result of the alleged violations, the Petitioners sought the following reliefs:

a. **A Declaration that the conducts of the Respondents are contrary to and inconsistent with the provisions of Articles 10 of the Constitution of Kenya, 2010.**

b. **A Declaration that the Respondents violated constitutional rights of the Petitioners and in particular Articles 20 (1) and (2), 24(1), 25(c), 27(4), 29, 31, 39, 47, 49, 50(1) and 51 of the Constitution of Kenya, 2010.**

c. **A Declaration that no person should be held in remand or custody for an offence punishable by fine only or by imprisonment for not more than six months, no cash bail shall be imposed on such offender either by a police Officers or any Court of law and any such incarceration is unconstitutional.**

d. **An Order that cash bail of KES. 10,000/- imposed by the Kibera Magistrate's Court against the 20th Petitioner herein being the accused Criminal Case Number 2477/2016 be released to the Petitioner forthwith and in its place execute a Personal Bond for the same amount be granted.**

e. **An Order that the arrests and incarceration of the 1st to 19th Petitioners each for a period of Fifteen (15) Hours by the Respondents for alleged offences of being idle and disorderly and failure to produce them in court was unconstitutional.**

f. **An Order that the arrest and incarceration of the 20th Petitioner for a period of Twelve (12) Hours by the Respondents for an alleged offence of creating disturbance was unconstitutional.**

g. **An Order for adequate compensation for damages for unlawful arrest and incarceration in (c) and (d) above for deprivation of the Constitutional right to freedom of movement and their liberty by the Respondents.**

h. **Any other relief that this Honourable Court shall deem fit by dint of Article 23 (3) of the Constitution of Kenya, 2010 and are just to grant in the circumstances.**

i. **Costs of this petition.**

It was the Petitioners case that on the evening of 4th June, 2016 at around 9.00pm or thereabout, the 1st to 19th Petitioners were unlawfully arrested around Tumaini Supermarket area of Ongata Rongai town, Kajiado County while engaging in normal business. They alleged that

upon their arrest they were bundled into a police vehicle and threatened by the 3rd, 4th and 5th Respondents against making any phone calls. According to the Petitioners, the 1st and 2nd Petitioners defied this order and called the 20th Petitioner, an advocate of the High Court to come to their aid. Upon the arrival of the 20th Petitioner, he explained his reasons for being there and was instead met by threats of arrest and chased away by the 3rd Respondent.

As per the Petitioners, they were held by the Respondents in the aforesaid motor vehicle from the time of their arrest until 12:20AM on the 5th June, 2016, when they were taken to Ongata Rongai police station, booked in and placed in custody without being informed of the reasons for their arrest.

The Petitioners assert that the 20th Petitioner followed the police vehicle to the Ongata Rongai police station where he pressed the officers on the reasons for the arrest of the other petitioners while trying to explain to the officers the rights of arrested persons. He was however met with hostility and in the end was arrested on the charge of creating disturbance in a police station vide OB02/5/6/2016. The other Petitioners were booked for the offence of being idle and disorderly.

According to the Petitioners, the 1st to 19th Petitioners were released unconditionally on 6th June, 2016 at about 10:35am with no charge being preferred against them. The 20th Petitioner on the other hand was released on a cash bail of KES. 5,000/- and it is after this point through his lawyers that he got to know the reasons for his arrest and detention and that charges of creating disturbance were brought against him.

The 1st to 19th Petitioners contend that they spent a total of 15 hours in custody while the 20th Petitioner spent 12 hours, thus a claim for violation of their human rights was guaranteed under the Constitution. It was the 1st to 19th Petitioners case that their right to representation by a person of their choice was infringed upon by the arrest and detention of their advocate, the 20th Petitioner. This arrest was effected even after the advocate had intimated to the Respondents that he would pay a cash bail for all the Petitioners as well as represent them in a court of law. Further, it was the Petitioners contention that the offences under which they were booked are minor offences that ought not to have warranted their right to liberty and freedom of movement being violated through their incarceration for up to 15 hours and release without charges being preferred against them. The Petitioners maintain that the Respondents ought to have exercised their powers strictly in compliance with the provisions of Articles 10, 49 and 51 of the Constitution before acting in the manner they did. Additionally, the Respondents ought to treat persons fairly and not abuse the rights guaranteed under the Constitution of Kenya. It is the Petitioners contention that the actions and omissions on the part of the Respondents were tantamount to a violation of the Petitioners' freedom and rights guaranteed under Articles 20 (1) and (2), 24(1), 25 (c), 27, 29, 31, 39, 47, 49, 50(1), 51 of the Constitution of Kenya, 2010. It is upon this premise that the Petitioners sought the reliefs described herein.

THE RESPONDENTS' CASE

The Respondents' case was made through the affidavit of Henry Kandie, then the OCS at Rongai Police Station and 1st Respondent herein. It was supported by the witness statements of David Ndiema, Deputy OCS Ongata Rongai Police Station and Zedekiah Nyangoye Police Constable attached to Rongai Police Station; the 2nd and 4th Respondents respectively. The 2nd and 4th Respondents' contended that on the evening of 4th June 2016, while conducting patrols in the area between the Ongata Rongai Police Station and Maasai lodge, the 4th Respondent together with the 3rd ,5th, 6th and 7th Respondents arrested 19 people who were taken to Ongata Rongai Police Station and booked in the occurrence book with the offence of being Idle and disorderly in a Public place under OB 2/5/6/2016. It was further contended that at around 20 minutes after midnight on the 5th June 2016 the 20th Petitioner walked into the police station drunk and demanded for the release of two of his clients whom he claimed were among the 19 people that had been arrested. According to the 2nd and 4th Respondents, the 20th Petitioner was abusive and when efforts to calm him did not bear fruits, the 2nd Respondent directed that he be arrested. He was then charged with the offence of creating disturbance in a manner likely to cause a breach of peace. Later, the 1st Respondent herein released the 20th Petitioner on cash bail of Kenya Shillings Five Thousand (Kshs 5,000) and also unconditionally released the 19 people who had been arrested. The 1st Respondent made the case that on the 5th of June 2016 he was informed of the arrest of the 20th Petitioner vide OB No 02/05/06/2016 at 0020hrs and booking alongside nineteen other persons who were arrested and charged with the offence of being idle & disorderly. The 1st Respondent further averred that he informed the 20th Petitioner of his right to be released on bail and subsequently released him upon payment of a cash bail of Ksh. 5,000/- It was further averred that the 1st Respondent then proceeded to unconditionally release the 1st and 2nd Petitioners who were clients of the 20th Petitioner. Thereafter, the 1st Respondent averred that he likewise released 17 more prisoners who had been arrested on the same offence of being idle and disorderly. The 1st Respondent averred that upon his release, the 20th Petitioner came back to record a complaint that he had been arrested when he had come to inquire about the circumstances of the arrest of his two clients. The 1st Respondent asserted that it was revealed to him by the 2nd Respondent that on the night the 20th Petitioner had come to the station he was drunk and abusive. This led to the 20th Petitioner's arrest and charge with the offence of creating disturbance in a manner likely to cause a Breach of Peace contrary to Section 95(1) of the Penal Code. The 20th Petitioner was subsequently arraigned at Kibera Chief Magistrates Court under Criminal case No. 2477 of 2016 which matter was later on transferred to Ngong Law Courts. The 1st Respondent averred that the 20th Petitioner had not provided compelling reasons to warrant a variation of the bond terms and that such variation amounted to interference with the discretion of the trial court. It was further asserted by the 1st Respondent that the 20th Petitioner, who is also the accused person in the Criminal Case 2477 of 2016, ought to make an application before the trial court for variation of the bond terms. According to the 1st Respondent, the 20th Petitioner was arrested and taken to court as per Article 49 (f) (ii) of the Constitution. Additionally, under Chapter 8 of the National Police Service Standing Orders the OCS is in charge of prevention and detection of crime, apprehension of offenders in the area and organizing Special Police Operations. The 1st Respondent asserted that the Police could arrest a person on reasonable grounds that they either committed or are about to commit a cognizable offence and that the Petitioners failed to demonstrate that the Police Officers acted maliciously or outside their powers or that the arrests in question were commenced without proper or reasonable foundation. The 1st Respondent contended that the Petitioners' had failed to specify with precision the manner in which the respondents had denied, infringed and violated their fundamental rights. Additionally, it was his position that the Police Officers acted on the basis of Section 24 of the National Police Service Act which mandated the Police to detect and prevent crimes. Moreover, criminal charges being preferred against the Petitioners was not a violation of their Constitutional rights as the actions complained of by the Petitioners fell

within the mandate of the Respondents. On the basis of the foregoing, the Respondents' averred that Petition was deficient and disclosed no justifiable cause to warrant the intervention by the Court and the same ought to be dismissed with costs.

PETITIONERS' SUBMISSIONS

By way of written submissions, Mr. Nzaku counsel for the Petitioners articulated 5 issues for determination by the court to wit:

a. **Whether a Written Authority by the 3rd – 19th Petitioners to the 1st, 2nd and 20th Petitioners is sufficient to grant locus standi in filing the present Petition?**

b. **Whether the Petitioners' arrest and detention by the Respondents violated the constitutional rights?**

c. **Whether the Petitioners are entitled to general, exemplary or punitive damages as against the Respondents?**

d. **Whether prayers sought by the Petitioner are tenable as sought in the Petition?**

e. **Who should bear the cost of this suit?**

On the issue of locus standi, Counsel submitted that Article 22 of the Constitution and Rule 4, Part II; Procedure for instituting court proceedings, The Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure Rules, 2013 ("The Mutunga Rules") granted the 1st , 2nd, and 20th, Petitioners the right to bring forth an action on behalf of the rest of the Petitioners. Further, counsel submitted that as per Rule 15 of the Mutunga Rules, the Court had the power to proceed and determine the Petition in the absence of the Respondents' responses. The case of **Wilson Olal & 5 others v Attorney General & 2 Others [2017] eKLR** was cited in support of this argument.

Regarding the issue of whether the Petitioners' arrest and detention was in violation of their rights, Advocate for the Petitioners begun by analysing whether the respondents had acted within the confines of the law in conducting the arrest and detention of the Petitioners. Mr. Nzaku posited that the powers of arrest without warrant as encapsulated by **Section 36 of the Criminal Procedure Code** were not unfettered and were subject to challenge in court when exercised in violation of human rights. **Section 36** provides:

'When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable:

Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.'

Counsel cited **Republic vs. Council of Legal Education & Another Ex-Parte Mount Kenya University [2016] eKLR** in support of this notion.

Counsel posited that the offences the 1st to 19th Petitioners and the 20th Petitioner had been charged with, being idle and disorderly and creating a disturbance in a manner likely to cause a breach of peace, carried a sentence of one-month imprisonment or a fine not exceeding one hundred shillings or both for the former and a maximum sentence of 6 months for the latter. That being the case, it was Counsel's submission that the Petitioners arrest and detention was in violation of **Article 49(2)** of the Constitution which provides that***: 'a person shall not be remanded into custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.'*** It was submitted that **Article 25** of the Constitution guaranteed freedom from torture and cruel, inhuman or degrading treatment or punishment and the Respondents could not rely on **Section 36** of the Criminal Procedure Code to shield their acts which had been rendered unlawful by virtue of **Article 49(2).** This submission was supported by **In Re S vs. Walters & Another [South African Constitutional Court] (CCT 28/01) [2002] ZACC 6**

Mr. Nzaku posited that the Respondents failed to demonstrate that they had followed the procedure under the **Kenya National Police Service Act, No. 11A of 2011.** It was learned counsel's position that a personal bond ought to have been granted to secure the freedom of the 20th Petitioner as opposed to a cash bail and that when the magistrate's court ordered for the payment of a cash bail this was tantamount to an infringement of the arrested persons right to property as envisioned under **Article 40** of the Constitution. According to Counsel, all the Petitioners were discriminated against under **Article 27(4)** by dint of their detention. On this limb of argument, the case cited was **R vs Cabinet Secretary for Transport and Infrastructure Principle Secretary & 5 Others ex-parte Kenya Country Bus Owners Association & 8 Others [2014] eklr.** It was Mr. Nzaku's submission that the Petitioners right to have their dignity respected and protected under **Article 28** of the Constitution was violated by the manner in which both male and female Petitioners were bundled into the police vehicle for more than three hours. It was contended that the Petitioners' human dignity was degraded in addition to being subjected to physical and psychological suffering by the Respondents in violation of **Article 29** of the Constitution.

Turning to whether the Petitioners were deserving of general, exemplary and punitive damages, Mr. Nzaku relied on Article 23 (3)(e) of the Constitution for the submission that the Court must order for adequate compensation to the Petitioners on finding that the Respondents denied, violated or infringed their constitutional rights. It was submitted that the 1st to 19th Petitioners be compensated by general damages to the tune of Ksh. 3,000,000/- and the 20th Petitioner be awarded Ksh. 5,000,000/- in general damages for unlawful arrest and false

imprisonment. On this limb of his argument, counsel placed reliance on **Florence Amunga Omukanda & another v. Attorney General & 2 others [2016] eKLR; Minister of Home Affairs v Rahim & Others (Constitutional Court of South Africa) (CCT124/15)[2016] ZACC 3; Wilson Olal & 5 others v Attorney General & 2 Others [2017]Eklr and Titus Barasa Makhanu v Police Constable Simon Kinuthia No. 83653 & Others [2016] Eklr.**

Submitting on whether the prayers as sought in the petition were tenable, Counsel urged the court to interpret the Constitution in a manner that favoured the Petitioners as in was enjoined to do so under Article 20 of the Constitution. Further, Counsel submitted that the court had the jurisdiction to grant the orders sought by the Petitioners and any other order it deemed merited in light of the various breaches of the law by the Respondents. In support of this submission, Mr. Nzaku cited **R vs Cabinet Secretary for Transport and Infrastructure Principle Secretary & 5 Others ex-parte Kenya Country Bus Owners Association & 8 Others [2014] eklr** and **Lin Wen Jie & 2 Others vs Cabinet Secretary, Interior and Coordination of the National Government & 3 Others [2017] eklr.**

On the final issue of costs, it was Mr. Nzaku's argument that the Respondents should bear the costs of the Petition as it was merited and brought without undue delay. Per counsel, the Respondents are trained using taxpayer's money to be professional in the dispensation of their duties. As such, their misdeeds ought not to burden the taxpayer further. Any costs and damages should be borne by the Respondents from their personal funds. The South African case of **In Jack Coetzee vs. National Commission of Police & Another [Constitutional Court of South Africa] (CCT124/12) [2013] ZACC 29** was applied to buttress this line of argument.

It is for the reasons advanced above that Advocate for the Petitioners urged the court to grant the prayers sought in the Petition.

THE RESPONDENTS' SUBMISSIONS

Litigation Counsel for the Hon. Attorney General, Ms. Robi submitted that in a case on unlawful arrest it was upon the Petitioner to prove that the arrest had no basis in law and that the Respondent did not have any reasonable grounds to arrest the Petitioners which led to a violation of their rights. According to her, no evidence was adduced to show that the police officers had acted without reasonable or probable cause. The Petitioners were arrested on an offence under the law and the Respondents had reasonable grounds to arrest the petitioners. Further it was submitted that the Petitioners failed to demonstrate that the Police Officers acted maliciously or outside their powers or that the arrests in question were commenced without proper or reasonable foundation. With regard to the alleged violation of the Petitioners right to freedom of movement under **Article 39(1)** and rights of an arrested person under **Article 49(1)**, it was submitted that it was not in dispute that the 1st to 19th Petitioners were arrested and booked for the offence of idle and disorderly, an offence under **Section 182 of the Penal Code** and that they were held in custody for a period of less than 24 hours. It is also not in dispute that the 1st to 19th Petitioners were thereafter released by the OCS without being taken to court. The 20th Petitioner was taken to Court and Charged at Kibera Magistrates Court. It was learned counsel's submission that the decision to release the 1st to 19th Petitioners without charging them was predicated upon the powers of arrest and discretion of the Officer in Charge of the Station under **Section 36 of the Criminal Procedure Code(supra)**. According to Counsel, after conducting an inquiry and obtaining statements from the arrested persons, the OCS determined that there was insufficient evidence to charge them in court and hence released them. On the issue of the alleged unlawful detention in relation to **Article 49(2),** Ms. Robi submitted that while she agreed with the provisions of the Article, it was contended that its applicability depends on so many factors such as the time in which a person is arrested. Counsel further submitted that the right to bail under **Article 49(h)** was to be effected by the Officer in Charge (OCS) who is mandated to grant bail or bond under **Section 123(1) of the Criminal Procedure Code**. Moreover, per Counsel, it is common practice that bail can only be granted between the period 6am and 6pm and in the instant case the Petitioners were arrested at midnight and at the time the OCS was not at the Police Station. This therefore meant that the Petitioners could only granted the bail or bond the following day by the OCS. Besides, Counsel posited, **Article 49** is not an absolute Right. It does not fall under the **Article 25** rights and can therefore be limited.

Turning to whether the 20th Petitioner ought to have been granted a free bond since he was charged with a petty offence that falls under **Article 49(2)**, it was submitted that under **Order 9 (i) of the Police Service Standing Orders**, the Officer in Charge of the Station is required to release any person arrested on a minor charge on the security of Cash bail. Ms. Robi further submitted that **Article 49(2)** of the Constitution does not necessarily mean that all persons accused of committing offences that are punishable by a fine only or by imprisonment for not more than six months are entitled to free bonds or release on personal recognizance. Police officers had the powers to impose appropriate bail or bond terms when releasing such offenders.

Regarding the question of whether the 1st, 2nd and 20th Petitioner could testify on behalf of the 3rd to 19th Petitioner, it was submitted that the Bill of Rights are individual in nature. No evidence had been adduced to show that the 3rd to 19th Petitioners could not bring this petition on their own or even swear affidavits stating that their rights have been violated. According to Counsel, a proper reading of **Article 22 (2)** cannot allow the 1st, 2nd and 20th Petitioners to present the petition or even testify on the violation of rights on behalf of 3rd to 19th Petitioner without showing that the 3rd to 19th Petitioners could not act on their own. It was therefore submitted that there was no nexus between the 1st, 2nd and 20th Petitioner with the 3rd to 19th Petitioners. As such the Court should only give orders that relate to the 1st, 2nd and 20th Petitioners. The case cited in support of this argument was **Mining Temoi & Another Vs. Governor Of County Of Bungoma & 17 Others.**

On the issue of whether the Petitioners rights were violated, Ms. Robi submitted that there was no evidence presented before the Court to show that the Respondents violated the rights of the Petitioners. The arrest conducted by the respondents was pursuant to a legal and statutory duty. The action of the Police Officers to detain the Petitioners and thereafter release them was justified.

In closing, on the issue of whether the Petitioners are entitled to compensation as a result of the alleged violation of rights by the respondents, it was submitted that the Petitioners had not indicated that the lack of being informed of their rights prejudiced them in any way. Since there was no violation of the rights, it follows that the Petitioners were not entitled to any compensation by the court. Further, it was submitted that **Section 66(1) of the National Police Service Act** protects Police Officers from personal liability. It states that no matter or thing done by a member, employee or agent of the Service shall, if the matter or thing is done in good faith for the performance and execution of the functions, powers or duties of the Service, render the officer, employee or agent personally liable to any action, claim or demand whatsoever.

With a view of the preceding submissions, Counsel asserted that the Petition lacked merit and urged the Court to dismiss it with costs.

ANALYSIS AND DETERMINATIONS

I have fastidiously considered both parties pleadings and the respective advocates submissions and to mind, I find 3 broad issues for determination:

a. **Whether the 1st, 2nd, and 20th Petitioners had the locus standi to institute the Petition on behalf of the 3rd to 19th Petitioners.**

b. **Whether the arrest and detention of the Petitioners was in violation of their fundamental rights and freedoms.**

c. **Whether the Petitioners were entitled to the reliefs sought.**

Relying on **Article 22** of the Constitution, the 1st, 2nd and 20th Petitioners claimed that they had the locus standi to institute the Petition on behalf of the 3rd to 19th Petitioners having sought written authority from them. The Respondents had a different interpretation of the same article, arguing that the Bill of Rights are individual in nature and that there was no nexus between the 1st, 2nd and 20th Petitioners and the 3rd to 19th Petitioners that would warrant the former to sue on behalf of the latter where it had not been demonstrated in any way that the 3rd to 19th Petitioners could not sue in their own capacity.

Article 22 states that:

'22(1) Every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied. violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause may be instituted by –

a) A person acting on behalf of another person who cannot act in their own name;

b) A person acting as a member of, or in the interest of a group or class of persons;

c) A person acting in the public interest; or

d) An Association acting in the interest of one or more of its members.'

Article 258 mirrors the provisions of **Article 22.**

The law on *locus standi* is well settled. In the **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** the court stated:

"(28) It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013– which, in view of its long title, we take the liberty to baptize, the "Mutunga Rules", to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of the Constitution.

(29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution."

In **Randu Nzai Ruwa & 2 others v The Secretary, Independent Electoral and Boundaries Commission & 9 Others [2012] eKLR** the Court held:

"*79. As earlier noted, Article 22 (2) (b) entitles:*

"*a person acting as a member of, or in the interest of, a group or class of persons"*

to seek enforcement of the Bill of Rights. The "Group" rights at a certain level may be distinguished from "association" rights under Article 22 (2) (d). An "association" is defined in the concise Oxford Dictionary as: "[an] organised body for a joint purpose" Thus, a group of persons who may not be organised for a joint purpose may bring an action through one or more of them under Article 22(2) (b). If they can be described as an organised body for a joint purpose, they will fall into the category of an association seeking to rely on Article 22 (2) (d), and may be limited by its organisational objects. The objects or purpose of a group may determine the locus standi of the Applicants. Under Article 3(1) of the Constitution "every person has an obligation to respect, uphold and defend this Constitution". So, if the objects or purpose of a group or class of persons or association are contrary to the Constitution; their very existence would have to be tested under other parameters as to its constitutionality, because under Article 2 the Constitution is the "supreme law" and "any law...and any act or omission in contravention of this Constitution is invalid."

In **Robwa C. Kimkungu & 4 others v Redeemed Gospel Church INC. & 15 others [2015] eKLR** Muriithi J opined that:

> *"[18] Further, in view of the liberalized rules on locus standi under Article 22 of the Constitution the respondents' objection cannot succeed. Article 22 grants standing to "a person acting as a member of, or in the interest of, a group or class of persons". There is no requirement under Article 22 that the group of persons on whose behalf the petition is brought be registered under the Society's Act or other legislation or rules. Indeed, it is conceivable that such a group or class of person will be an unregistered group of, say, a congregation in a church, parents in a school, patients in a hospital, hawkers or traders in a market, persons with certain disabilities, pupils or students in a school or college or university, etc. It would be wholly to disenfranchise such groups by taking away their constitutional right to access justice under Article 48 and 50 (1) of the Constitution of Kenya to deny them standing before the court on account of their unregistered status. The test in my view is in the common interest of the group or class in the enforcement of their rights under the Bill of rights which are identifiable, irrespective of whether the group is formally registered or not."*

The legal precedents set out above create the picture that when considering whether a party has locus standi, the courts have generally taken a liberalized approach, especially in matters related to the upholding of the Bill of Rights. All the Petitioners had to do was bring themselves within the umbrella of Article 22(2)(b). The Petitioners filed a written Authority to Represent that was signed by all the 17 Petitioners that the 1st, 2nd and 20th Petitioners sought to represent in the petition. On the other hand, it was contended by the 1st Respondent that the 20th Respondent was acting as the advocate for the 1st and 2nd Respondents and there was no connection between them and the rest of the Respondents. This court is of the view that by virtue of the Authority to Represent that was signed by all the relevant Petitioners, the 1st, 2nd and 20th Petitioners were acting on behalf of a group of persons as envisioned under Article 22(2)(b). In addition according to Article (3) (1) of the constitution every person has an obligation to respect, uphold and defend this constitution. With respect to the submissions tendered by the respondent counsel any of the foregoing defects on locus- standi does not make this petition incompetent.

The other point of reference is that the great mass of the Kenyan society are not educated or aware of their legal rights. They are of different class of people, lack proper knowledge, poverty and disadvantaged towards enforcement of their infringed rights. The power to open the litigation space permitting any member of society to be at liberty to approach a constitutional court to articulate the infringement or violation of a right or rights is underpinned in the supremacy of the constitution. I therefore find that the Petitioners had the *locus standi* to institute the Petition and that the Petition has been brought properly before this court.

Having dispensed with the preliminary issue of locus standi, I now turn my gaze to the contested issue of whether the Petitioners' arrest, detention and subsequent freedoms was justified.

Constitutional and international conventions on wrongful arrest and detention.

Article 49 basically protects the interests of the arrested person. The said article embodies rules which have always been regarded as vital and fundamental for safeguarding personal liberty in almost all legal systems where the Rule of law prevails. The abovementioned article provides as follows:

> "***49. RIGHTS OF ARRESTED PERSONS***
>
> ***(1) An arrested person has the right—***
>
> ***(a) to be informed promptly, in language that the person understands, of (i) the reason for the arrest; (ii) the right to remain silent; and (iii) the consequences of not remaining silent;***
>
> ***(b) to remain silent;***
>
> ***(c) to communicate with an advocate, and other persons whose assistance is necessary;***
>
> ***(d) not to be compelled to make any confession or admission that could be used in evidence against the person;***
>
> ***(e) to be held separately from persons who are serving a sentence;***
>
> ***(f) to be brought before a court as soon as reasonably possible, but not later than— (i) twenty-four hours after being arrested; or (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;***

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

(2) A person shall not be remanded in custody for an offence if the offence

The rights are also protected under article 9 of the International Covenant on Civil and Political Rights. It states as follows:

"***Article 9***

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

In light of the above, it is important to mention that the expression of the right to liberty in article 3 of the Universal Declaration of Human Rights reflects the inalienable nature of that right. The common conception of liberty formed the basis for the later articulation of the right to liberty in article 9 of the ICCPR.

Article 9(1) of the ICCPR basically prohibits arbitrary arrest and detention and the use of the term, "arbitrary" simply covers unjustifiable deprivation of liberty rather than seeking to list exhaustively all permissible causes of deprivation of liberty. As regards arbitrary arrest, article 49(1) of the constitution which is equivalent to article 9(2) of ICCPR comes into play. These provisions are often referred to following a well-known United States Supreme Court Case of Miranda-v-Arizona.

In that respect the Petitioners alleged that their right was violated on the account of them not being informed of the reason for their arrest. It is noteworthy that the existence of the power to arrest is one thing. The justification for the exercise of it is quite another thing. The law demands that whenever an arrest is made, the accused person has a right to be informed not only that he is being arrested but also of the reasons or grounds for the arrest. Thus the police officer must be able to justify the arrest apart from his power to do so. He does that by communicating to the arrested person the full particulars of the offence for which he is arrested or other grounds for such arrest at the time of the arrest. Thus it is incumbent upon those who deprive other persons of liberty in the discharge of what they conceive to be their duty to strictly and scrupulously observe the forms and rules of law. I'm also tempted to mention that no arrest should be made by Police Officer without a reasonable satisfaction reached after some investigation as to the geniuses and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest.

The prohibition of "arbitrary" detention in article 9(1) aforesaid acknowledges that administrative detention will be occasionally be permissible in order to achieve particular aims. However, owing to the importance of the right to liberty, any restriction must be necessary to achieve a particular legitimate aim, and the degree to which the right to liberty is infringed must be proportionate to achieving that aim. This involves consideration of whether there are less evasive means of achieving the same aim. ***(See C v Australia, Communication No. 90011999, UN Doc CCPRICI761DI90011999 at [8.2].)***

It follows that the detention of an individual is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the end or public interest which might require that the person concerned be detained. ***(see Laden v Poland, Application no. 11036103, 18 March 2008 at [54]. See generally R Clayton and R Tomlinson, The Law of Human Rights (2"' ed, 2009) at [6.68]-[6.70] (noting some inconsistency in the approach taken by the European Court of Human Rights to proportionality).***

The United Nations Human Rights Committee in its ***General Comment No. 35, Article 9 (Liberty and security of person), UN Doc CCPR/C/GC/35 (16 December 2014) at[15]*** has taken the view that detention not in contemplation of prosecution on a criminal charge presents 'severe risks' of arbitrary deprivation of liberty.

It must be noted that the protection of individuals from arbitrary punishment and abrogation of rights is one of the central purposes incumbent upon judicial process. The action that is before this court is one of unlawful arrest and detention. Wrongful arrest involves deprivation of a person's liberty; it consists of arresting and holding a person without legal justification. Thus liability thereof is strict, a party need not show that the person causing the arrest was at fault or that he was aware that the arrest was wrongful. It is one that falls under *action injuriam*, and so proof of damage is not necessary to support the action. Even if no pecuniary damage has been suffered, the court will not award a contemptuous figure for the infringement of the right to liberty. Damages for unlawful arrest and detention should be exemplary and punitive in order to deter would-be offenders. The Petitioners only need prove that the arrest or detention was illegal which they did in this case. They do not have to prove that the Respondents had intention to act illegally or to cause harm. In order to establish the lawfulness

of an arrest without a warrant, the onus of proof resides with the Respondents to show probable cause or reasonable suspicion. In exercising the power to arrest, he must act as an ordinary honest man would act, on suspicions which have a reasonable basis, and not merely on wild suspicion. However, the suspicion need not be a matter of certainty, or even probably, it must not at the other extreme, be vague, remote or tenuous. It is a question of a feasibility possibility, a matter of likelihood.

For the sake of clarity, for as far as it is practicable, I will deal with the allegations relating to the 1 st to 19th Petitioners separately from those concerning the 20th Petitioner.

From the pleadings, I established that the 1st to 19th Petitioners were arrested on the night of 4th June 2016 at around 9.00pm and booked into custody at around 12.20am on 5th June 2016. They were arrested on a charge of being idle and disorderly contrary to **Section 182 of the Penal Code.** This fact is not in dispute. The 1st to 19th Petitioners were subsequently released on the 5th of June 2016 without any charges being proffered against them. The Petitioners contended that they were not informed of the reasons for their arrest and only came to know of the reasons for their arrest after their release and upon subsequent perusal of the Occurrence Book. The 20th Petitioner was arrested and charged with threatening a breach of peace under **Section 95 of the Penal Code.** He was subsequently released on a cash bail and later charged in court

As a general rule an arrest of a suspect should not be made unless and until his or her case has been investigated with sufficient evidence requiring an answer on the complaint. The starting point for the investigating officer is not to depart from the enforcement of a right to a fair hearing and due process.

Given the importance of section 182 in this petition i find it worthy to set out how the legislature defined what elements constitutes the offence.(a) *Every common prostitute behaving in a disorderly or indecent manner in any public place ,(b) Every person causing ,procuring or encouraging any person to beg or gather alms.(c)Every person who publicly conducts himself in a manner likely to cause a breach of the peace.(d)Every person who without lawful excuse publicly does any indecent act.(e) Every person who in any public place solicits for immoral purposes; shall be deemed idle and disorderly persons and are guilty of a misdemeanour and are liable for the first offence to imprisonment for one month or to a fine not exceeding one hundred shilling ,or to both fine and imprisonment.*

Being a criminal offence both mensrea and actusreus are in issue to be proved by the state.

While considering the interpretation of what constitutes disorderly behaviour the Newzland court in the case of **Police v Christie 1962 1109 and melser v police 1967 NZLR437** had this to say *Behaving in a disorderly manner is behaving in a way that right thinking members of the public would consider inappropriately annoying to members of the public. Since behaviour was the focus of the section and to behave meant to conduct oneself with propriety, he considered that disorderly behaviour was to conduct oneself in a manner which contravenes good conduct or proper conduct as recognized by right thinking members of the public and which will disposed persons would stigmatize and condemn as deserving of punishment. In **Melser case** the court took an approach by stating that the disorderly behaviour must both seriously offend against those values of orderly conduct which are recognized by right thinking members of the public and must at least be of a character which is likely to cause annoyance to others who are present. The American case in **ALEGATE V COMMONWEALTH 358 MASS,287,303-304 embodies** the liberal definition of what constitutes disorderly sets of the offence. The court held A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance, or recklessly creating a risk thereof he or she engages in fighting, or threatening, or in violence or tantrums behaviour, or makes unreasonable noise or offensive coarse, or gesture, or display or addressing abusive language to any person present or creates a hazardous or physically offensive conduct by any act which serves no legitimate purpose of the actor. This offence allows the police to deprive the liberty and society of persons perhaps who at the end of the day are considered innocent. This to me is an excellent exposition of the law though from a comparative jurisdictions provides a measure to be applied to this petition.*

I do not know how one can criminalize idleness. Gone are the days when the marginalised members of our society were bundled into police cells under this rubric of offences, incapable of constituting any criminal elements. One wonders the sustainability of the offence of being idle and disorderly in our statute books save for the reason of being a fertile provision for the police to use it as a tool to infringe and or violate the right to equality and non discrimination under Article 27 0f the constitution. Undoubtedly, none of the middle income or economically advantaged class of our society finds himself or herself being arrested or indicted with these kind of offences.

With this background of the definition in mind none of the above elements were stated to apply to any of the nineteen petitioners. Why do I say so, the social-economic diversity of our society cannot be understated. The majority of informal workers go about their juakali business or employment in the various industries where they work in shift clocking many hours in those activities. At the end of it all they also contend with walking to their respective homes. The same urban centres are predominantly under constant patrols from the law enforcement officers purposed to prevent and combat crime.

From the perspective of the respondents we are not told what disorderly conduct any of the nineteen petitioners was involved in contravention of section 182 to warrant arrest and detention. The occurrence book extract relied upon by the respondents to justify their action remains vague and ambiguous as to which specific provision of the idle and disorderly offence was breached by the petitioners. What barometer did the police officers who arrested the petitioners have to determine and read the difference between an idle thought from that of criminal thoughts. The question for me is whether the respondents acquitted themselves to prove to this court that the conduct of the petitioners 1-19 was incompatible with what is viewed by reasonable members of society to be good behaviour. The fact that they were found moving or, standing, or seated, in or in an open area, near a road, or premises within Ongata Rongai Township is no answer to the action taken by the arresting officers. Firstly, I will seek to examine whether the arrest and detention of the Petitioner was done in accordance with the law or whether it amounted to unlawful or false arrest and imprisonment.

The law concerned with arrest and detention especially in relation to the instant case can be found in the Criminal Procedure Code as well as the National Police Service Act. For completeness, what follows is a replication of the relevant Sections.

Section 29 of the Criminal Procedure Code provides for an arrest without warrant by a police officer in the following terms:

> *"29. Arrest by police officer without warrant*
>
> *A police officer may, without an order from a magistrate and without a warrant, arrest—*
>
> *(a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence;*
>
> *(b) any person who commits a breach of the peace in his presence;*
>
> *(c) …*
>
> *(d…*
>
> *(e) …*
>
> *(f) …*
>
> *(g) any person whom he finds in a street or public place during the hours of darkness and whom he suspects upon reasonable grounds of being there for an illegal or disorderly purpose, or who is unable to give a satisfactory account of himself;"*

Section 36 of the Criminal Procedure Code as it relates to detention after an arrest without warrant provides:

> *"36. Detention of persons arrested without warrant*
>
> *When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable:*
>
> *Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge."*

Section 58 of the National Police Service Act gives a police office power to arrest without warrant in these terms:

> *"58. Power to arrest without a warrant*
>
> *Subject to Article 49 of the Constitution, a police officer may without a warrant, arrest a person—*
>
> *(a)…*
>
> *(b)…*
>
> *(c) whom the police officer suspects on reasonable grounds of having*
>
> *committed a cognizable offence;*
>
> *(d) who commits a breach of the peace in the presence of the police*
>
> *officer;"*

Having laid out the statutory provisions upon which the Petitioners' arrests were based, I must now question whether in the circumstances, that arrest was unlawful resulting in false arrest and detention of the Petitioners. My starting point is what constitutes a false arrest. In **Daniel Waweru Njoroge & 17 Others v Attorney General Civil Appeal No. 89 of 2010 [2015] eKLR** the court held:

> *"False arrest which is a civil wrong consists of an unlawful restraint of an individual's personal liberty or freedom of movement by another person purporting to act according to the law. The term false arrest is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetuated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement. Thus, where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort."*

A determination on whether or not there is false imprisonment is predicated on the circumstances of each case. The learned judge in the case of **Daniel Waweru Njoroge & 17 Others V Attorney General (supra)**, adopted the holding in **Jorgensen vs Pennsylvania R.R., 38 N.J Super 317{App. Div. 1955}** where it was held that: *"The gist of an action for false imprisonment is unlawful detention, without more."*

In **O'hara v Chief Constable of The Royal Ulster Constabulary (1997) A.C. 286** Lord Hope of Craighead stated at page 14 that:

> *"The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in article 5(1) (c) [section 5(1) (e)]. The court agrees with the Commission and the Government that having a 'reasonable suspicion' presupposes the existence of facts or information which would justify an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances."*

In the **O'hara case(supra)** it was held by Lord Steyn that:

> *"Certain general propositions about the powers of constables under a section such as section 12(1) can now be summarized. (1) In order to have a reasonable suspicion the constable need not have evidence amounting to a prima facie case. Ex hypothesis one is considering a preliminary stage of the investigation and information from an informer or a tip-off from a member of the public may be enough:* ***Hussien v. Chong Fook Kam [1970] A.C. 942, 949. (2)*** *Hearsay information may therefore afford a constable a reasonable ground to arrest. Such information may come from other officers: Hussien's case, ibid. (3) The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes the arrest"*

For the arrests of the Petitioners to be deemed as lawful, I must find that the arrests were for a cognizable offence and that the Respondents had reasonable grounds to believe the Petitioners had committed such offence. I find it necessary to seek out what "probable and reasonable cause" ought to entail. In the case of **Hicks v Faulkner, (1878), 8 Q.B.D. 167 at para 171** Hawkins J. defined probable and reasonable cause 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."*

Rudd, J. in **Kagane V Attorney General & Another, (1969) EA 643** aligned himself with the **Hicks** definition by reiterating that:

> *"... to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of the facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty."*

Armed with the leading discourse, I now turn to the facts at hand. As relates to the 1st to 19th Petitioners, the 2nd and 4th Respondents' in their affidavits contended that on the evening of 4th June 2016, while conducting patrols in the area between the Ongata Rongai Police Station and Maasai lodge, the 4th Respondent together with the 3rd ,5th, 6th and 7th Respondents arrested 19 people who were taken to Ongata Rongai Police Station and booked in the occurrence book with the offence of being Idle and disorderly in a Public place under OB 2/5/6/2016. No explanation is offered as to the prevailing circumstances that led the Respondents' to believe the 1st to 19th Petitioners had committed the offence of being idle and disorderly. The Occurrence Book booking does no better in shedding light on the mysterious circumstances. All that was offered by way of explanation was that the Respondents were within their powers conferred under Section 29 of the Criminal Procedure Code and Section 58 of the National Police Service Act. It was contended that upon due inquiry, the 1st to 19th Petitioners were released with no charges pursuant to Section 36 of the Criminal Procedure Code. So, while admittedly the 1st to 19th Petitioners may have been arrested on suspicion of committing a cognizable offence, I find it difficult to accept that these arrests were made by police officers acting with reasonable cause.

In a constitutional democracy like our own its imperative for citizens to have confidence and trust in the institutions established to safeguard the rule of law. In this regard the citizens expect the police officers in going about their duties to be fair, transparent and accountable in executing duties on behalf of the state. This means that chapter four of the supreme law of the land should at every juncture be the guiding light when effecting arrest and detention of suspects alleged to have committed cognizable offences.

In the case of **Republic V Dakes 1986 1SCR 103** the Supreme Court of Canada laid down the constitutionality threshold of the law when it comes to arrest. The court recognized the following key elements: First, the offence must be materially connected to its objective and not to be arbitr*ary, unfair or based on irrational considerations. Secondly, the offence, even if rationally connected to the objective, should impair as little as possible the right or freedom in question; and Thirdly there must be proportionality between the effects of the offence which are responsible for limiting the right or freedom and the objective which has been identified as of sufficient importance to warrant overriding of a constitutionally protected right.* In establishing the same framework our courts in the case of **Keroche Industries Ltd V Kenya Revenue Authority and 5 others 2007 2 klr** *the court held as follows "one of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our constitution and it's an important pillar of the rule of law. Enforcing the law and maintaining public order must always be compatible with respect for the human person. Under article 73(a) and (b) of the constitution its provided that authority assigned to a state officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of the constitution, demonstrates respect for the people, brings honour to the nation and dignity to the office, promotes public confidence in the integrity of the office and vests in the state office the responsibility to serve the people, rather than the*

power to rule them".

In sum this is the yardstick that police officers are meant to achieve in exercising their powers under the National police service Act and the criminal procedure code**.** To arrest, detain or investigate must be carried out within constitutionally permissible parameters.

Therefore any system of law which keeps in mind the constitutional provisions must ask the fundamental question whether in order to fight crime its necessary to derogate from the bill of rights entitlements by denying a suspect of misdemeanours right to liberty, freedom, dignity, equality, freedom from torture, degrading and inhuman treatment.

The act of apprehending a person without notice even if it's for a short period has far reaching effect on his or her rights to human dignity. I have in view the harm done to the individual and his or her family before the investigations are carried out and a decision is made of charging him or her before a court of law. First, being on suspicion the right to liberty and security of person under Article 29 of the constitution should not be interfered with arbitrarily to confine the individual to a police station or detention facility. Furthermore the maxim innocent until proven guilty is one of our key pillar in the administration of criminal justice. This principle applies to all criminal law litigation. MUMBI J In the case of **Antony Njenga Mbuli and 5 others v Attorney General held interalia on this legal position as follows: "***That the conduct by law enforcement officers profiling suspects on mere suspicion, arresting and detaining them with no evidence of crime committed is arbitrary and discriminatory guaranteed in our constitution."*

It must be emphasized that reasonableness and rationality of the decision to arrest where deprivation of individual liberty of a person is concerned should be consistent with the constitution and international standards in upholding the rights of the individual. I have no quarrel with the arrest as it's provided for in the law. What is at stake is the failure by the respondents to demonstrate that they took proportionate measures to ensure compliance with the constitution more so Article 49 .The right to be released on bail, being given reasons for their arrest in the legal sense under section 182 of the penal code, right to communicate with counsel upon arrest were not adequately addressed by the respondents.

I appreciate that administratively the officer in charge has the responsibility to make a final decision on the arrested persons. What I find absurd is that important human rights like the liberty of a person once taken away arbitrarily has to await the availability of a single officer to determine whether you enjoy that right or not. There are no simple solutions to institutions but to enhance accountability and prevent an abuse of the administrative process the features of Article 10 of the constitution should be the key driving authority in the decision making process at the police stations. It is clear that both under the constitution and our statutory framework an individual right to liberty cannot be just taken away without a just cause.

Regarding the arrest of the 20th Petitioner, it is also not in doubt that he was charged with a cognizable offence. However, I am inclined to ask what the motivations behind his arrest were. The Petitioners averred that when the 20th Petitioner first approached the 3rd Respondent to inquire about the arrest of his clients, he was met with hostility. This claim remained uncontroverted. Thereafter, the 20th Petitioner who I am inclined to believe was acting not only on his duty to his clients but as an officer of the court followed the police vehicle to the police station to inquire about the arrest of his clients. It is expected that an advocate be zealous in defending the rights of his clients. As such it is unlikely that while at the station, the 20th Petitioner was mollycoddling the Respondents. Be that as it may, I find it ludicrous that the Respondents would seek to paint a picture of the 20th Respondent as a drunk who was causing a raucous at a police station without offering an iota of evidence in support of such a claim. From where I stand, the arrest of the 20th Petitioner was occasioned by his spirited defence of his clients.

It must be emphasized that in exercising statutory powers of arrest the respondents must act reasonably and should not be oppressive or punitive under the guise that the petitioner was obstructing lawful execution of their duties.

In light of the overall constitutional obligations cast upon members of the legal profession and in the circumstances of this petition rules of police station protocol should not negate the realization of the right to legal representation to arrested persons. It's acknowledged that only legal counsels have the knack to agitate the rights of accused persons by applying the law to the facts of the case, whether at the police station or courtroom setup.

In the matter before me impairing such a right makes a mockery of the principles laid down in our constitution. It's my view that for a lawyer who has found himself at a police station for the sole purpose of representing his or her client the arrest and detention is not an option. However in the event he commits an offence within the precincts of police station the arrest and detention should be a measure of last resort. Given the circumstances of the Kenyan society where the poor, vulnerable, weak and, illiterate presumably find themselves in breach of the law legal assistance at both pre-trial or during trial must be provided to ensure that there is no failure of justice in the process.

Turning to the petitioner upon arrest he was also entitled to legal representation. From this view of what transpired it's in vain to say that the petitioner's clash with the respondents will accord him a fair hearing. This objective was attainable by inquiring whether the petitioner wanted to exercise his right to be represented by counsel. I have taken time to evaluate the facts with the evidence from both sides of this legal contest am satisfied that the respondents failed the constitution to ensure observance and effective protection of Article 49. I find no reasonable basis for such an arrest. In the end, it is clear to me that the arrest and detention of the Petitioners was actuated without a reasonable basis and was thus unlawful.

At this juncture, I now turn to the other substantive issue of whether the Petitioners' rights and freedoms were violated by the Respondents. My point of departure is the holding in the **Mumo Matemu case(supra)** where the court commenting on the why a petition ought to be precise in outlining alleged violations of rights had this to say:

> *"(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the*

constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

It is trite law that the burden of proving violation or threat of violation is upon the Petitioners as was established in **Anarita Karimi Njeru Vs- Republic (1976 – 80) I KLR 1272**. Further to this, it is also settled that the Petitioners must patently express the manner in which the Respondents have violated their rights as established in Matiba **v Attorney General [1990] KLR 666.** Placing reliance on the above dictum, I form the opinion that taken in totality, the pleadings and submissions of the Petitioners' seek redress for violation of their rights under Articles 25, 27, 28, 29, 39, 40, 49, 50 and 51.

This court has found that the arrest of the Petitioners was unlawful and based on a flimsy basis. It therefore follows that the arrests were in contravention of **Article 29(1)** which protects the Petitioners from being deprived of their freedom without just cause. Similarly, the detention deprived the Petitioners'' of their freedom of movement guaranteed under **Article 39(1).** Additionally, I find the actions of the police officers to have been discriminatory in nature against the 1st to 19th Petitioners contrary to **Article 27(4)** of the constitution.

It is not in dispute that the 1st to 19th Petitioners were held for about three hours in the back of a police vehicle. Given the size of the average police Landcruiser, I can only surmise that being at least 19 persons at the back of the vehicle, the conditions must have been at the very least substantially uncomfortable, I dare say cruel. Sitting at the back of a police vehicle for such a long period of time while not knowing the reason for your arrest, being booked into a police station and thrown in the cells without being informed of the reason for your arrest and being denied an audience with your advocate to me constitute violation of the right to inherent human dignity under **Article 28, 25(a)** freedom from torture, and cruel, inhuman and degrading treatment or punishment, freedom and security of the person (ART 29), and Article 27(1) on equality and freedom from discrimination.

The Petitioners submitted that their rights to human dignity, freedom from cruel treatment, physical and psychological torture as guaranteed under **Articles 25, 28 and 29** were violated. This court agrees with Counsel for the Petitioners on this front. My decision is based on the holding in **Moses Tengeya Omweno v Commissioner of Police & another Civil Appeal 243 of 2011 [2018] eKLR** where it was held that:

*"39. As regards violation of the right to human dignity, the East African Court of Justice in **Samuel Mukira Mohochi -v- Attorney General of Uganda, EACJ Reference No. 5 of 2011** expressed that detention is indeed deprivation of liberty. When it is illegal, it is not only an infringement of the freedom of movement, but also an act that undermines one's dignity. In the instant appeal, the appellant contended that his detention at Embakasi Police Station in Nairobi Kenya and subsequent detention in Amsterdam and Kosovo were a violation of his fundamental rights."*

As I have already indicated elsewhere in this judgement, the 20th Petitioner went to the police station in his capacity as an advocate for his clients and as an officer of the court. He had not gone there to mince words with the police officers but rather to defend the rights of his clients who had been arrested on a rather sketchy basis. The Respondents' allege that the 20th Petitioner was drunk. I find this reason unconvincing. The Respondents put forth no evidence in support of this notion. To me, it sounds like and is a mere excuse to cover up for the misdeeds of the officers. By arresting the 20th Petitioner in the course of conducting his duties without any reasonable cause, the Respondents not only violated his rights but also the rights of his clients to legal representation.

I am in full agreement with the sentiments of my colleague Okwany J in **Akusala A. Borniface v OCS Langata Police Station & 4 others Petition Number 351 of 2017[2018] eKLR** where she stated:

*"30. Needless to say this court takes judicial notice of the fact that lawyers in this country have, in recent past, been victimized by police officers while in the normal course of their duties of representing their clients. In this regard the case of lawyer Willy Kimani, who was brutally murdered in circumstances that are reported and alleged to be in the hands of police officers while in the course of representing his client is a case in point which this court cannot ignore. While in the instant case there was no disappearance and murder, the question that this court must ask itself is what if the worst happened" Who will stand up for the rights of the downtrodden in the society" It would appear that the actions of the police if not checked would make the legal practice a matter of life and death. Lord Denning M.R., in the case of **Rondel –v- Worsley** [1966] 3 ALL ER 657, stated as follows on the relationship of advocate and client with regard to the performance by the advocate of his work thus:*

"It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of those things. He owes allegiance to a higher cause. It is the cause of truth and justice." (emphasis mine)

31. From the dictum in the above cited case, it is clear that the critical role that lawyers play in the pursuit of the truth and justice must be appreciated as it is a role that should make them partner with the police in fighting crimes and other vices afflicting the society rather than be at cross purpose as was the position in the instant case. What I can infer from the circumstances of this case is that there was no basis whatsoever to arrest or detain the petitioner and that in order to justify their activities, the police made entries of framed up charges of incitement to violence and obstruction of police officers while knowing too well that they had no intentions of pursuing the said charges to their logical conclusion.

In the absence of an alternative explanation by the Respondents, I am inclined to side with the Petitioners on the claim that their rights under **Article 49** were violated on account of them not being informed of the reason for their arrest. Further to this, the unlawful arrest of the 20th Petitioner as he had gone to the aid of his clients deprived them of their constitutional right to legal representation of their choice as guaranteed by **Article 49 (c).**

On the question of the right to bond or bail under **Article 49(h),** my finding is that the 20th Petitioner was granted a cash bail at the police station and subsequently charged at a subordinate court. Matters concerning bail and bond at the subordinate court are not within the purview

of this court. As such the 20th Petitioner ought to raise said issue in the appropriate forum. Therefore, the Petitioners ought not to have been detained in custody in the first place for the alleged offences. As such, their rights under **Article 49(2)** were further violated.

Having dispensed with the issue of violation of the fundamental rights and freedoms, all that is left is to assess whether in the instant case, the Petitioners are entitled to general, exemplary and punitive damages and if so, to what extent. I shall do this while keeping in mind that the Court has discretion when dealing with claims of a compensatory nature for violations of constitutional rights and freedoms by the state or its agents.

In the instant petition the respondents unlawful arrest and cumulative detention from 900pm, being bundled into a police vehicle with no capacity to handle nineteen passengers was an act of human indignity. The treatment accorded to the petitioners with effect from 900pm until their release the following day without charge was an emotional and psycho traumatic experience which will be a dark stain in their personal profile. The inquiry here relates to the right to liberty and security of the petitioners during the time of arrest and detention at the police station. I further find that the action by the respondents under section 182 of the penal code was offensive and arbitrary deserving both compensatory and exemplary damages.

In the case before hand we are not told why Article 49(2) of the constitution did not apply to the petitioners, either to release them immediately on surety recognizance or cash bail. There was no justification in law for them to spend a night at the police station. There was no mention of any complaint made by some member of the public or such other person at the time of arrest and subsequent detention at the police station. The arrest and detention of any suspect is generally considered an upfront or an infringement of the right to liberty and freedom of the person under Article 29, Inherent right to human dignity in Article 28, right to privacy under Article31, right to equality and freedom from discrimination inn Article 27 of the constitution. The burden of proof was on the respondents to justify reasonable cause which necessitated the arrest on any of the elements of the law expressly stated in section 182.

What is more intriguing in this petition is the fact of the arrest and indicting the advocate of the high court who had explained himself the purpose and his presence at police station. The rationale of restricting him from providing legal services to his clients in custody never met the minimum legal threshold. I consider the conduct by the respondents to betray the very values and principles of Article 10 of the constitution. The court must come out strongly against arbitrary and inequitable use of police power on innocent citizens. Sometimes loss of self-esteem and reputation associated with the aftermath of such conduct cannot be compensated by way of damages.

However, this is the approach the law takes to punish wrong doers to serve as a preventive measure for future unlawful conduct and also to give fair compensation to the victims for the violation or infringement of their rights. Pursuant to the holding on liability as set out above its now my singular duty to navigate the discretionary jurisdiction on award of damages by placing reliance on the past jurisprudence on this issue.

Addressing itself to the question of damages, the Court of Appeal in **Gitobu Imanyara & 2 others v Attorney General Civil Appeal No. 98 of 2014 [2016] eKLR** had this to say:

> *"…It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is* ***"appropriate and just"*** *according to the facts and circumstances of a particular case.* ***As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements****. (****emphasis supplied)*** *The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration..."*

For a determination on what concerns to keep in mind in awarding damages for constitutional violations, I find solace in **Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004** where the Privy Council held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense. Per Lord Nicholls at Paragraphs 18 & 19:

> *"When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.*
>
> *All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object.* ***Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award." (emphasis supplied)***

A similar position is established by the Constitutional Court of South Africa in **Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291** where it held that:

"...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

"...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

In the **Akusala case(supra),** on the question of damages, the court held as follows:

"42. In the instant case I find that the appropriate determination is to award reasonable damages in addition to the declaration of violation of constitutional rights. As I have already noted in this judgment, the petitioner prayed for an award of Kshs. 10 million for damages, I am however of the view that an award of Kshs. 2 million will be appropriate in the circumstances of this case. I am guided by the decision in the case of Lucas Omoto Wamari v Attorney General & another [2017] eKLR wherein the Court of Appeal upheld an award of Kshs. 2 million for violation of constitutional rights under circumstances that were similar to the instant case."

On the question of damages for false imprisonment, Mativo J in the **Daniel Waweru Njoroge case (supra)** held as follows:

"On quantum of damages the court has to bear in mind the following cardinal principles in the assessment of damages namely: -

i. Damages should not be inordinately too high or too low.

ii. Should be commensurate to the injury suffered.

iii. Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.

iv. Awards in past decisions are mere guides and each case depends on its own facts.

This court has applied the above principles to the facts herein and it makes a finding that the action of the defendant was high handed and an award of Kshs.100,000/= will be an adequate compensation for each of the plaintiff herein as general damages for unlawful arrest and false imprisonment."

Drawing from the principles laid out in the judicial precedents above, I am of the opinion that where a Petitioner is entitled to compensation for a violation of his constitutional rights by the state, such compensation ought to be both general and exemplary or punitive in nature. This is so because such an award is meant to vindicate the violation of the Petitioners rights and deter future infringements. In light of the violations occasioned by the respondents on the Petitioners rights as alluded to elsewhere in this judgement, I find that the Petitioners are entitled to general exemplary damages in addition to a declaration on the violation of their constitutional rights.

In the **Daniel Waweru Njoroge case (supra),** finding in favour of the Plaintiffs in a tort for unlawful arrest, the Honorable judge awarded each Plaintiff a sum of Ksh. 100,000/-. For the violation of the rights of an officer of the court who was acting in the general course of his duty to uphold justice, Okwany J. in the **Akusala case(supra)** citing the case of ***Lucas Omoto Wamari v Attorney General & another [2017] eKLR,*** awarded the Petitioner Ksh. 2,000,000. Guided by the precedents cited, I hereby award the 1st to 19th Petitioner Ksh. 100,000/- compensatory damages and in addition similar amount for exemplary damages. As for the 20th petitioner I award a global sum of 3 million to cater for both compensatory and aggravated damages.

In the upshot, judgement is entered for the Petitioner as against all the Respondents, jointly and severally in the following terms:

a. I find the respondents jointly and severally liable for the infringement of the constitutional rights of the petitioners.

b. I declare that the actions of the police officers contravened the petitioner's rights and freedoms under Articles 25, 27, 28, 29, 39 and 49 of the Constitution.

c. The 1st to 19th Petitioners are awarded Ksh. 100,000/- general damages together a similar amount to cater for exemplary damages. The 20th Petitioner is awarded a global sum of Ksh. 3 million for both general and aggravated damages.

d. The petition is also allowed in terms of the declarations in prayer No. (a), (b), (c), (e) and (f).

e. The above quantum of damages shall attract interest at court rates from the date of this judgement until payment in full.

f. Costs of the suit be borne by the respondents.

Dated, Signed and Delivered in open court at Kajiado this 20th day of December 2018.

…….....

R. NYAKUNDI

JUDGE

Mr. Nzaku for the petitioners

John Mugwe – present

Mohamed Feizal – present

Ms Robi for the Attorney General