Mbuti & 5 others v Attorney General & 2 others; Mission (Interested Party); Law Society Of Kenya (Amicus Curiae) (Constitutional Petition 45 of 2014) [2015] KEHC 6970 (KLR) (Constitutional and Human Rights) (27 March 2015) (Judgment)

Anthony Njenga Mbuti & 5 others v Attorney General & 3 others [2015] eKLR

Neutral citation: [2015] KEHC 6970 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 45 OF 2014

M NGUGI, J

MARCH 27, 2015

BETWEEN

ANTHONY NJENGA MBUTI ..... 1ST PETITIONER

ROBERT NDUNGU CHEGE ..... 2ND PETITIONER

MARTIN WANGOMBE WERU ..... 3RD PETITIONER

DOUGLAS NJOROGE KAMAU ..... 4TH PETITIONER

GODFRED MUIGAI KAHUNGURI ..... 5TH PETITIONER

PATRICK NJUGUNA KIHUTA ..... 6TH PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

INSPECTOR GENERAL OF THE KENYA POLICE ..... 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 3RD RESPONDENT

AND

INTERNATIONAL JUSTICE MISSION ..... INTERESTED PARTY

AND

LAW SOCIETY OF KENYA ..... AMICUS CURIAE

JUDGMENT

Introduction

1. This petition which is dated 30 January 2014 raises the constitutionality of the provisions of Section 43 – 61A of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya. The petitioners assert that these provisions offend various Articles of the *Constitution*, among them Articles 27, 28, 29, 49 and 50 with regard to the rights of an accused person, and are therefore null and void. I shall in this judgment refer to these sections as the peace bond provisions.

The Parties

2. The petitioners describe themselves as male adults of sound mind residing in Kikuyu Division within Kiambu County. They have at various times been arrested and arraigned in Court, but have not been charged with any criminal offences. Instead they have been required to execute a 'Bond to keep the peace in accordance with the provisions of Sections 41-63 of the *Criminal Procedure Code*.

3. The petitioners have lodged this petition against the Attorney General (AG) of the Republic of Kenya, the principal legal advisor of the Government pursuant to the provisions of Article 156 of the *Constitution*. The second respondent is the Inspector General of Police, appointed in accordance with the provisions of Article 245 (2) (a) of the *Constitution* and who is constitutionally in charge of the police service in Kenya. The 3rd respondent, the Director of Public Prosecutions (DPP), is mandated under Article 157 of the *Constitution* to exercise state powers of prosecution.

4. Upon application being duly made, the Court permitted the participation of an interested party and an *amicus curiae* in the matter. The International Justice Mission (IJM) is an international Human Rights agency which works to aid the poor in matters of justice, and describes its mission as to rescue thousands, protect millions and prove that justice for the poor is possible. It states that it has over the years represented victims of arbitrary arrests and detention failing under the scope of sections 43-61A of the *Criminal Procedure Code*.

5. The Law Society of Kenya was permitted to participate in the proceedings as a friend of the Court. It is established under the provisions of the *Law Society Act*, Cap 18 Laws of Kenya. It shall in this judgment be referred to as LSK or Amicus.

6. The Kenya National Commission on Human Rights had expressed an interest in participating in the proceedings as an Amicus. It however, filed its application too late in the day, and sought to prosecute it on the day scheduled for the hearing. Although it did file submissions in the matter, it was excluded from the proceedings.

Factual Background

7. The petitioners have all approached the Court because of what they state they have experienced at the hands of police officers and the criminal justice system, and which they assert violates their rights under the *Constitution*.

8. The 1st petitioner avers that he was arrested on 28th February 2011 at about 7:30 pm at the Kingeero Shopping Centre. He was taken to the CDF Police post at Kingeero and later on transferred to Kikuyu Police Station where he remained in detention for more than 48 hours during the week of 28th February through 3rd March 2011. He was charged in the Magistrate's Court at Kikuyu in Misc. Criminal Case No 5 of 2011. A Mr. Stanley Riungu, a police officer, invoked the provisions of the Peace Bond Statute

and further swore under oath that he had not obtained sufficient evidence to charge the petitioner. The officers of the 3rd respondent did not charge him with any offence, and he remained silent throughout the said proceedings. He was ordered to execute a Peace Bond of Kshs 50,000 and a surety of a similar amount for a period of two years.

9. However, since he was unable to raise the said amount, he was remanded in custody at the Industrial Area Remand Prison where he remained incarcerated for twenty one months before being released on 27th December 2012. On 11th July 2013, the Honourable Judge A. Mbogholi Msagha considered the original conviction and sentence in Misc. Criminal Case No 5 of 2011 and ruled that the proceedings which bonded the petitioner to keep peace were a nullity for breach of express provisions of the *Criminal Procedure Code*, and set them aside in their entirety.

10. The 2nd, 3rd, 4th and 5th petitioners were arrested at various times and in various locations near the Wangige Market on 23rd March 2013. At about 1:00 am on 24th March 2013, they were taken to Kikuyu Police Station where they spent the remainder of the weekend in custody. On 25th March 2013, they were charged in the Magistrate's Court at Kikuyu in Kikuyu Misc. Criminal Case No 21 of 2013, Republic v Leonard Kamenwa Nganga and 7 others.

11. The Court ordered them to execute a bond of Kshs 30,000 with a surety of a like amount for a period of one year. The 2nd, 3rd and 4th petitioners were unable to raise the bond amount and were remanded in custody at the Industrial Area Remand Prison from 25th March 2013 until their release on 25th April 2013. The 5th respondent was able to post the required amount of bond but was remanded at the Kikuyu Police Station from 25th March to 29th March 2013 while his bond payment was processed.

12. The 3rd respondent's agents never charged them with any offence, and they all remained silent throughout the Bond proceedings. As in the case of the 1st petitioner, on 11th July 2013, Honourable Judge A Mbogholi Msagha considered the original conviction and sentence with respect to the 2nd -5th petitioners and ruled that the proceedings which bonded them to keep peace were a nullity for breach of express provisions of the *Criminal Procedure Code* and the *Constitution*. He also set aside the proceedings in their entirety.

13. The 6th petitioner states that he was arrested sometime in 2011 and taken to Kikuyu Police Station. He was also charged before the Principal Magistrate's Court Kikuyu in Kikuyu Misc. Criminal No 44 of 2010 in which the court conducted Peace Bond proceedings. He was ordered to execute a bond of Kshs 100,000 with a surety of a like amount for a period of two years. He was unable to pay the amount ordered and was taken to the Industrial Area Remand Prison where he spent nearly two months. Eventually, he was able to secure his release when the bond was reduced to Kshs 30,000.

14. However, he was again arrested and taken to Kikuyu Police Station along with 11 others and after about four days he was charged before the Principal Magistrate's Court on 16th October 2012 in Kikuyu Misc. Criminal Case No 58 of 2012, Republic v Patrick Njuguna Kihuta and 11 others. The arresting officer, Inspector Linyerera, told the court that he had not obtained sufficient evidence to charge the petitioner with a criminal offence and he therefore prayed that he be ordered to execute a bond to keep peace for one year. The petitioner was ordered to execute a Peace Bond of Kshs 30,000 with a surety of a similar amount for a period of one year.

15. As he was unable to raise the said amount, he was remanded at the Industrial Area Remand Prison from 16th October 2012 to 13th December 2012. On 13th December 2012, after obtaining legal representation, his lawyer appeared at a mention and argued that his ongoing detention was improper given the failure of the 3rd respondent's agent to bring a criminal charge. The Court, after considering his arguments, directed that the petitioner be released on a free bond.

16. The petitioners ask the Court to declare the Peace Bond Statutes and procedures unconstitutional, and they also ask the court to award them compensation for their unlawful arrests and detentions.

The Petitioners' Case

17. The petitioners have set out in depth the circumstances of their arrest, charging in Court, and their being asked to execute peace bonds with sureties, in their respective affidavits. In all the cases, there were no charges brought against them. They claim that in some cases, they were place in police vehicles and asked for money in order to secure their release. When they were unable or unwilling to pay the requested bribe, they were detained inside the police vehicle for several hours before being taken to Court where they were required to execute the peace bonds.

18. The petitioners' case stems from the recognition of the inherent dignity of all which is recognised in the *Constitution* of Kenya, both in the Preamble and in Article 28. They submit that through the *Constitution*, the people of Kenya recognize the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, social justice and the rule of law. It is their submission that in order to achieve these aspirations, the *Constitution* has established a framework through which all the laws of the Republic must operate; that all the protections found in the *Constitution* flow through the promise of Article 28 which guarantees to everyone inherent dignity and the right to have that dignity respected.

19. It is their case that because a person has inherent dignity, he should not be arbitrarily arrested, oppressed, manipulated, or abused by the State; nor should he or she be deprived of liberty without due process or without a fair trial. It is their submissions that through the Peace Bond process, the State oppresses and violates the dignity and rights of individuals, among them the petitioners, in violation of the *Constitution*.

20. The petitioners submit that through the Peace Bond provisions contained in the *Criminal Procedure Code*, the State fully displays its disregard of the inherent dignity of all people by subjecting them to an ancient procedure which lacks all of the due process and equal protections the *Constitution* promises them.

21. According to the petitioners, the provisions of the *Criminal Procedure Code* originate from a mechanism found in English Common law namely the Bond to Keep Peace which dates back to at least the 11th century. It was codified into law in the *Criminal Procedure Code* at various points between 1955 and 1971. They submit that the *Penal Code* has, however, worked to clearly outline, define, and protect against the behaviour the ancient Peace Bond was designed to address. It is their submission therefore that the binding over process has become unnecessary because statutes exist to address every situation to which they used to apply, and further, that the processes are now incompatible with the *Constitution*.

22. The petitioners allege violation of their constitutional rights in two main respects: with regard to the requirements in respect of an arrested person, and with regard to the right to a hearing under Article 50.

23. With respect to violation of their rights under Article 49(1), they submit that they were all not offered an explanation for their arrest, nor were they informed of their right to remain silent, or the consequences of not remaining silent. They aver that in some cases, no entries were made with regard to their arrest in the Occurrence Book, the duty officer stated that the arrested person was not being charged with any offence; and that he was only being arrested in connection with investigations into a robbery/burglary.

24. They assert that they were not cautioned, and that they were only asked to keep the peace, which they agreed to. It is their submission that the authority to order a person to speak cannot exist if the rights under Article 49(1) (b) are to be respected; and that if Article 49(1)(a)(iii) is to be complied with, the Magistrate must be required to give a caution outlining to the suspect the ramifications of the peace bond proceeding to ensure they knowingly and willingly waive their right to remain silent.

25. The petitioners further allege violation of Article 49 (1) (g) which requires that the suspect be informed of the reason for his detention, and if the State is not willing to do so, then Article 49 (1)(g) demands that he be released.

26. The petitioners further argue that the peace bond provisions violate the requirements of Article 49(2) which provide that a person shall not be remanded in custody for an offence if the offence is punishable by a fine only. It is their contention that the archaic nature of the process creates yet another untenable situation in which a person who is not facing an offence which has established penalties is ordered to provide a bond and surety to demonstrate their willingness to comply with the already existing laws of the land; and when unable to raise the sum required, is imprisoned.

27. The petitioners argue that where the suspect is imprisoned only on the grounds that they were not able to pay a sum of money is unconstitutional as the Peace Bond inquiry is not purely a criminal trial, requiring an individual to pay a bond or bail must amount to a civil obligation against the State and imprisoning a suspect for failure to comply with a civil obligation violates the protection guaranteed by the *Constitution* and Article 11 of the *International Covenant on Civil and Political Rights*. They rely on the decision in *Re The Matter of Zipporah Wambui Mathara* [2010] eKLR in support of that line of their argument.

28. The petitioners submit that the process they each underwent illustrates the violation of the *Constitution*, both by the police and the Courts seized of the matters, in the application of the Peace Bond process: each of them was arrested arbitrarily and unlawfully and detained; produced in court; compelled to make a statement against their interest; subjected to an unreasonable bond, and imprisoned for failure to pay. They submit that while the initial violation was by the police, the Courts which are supposed to be the guardians of justice abandoned their duties and were complicit in the injustices to which the petitioners were subjected.

29. In this regard, the petitioners submit that having examined no witnesses, seen no evidence, or given the petitioners the opportunity to defend themselves, the Courts bowed to the wishes of the police, consigning the petitioners to prison without due process. It is their submission that this was possible because an ancient relic of the common law can still be found in Kenya's *Criminal Procedure Code*.

30. The petitioners submit that in respect of five of the six petitioners' cases, the High Court established that the statutory procedures for a Peace Bond inquiry were not properly followed by the Magistrate. Instead the petitioners, like an untold number of Kenyans, were subjected to a process which has become commonly abused by police and acquiesced to by courts throughout the country mostly in the name of 'National Security'. They submit, however that even if the process had been properly applied in their respective cases, it cannot withstand constitutional scrutiny as it is fundamentally unable to comply with Articles 29, 49, and 50 of the *Constitution*. It is also their case that the Peace Bond inquiry violates Article 27 of the *Constitution*.

31. According to the petitioners, the peace bond Statutes grant a Magistrate the power to imprison a person for failure to pay the bond or for failure to comply with the terms of the bond as provided under Section 58 of the *Criminal Procedure Code* If the ability of a Magistrate to imprison the subject of a Peace Bond inquiry is to remain, the procedures established by the Statutes must satisfy the Constitution's

requirement of a procedurally fair trial. It is their submission that the Peace Bond inquiry does not amount to a trial, much less one which is procedurally fair. The ability of a Magistrate to imprison someone without a trial, according to the petitioners, is a prima facie demonstration that the power of the Peace Bond Statutes to imprison is unconstitutional. It is also their case that the power of the police to rely on the Peace Bond Statutes as an alternative to charging a person with a criminal offence is a prima facie demonstration of arbitrary and unjust deprivation of freedom.

32. The petitioners rely on the definition of a trial in *Black's Law Dictionary* (8th Edition) as a formal judicial examination of evidence and a determination of legal claims in adversary proceedings, which involve "active and unhindered parties contesting with each other to put forth a case before an independent decision maker" to submit that the peace Bond inquiry is not a trial precisely because it lacks crucial components of a true trial. It is their submission that crucial elements of a fair trial are missing from the peace bond process: that it is silent on the standard of proof necessary for the Court to satisfy itself that the information presented to it with regard to the person before the Court is true; the availability of the informant for cross-examination; and the opportunity of the suspect to challenge and adduce evidence.

33. The petitioners submit that without a clearly stated burden of proof beyond reasonable doubt, imprisonment under the statutes cannot be termed procedurally fair; nor can a criminal procedure where the State does not assume the burden of establishing guilt beyond a reasonable doubt be termed as fair. They rely on the decisions in *Republic v Michael Mucheru Gatu* [2002] eKLR and *Yeung Chung Ming v Commissioner of Police*, FACV 22/2007 to support their submission that an accused person assumes no burden to prove his innocence.

34. The petitioners submit that in the petitioners' Peace Bond inquiries, the lack of a clearly stated standard of proof led the Magistrates to satisfy themselves by listening only to a police officer swear an affidavit to the effect that the petitioners were suspects in numerous crimes. They contend that the affidavit by the police officer satisfied each Magistrate and they proceeded to bond the petitioners to keep the peace. The petitioners submit that with a clearly stated burden of proof beyond reasonable doubt, injustice such as they were subjected to, in which the Magistrate accepted mere suspicion as proof of the allegations against them even though police officers admitted that they had no evidence by which to establish a charge against the petitioners, would not have occurred.

35. The petitioners further submit that the plain language of the *Criminal Procedure Code* and the facts on record demonstrate that they were not lawfully before a Magistrate when they were submitted to a Peace Bond inquiry; that it is not constitutionally permissible for the police to use the Peace Bond process as an alternative to charging if their investigations do not produce enough evidence; and the abuse of the Peace Bond Statutes violates not only a person's right to freedom and security under Article 29 but also strips them of their human dignity in violation of Article 28 of the *Constitution*.

36. The petitioners argue that out of the 11 circumstances provided under Section 29 of the Criminal Procedure under which a police officer may arrest without a warrant, 8 of these, which are relevant to the present case, cover behaviour which amounts to cognizable offences. Section 29 (a) grants a police officer power to arrest any person whom he suspects upon reasonable grounds of having committed a cognizable offence without first obtaining a warrant. It stands to reason therefore, according to the petitioners, that if the police arrested the petitioners without a warrant, they would have to have done so on reasonable grounds that they committed a cognizable offence. The petitioners submit that there is no statutory definition of the term "reasonable grounds."

37. They submit, however, in reliance on the definition in Black's Law Dictionary (8th Edition) which is to the effect that "reasonable grounds" denotes: as amounting to more than a bare suspicion but less than evidence that would justify a conviction, that the term requires application of an objective

test, and the facts relied on to justify an arrest must be such as would warrant a belief by a reasonable man. They further rely on statutes from England and Wales, namely, under the *Police and Criminal Evidence Act 1984* ("PACE Act"), Section 24 (1) and (2) which they aver that the circumstances that are considered as reasonable in the said jurisdictions are broadly similar to those provided by the *National Police Service Act* (NPSA) in Section 58 (c) and (g) as well as *Criminal Procedure Code* in Section 29.

38. In that regard they further rely on the decision in *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] A.C. 286 in support of their argument. It is their submission that an arrest cannot be carried out arbitrarily, but, in the contexts of the *Criminal Procedure Code* by dint of Section 29 and *National Police Service Act* under Section 58 based on all of the known facts and information for there must be reasonable grounds that would render a "reasonable man" to suspect that the person in question committed the alleged offence. It is their submission that in the circumstances, the actions of the petitioners were the normal every day actions of any lawful citizen: they were going to or coming from a crowded public market, working at their place of employment, or they were socializing, and such actions would not render a "reasonable man" to suspect they had committed the act of robbery.

39. The petitioners submit that the State, through its agents, abuses the Peace Bond Statutes as a loophole to justify arbitrary arrest and detention. It is their case that what happened to each of them demonstrates the obvious loophole the 2nd respondent's agents have been taking advantage of, to arbitrarily arrest innocent citizens, extort bribes from them, and bring them to Court for a Peace Bond to give the appearance of compliance with the *Constitution*. In that regard they rely on the decision in *Daniel Munyambu v Director of Public Prosecutions & others* [2014] eKLR in support of their arguments of the abuse of court process and submit that the police practice of arresting on mere suspicion and then requesting a peace bond is an abuse of the justice system and this Honourable Court has a duty to stop this abuse from continuing.

40. The petitioners further argue that should the Court find the Peace Bond inquiry not to be a trial; it will have damned the process entirely. If it finds that it is, then it cannot function as the right to a fair trial under Article 50 of the *Constitution* must apply, and if these rights apply, the entire Peace Bond process would be utterly unable to function as currently designed for the Peace Bond inquiry violates nearly every right provided under Article 50. In this regard, the petitioners argue that the Peace Bond inquiry removes the right to be presumed innocent guaranteed by Article 50 (2) (a) of the *Constitution*, which is similar to Article 14 (3) (g) of the *International Covenant on Civil and Political Rights*. They submit that when the suspect is ordered to show cause why he or she should not be bonded to keep peace, the Court, in effect, takes the burden of proof from the State and places it on the suspect; that instead of the State proving guilt beyond a reasonable doubt, the suspect is forced to establish their innocence. The petitioners rely on the dictum in the Hong Kong case of *Yeung Chung Ming v Commissioner of Police*, FACV 22/2007, with respect to the importance of the presumption of innocence.

41. The petitioners further submit that the Peace Bond Statutes violate Article 50 (2)(b) of the *Constitution* by creating a situation in which the State does not inform the suspect of the charge against him in order for him to answer it with sufficient detail. They rely on the decision in *Mwagona and 3 others v Republic*, 1990 KLR 515-516, where the High Court in Mombasa noted that proceedings under the Peace Bond Statutes do not include charges to submit that if there is no charge, it is impossible for the State to fulfill the constitutional requirement that the accused be informed of the charge against him.

42. It is contended that in effect, Section 47 of the *Criminal Procedure Code* would inform the suspect of the behavior he is accused to have engaged in and why that behavior has caused him to be before this Magistrate for the Peace Bond inquiry. They argue that the behaviour covered by Sections 43 to 46 of the *Criminal Procedure Code* is either already an offence under the *Penal Code* or would expose a person to being tried for an offence in respect of an act or omission for which they have previously been

either acquitted or convicted, in direct contradiction to Article 50(2) (o). They submit that a person facing a Peace Bond inquiry under Section 43 of the *Criminal Procedure Code* could be subjected to 12-months imprisonment for the exact behaviour which is only punishable by 6-months imprisonment or a fine under the *Penal Code*. It is their submission that this demonstrates how the application of the Peace Bond Statutes leads to a violation of the equal protection of the law guaranteed by Article 27(1) of the *Constitution*.

43. The petitioners contend that when the police using Peace Bond proceedings as a substitute for charging after arrest, the suspect finds himself in an impossible situation for they have been arrested and detained inside a jail cell (often for more than 24-48 hours as in the present case, yet they are not facing criminal charges. Despite this, the threat of continued incarceration is very real if they are unable to quickly raise large sums of money; and further, they are put to the absurd task of convincing the Court that although the State cannot specifically show which law they have violated, they will pledge to maintain a vague, indefinable standard of behavior known as "keeping peace." It is their submission that the fact that no charges exist or are brought against persons brought to court under the peace statutes demonstrates the Peace Bond proceeding cannot fulfill the most basic constitutional requirements.

44. The petitioners also allege violation of the right to remain silent and not testify during the proceeding as guaranteed by Article 50 (2) (i) of the *Constitution*. This is because the Peace Bond proceeding shifts the burden of proof onto the defendant, requiring them to show cause why they should not be bonded and thus, a suspect's right to remain silent is effectively eliminated. They submit that persons presented to Court under the Peace Bond statutes is confronted with Hobson's choice, for if the accused person exercises their constitutional right and stands mute, he risks imprisonment for refusal to comply with the Peace Bond Order results in imprisonment as stipulated by Section 56 and 58 of the *Criminal Procedure Code*.

45. The petitioners further argue that the Peace Bond process violates Article 50 (2) (j) of the *Constitution*. They submit that as their cases illustrate, the proceedings allow a Court to entertain mere suspicion of past or future unlawful behavior in order to force the accused to execute a bond to keep peace. It is their submission that if the State were able to produce evidence of wrongdoing, it would be able to charge a violation of the *Penal Code* but as it stands, the Peace Bond process allows the State, without any evidence of actual wrongdoing, to bring an innocent person before the Court and subject them to a process under which they must affirmatively demonstrate their willingness to comply with the laws that all citizens are already compelled to abide by.

46. The petitioners further argue that the Peace Bond process is also in conflict with Article 50 (2) (l) of the *Constitution*. This is because, when the court asks the suspect if they will keep peace, their answer is, in effect, a confession of guilt. The petitioners contend that by agreeing to keep peace, the suspect has implicitly admitted they were previously "not keeping peace." The petitioners contend that the idea that they had any option but to agree to keep the peace is absurd as no rational person will inform the Court that they do not intend to keep peace. The persons brought before the Court is therefore compelled to abandon their rights under Article 50 (2) (l) and acquiesce to the allegations of the State.

47. The petitioners contend further that the provisions of the *CPC* with regard to the peace bonds allow a person to be imprisoned for allegations of engaging in behavior which does not constitute an offence in Kenya. They submit that if the State has evidence that the accused has violated the *Penal Code*, it can easily charge the offence in question. They submit that the provisions of the peace bond statutes in effect lead to the incarceration of citizens whose only crime is being too poor to afford the bond, and as a result, unconstitutionally force citizens to spend significant periods of time remanded in custody without the State having demonstrating they offended Kenyan law.

48. The petitioners further argue that the peace bond provisions are unconstitutional as the Court does not maintain its neutrality as the State and defence present their cases. They submit that instead of making a decision based on the adversarial nature of the system, the Magistrate in a Peace Bond inquiry takes on the role of the prosecutor and proceeds to examine witnesses and collect evidence. The prosecution remains silent throughout the entire proceedings, the only interaction being between the police, who are the complaining witness(es), the Magistrate, and the suspect.

49. The petitioners urge the Court to recognize the injustice which results from the Peace Bond process and find it unconstitutional. They further plead with the Court to send a clear message to the National Police Service that it may not use the Peace Bond Statutes to abuse the courts and cover arbitrary detention with a thin veneer of legality. They assert that the Court has a duty to prevent the justice system from being abused, noting that they represent a small portion of the untold number of Kenyans who have been abused and oppressed at the hands of the Peace Bond inquiry. They argue that while the stated purpose of the statutes is to prevent offences, it is doing the opposite by the fact that it is being systematically used to bolster and maintain a system of illegal arrest and arbitrary detention and contribute to the clogging of the already overstretched prisons in which taxpayers have to feed people who would otherwise be engaged in economically empowering activities. They ask the Court to put an end to this injustice once and for all by ruling the Peace Bond Statutes unconstitutional, and to grant the following orders:

    a. A declaration be and is hereby issued that Sections 43-61A of the *Criminal Procedure Code* Cap 75 are unconstitutional and thus null and void.

    b. A declaration be and is hereby issued that the aforementioned Sections of the *Criminal Procedure Code* be repealed.

    c. An order for compensation/damages for the injuries suffered due to the unlawful deprivation of the petitioners' constitutional rights due to unlawful arrest and subsequent detention.

    d. Any other just and expedient order that the court may deem fit to make.

    e. Costs of and incidentals to this Petition.

The Case for the Interested Party

50. Through its Learned Counsel, Mr. James, Kironji, the interested party, the International Justice Mission (IJM) supported the position taken by the petitioners with regard to the provisions of Section 43-61A of the *CPC*. IJM relied on an affidavit in support of the petition sworn by Mr. Benson Shamalla on 4th April 2014 and submissions dated 8th April 2014.

51. According to IJM, it has over the years represented victims of arbitrary arrests and detention falling under the scope of Section 43-61A of the *Criminal Procedure Code*. It seeks to prevent illegal detentions which occur when such persons are arbitrarily arrested or imprisoned without charge or trial. Between 2012 and 2013, it secured the release of 43 individuals in Thika and Kikuyu Law Courts, and another 18 in 2014 in Thika who had been bonded to keep the peace through having their surety bonds replaced with their personal bond to keep the peace IJM states that the bond terms that were issued to the persons whose release it secured were beyond their means, no witnesses were brought to court to verify their involvement in the alleged offences, and the bond terms were set on the basis of the affidavit sworn by one Ag. S.P Bernard Kazee, who believed that the suspects were involved in a series

of robberies, murders, burglaries and other serious crimes. It states that the said affidavit was premised on unsubstantiated allegations and the persons had not been charged with any offence.

52. IJM submitted that when attempting to analyse the constitutionality of the procedures set out in Sections 43-61A of the *CPC*, the most appropriate description is that of the hydra: as soon as one issue is chopped down, two or three pop up to replace it. It submits that the peace bond statutes create a hybrid criminal/civil procedure designed not to punish criminal behaviour, but to prevent future criminal behavior.

53. IJM impugns the process further in that it allows for the imprisonment of the person unable to either pay the bond or comply with its terms; it allows Magistrates to exceed their constitutional authority to imprison, and creates a category of people for whom the *Constitution* does not apply. According to IJM, the Peace Bond provisions seek to control behaviour through a mechanism which is incompatible with Article 49 of the *Constitution*.

54. IJM agrees with the petitioners that the peace bond provisions violate due process provisions in the *Constitution*, but the implementation of the entire binding-over processes itself fundamentally violates the principles of equal protection. It is its submission that the process is now superfluous and nearly universally unlawfully carried out, and that it has become common for police to abuse the Statutes in gross ways which have an unconscionable effect on the poorest and most vulnerable members of the society. It submits further that the only purpose the peace bond process serves is to apply a thin veneer of legality to what is, in effect, arbitrary and capricious abuse of State power.

55. IJM contends that the Peace Bond Statutes unconstitutionally grant Magistrates authority to imprison a suspect without a trial contrary to Articles 29, 49 and 50 of the *Constitution*. It supports the petitioners' argument that in the Peace Bond inquiry there is no classic adversarial system, and it does not guarantee the suspect the opportunity to cross-examine the witness/witnesses against him, a violation of the right of an accused person to meet his accusers face-to-face, which is universally recognized. IJM relies on the decision in Michael Kamoru Guantai v Republic 2013 eKLR.

56. IJM submits that without a three-party adversarial system and without the vital component of cross examination, the procedures created by the Peace Bond Statutes cannot be said to be a trial in the traditional sense of the word; that it is clear that they are a judicial inquiry as the language of the Statute is replete with reference to the process being an inquiry. IJM cited as instances the reference at Sections 43 (4), 52 (2), 53 (1), 54 of the *Criminal Procedure Code* which make reference to an inquiry. IJM contends that the Peace Bond inquiry is not a trial and the ability of Magistrates to imprison must be removed in order for the Statute to comply with Article 29 (b) of the *Constitution*.

57. IJM further agrees with the petitioners that the Peace Bond process violates Article 50 (2) (a) and (i) of the *Constitution*, and does not set the standard of proof for the Magistrate to employ during the inquiry.

58. IJM argues that the Peace Bond Statutes amount to discrimination and that its most adverse impact is on the poor. This is because the sums imposed are too high on such persons and therefore guarantee that those before the Court will be imprisoned. It is its contention that the procedures irrationally differentiate between people based on their class or socio-economic status.

59. IJM also agrees with the petitioners that as there is no activity for which the Peace Bond Statutes seek to address which the *Penal Code* itself cannot cope with, it poses risks and threats to constitutional rights implicit in the process. Its case therefore is that if it is removed, it will leave no void in the criminal justice system in Kenya.

60. Mr. Kironji argued that the bond to keep peace is unnecessary and has been greatly abused. He contended that it was passed in the 1950s, and is a carbon copy of the vagrancy law which was intended to suppress the Mau Mau returnees that does not help to enforce the rule of law. It was his submission that it is an unholy alliance between the State, police and the judiciary, yet the judiciary is intended to safeguard the rights of citizens, and courts therefore have no business issuing bonds to keep the peace.

61. Counsel referred the Court to the Brooks Commission in England which, at page 63, recommended that the law in the bond to keep the peace be abolished. He urged this Court to adopt the same conclusion with regard to the peace bond in Kenya.

The Case for the 1st and 2nd Respondents

62. The 1st and 2nd respondents relied on the affidavit of Inspector Eganza Dewy Linyerera sworn on 22nd May 2014 and submissions dated 18th July 2014. Learned Counsel, Mr. Opondo, presented the case for the State.

63. In his affidavit, Inspector Linyerera avers that on diverse dates between the years 2011 and 2013, police officers from Kabete Administration Police Post received intelligence reports from members of the public that a group of Mungiki members, a proscribed Criminal group, were gathered in various parts within Wangige Market and Kingeero area and were planning to cause mayhem within the said areas. On the strength of this information, the police proceeded to these venues and caused the arrest of a group of people, amongst them the petitioners. They escorted the arrested persons to Kikuyu Police Station where they were interrogated on the allegations that they were adherents of Mungiki.

64. He avers that since since the interrogations did not yield much as the arrested persons denied the allegations, and since there was no sufficient primary evidence of the allegations, the arrested persons were taken before the Kikuyu Magistrate's Court. Inspector Linyerera avers that the police found it prudent to bring them before a court of law as provided under Sections 43-61A of the *Criminal Procedure Code* as releasing them back to the public was deemed detrimental to peace and security of the people.

65. The AG submitted that the peace bonds, also known as recognizances, were once part of the English Common law, and are also found in Section 810 of the *Criminal Procedure Code* of Canada. He states that a person who believes, subjectively, that another person will injure them, or another member of their family, or cause damage to their property, may apply for a peace bond. The applicant must satisfy the Magistrate, on a balance of probabilities, not only of their subjectively held fear, but that such fear, viewed objectively, is reasonably held. The AG submitted that if the applicant is successful in meeting that onus, the Magistrate will order the respondent to enter into a recognizance for up to 12 months, and upon such conditions as the Magistrate might direct.

66. The State submitted that the peace bond essentially means that the person must not be charged with a criminal offence in the intervening period; that it often has other conditions too, such as not having any weapons or staying away from a person or place. It is its averment therefore that the petitioners are wrong in their argument that in the peace bond inquiry, the State fully displays its disregard of the inherent dignity of all people by subjecting them to an ancient procedure which lacks all of the due process and equal protections of the *Constitution*.

67. The AG further submitted that it is trite law that the police can arrest a person on reasonable grounds that they either committed or are about to commit a cognizable offence; that "reasonable grounds" amounts to more than a bare suspicion but less than evidence that would justify a conviction. It is the respondents' submission, in reliance on the decision in *O'Hara v Chief Constable of the Royal Ulster*

Constabulary (1997) A.C 286, that the police were in the circumstances, right to ask for time to conduct further investigations, but to commit the petitioners to the peace bond Statutes.

68. The respondents further argued that the arrests and subsequent arraignment before court of the petitioners was lawful as the impugned Sections of the *CPC* expressly provide for the proceedings under the title "Security for keeping the Peace and for Good Behaviour," which proceedings allow arrest and arraignment in Court. The position of the State is that the provisions anticipate "preventive" rather than "curative" measures.

69. The respondents submitted that Section 43 of the *CPC* bestows upon the Magistrate before whom suspects are brought the full power to conduct the proceedings for keeping the peace and for good behaviour. It is the state's contention that it is often crucial that every kind of intelligence received by the police from the community or from any credible source be acted upon to avert and pre-empt any dire consequences, a position which is fortified by Section 84 of the *National Police Service Act* which provides for community policing. The AG further argued that Section 24 of the *National Police Service Act* mandates the Kenya Police to inter alia detect and prevent crimes. It is therefore the State's contention that the police acted on the basis of statutory provisions and the provisions of the *Criminal Procedure Code* and arraigned the suspects in court.

70. He submits therefore that the petitioners cannot be heard to say that their rights were violated simply because the police exercised a statutory duty of arresting them on suspicion of committing or about to commit a crime. In the AG's view, it would be a different story and a travesty of justice if the petitioners were arrested, detained and released without being taken before a court of law. The State's argument is that in the present case, the police officers, in exercising fidelity to the law, promptly presented the petitioners before the law courts so that they could be subjected to due process.

71. The AG argues that the peace bond proceedings are an inquiry, not a trial, and that once a suspect has been arraigned in court under the peace bond provisions, the proceedings are fully under the conduct of the Magistrate and the "silence" of the police is a creature of statute. It is its case that the Magistrate, in the absence of any guidelines on conducting an inquiry, is expected to act rationally and discretionally in conducting such inquiries under Section 52 of the *CPC*.

72. It is submitted that the peace bond provisions have been the subject of previous litigation in which the court clearly stated that the provisions are not unconstitutional. The AG relied on the decision in *Mwagona and 3 others* (*supra*) in support. The AG further argued that the peace bond provisions have the making and ingredients of a fair trial, contrary petitioners' assertions. It was the AG's submission that the mere fact that the magistrate did not conduct the proceedings in accordance with the dictates of the provisions does not render them unconstitutional.

73. The AG further argued that what emerges from the judgments arising from Criminal Revisions No 5 of 2011, 44 of 2010, 58 of 2010 and 21 of 2013 at Kikuyu Law Courts and the case of *Mwagona v R* is that the Magistrate's Courts coordinating the proceedings failed to apply the provisions as outlined in the *Criminal Procedure Code*. He contended that the petitioners cannot be heard to say that they were denied a fair hearing or that they were unlawfully detained as a look at the court proceedings in the above cases clearly demonstrates that the magistrate afforded them an opportunity to defend themselves, but they pleaded guilty, and the magistrate was left with no option but to order them to execute a bond to keep peace. The AG further contends that Section 58 of the *Criminal Procedure Code* clearly outlines the procedure to be followed on failure of a person to give security, and that is exactly what the Magistrate followed.

74. The AG further contends that a person can be required to attend court on a peace bond where a person has not been charged with an offence but a complaint has been made and the court requires them to

respond to the complaint. He submitted that keeping in mind the current volatile security situation in the country, it is important that the peace bond provisions are left in place to aid the police and the public at large in crime detection and prevention.

75. The respondents contend that agreeing to a peace bond is not the same thing as pleading guilty as there is no finding of guilt made or conviction registered under the process. They argue further that the peace bond proceedings are very unique proceedings and should not be construed in the realm of normal criminal trials. It is their contention that one of the reasons that a person may agree to enter a peace bond is to avoid a criminal record, and that the State does not wish to have a scenario where recidivism of offenders is encouraged.

76. The respondents agree with the petitioners' contention that a peace bond inquiry is not purely a criminal trial, but submit that it cannot be equated to trials anticipated under Article 50 of the *Constitution*.

77. It is also the AG's contention that it is common practice in our judicial system to put a person in remand as he/she organizes logistics of paying a cash bail or any form of bond, and it is their submission that it is in order for the petitioners to have been put in remand.

78. The Ag therefore argues that this court cannot declare any piece of legislation or any part thereof unconstitutional merely because it does not favour the standing of any particular person. It is their case that the peace bond provisions are constitutional and the intention behind them is to prevent, not punish, crime.

The Case for the 3rd Respondent

79. The Director of Public Prosecutions (DPP) filed Grounds of Opposition dated 14th May 2014 and submissions dated 18th July 2014. Learned Counsel Mr Ashimosi presented its case.

80. In the grounds of opposition to the petition, the DPP argues that declaring the impugned provisions unconstitutional would result to a greater injustice in the criminal justice system and public interest; and that the application of Sections 43-61A of the *CPC* does not in any way take away the constitutional rights of the arrested persons and are therefore not unconstitutional. The DPP terms the peace bond provisions as legislative aid to the National Police Service in exercising its constitutional mandate and statutory duty to deter and prevent the commission of offences. It is his case that they are therefore an essential policing tool that can be properly utilized while at the same time guaranteeing the rights and freedoms of suspects.

81. In the DPP's case view, the issue is not the unconstitutionality of the stated sections of the *CPC* but the manner in which the police and the courts, especially the Magistrates' courts, implement them. The DPP also opposes the petition on the grounds that the rights of suspects to a fair hearing under the impugned Sections of the *CPC* are still maintained in the procedural law, and the conduct of the matter entirely depends on the presiding judicial officer. In his view, the petition is entirely without merit, is an abuse of the Court process, and should be dismissed with cost to the respondents.

82. The DPP submits that Article 50 of the *Constitution* relates to accused persons while the petitioners are not accused persons. Not being accused persons, the provisions of Article 50 are not available to them. Mr. Ashimosi relied on the decision in *Dennis Mogambi Mong'are v The Attorney General & 3 others* Petition No 146 of 2011 to submit that as the peace bond process, like the vetting process in the Mong'are case, was not a trial but an inquiry, the rights guaranteed under Article 50(2) do not apply. It was the DPP's contention that the petitioners' rights are enshrined under Article 51 (1) of the *Constitution* as they are persons detained and/or imprisoned, and that Article 51(1) incorporates the

rights of fair hearing by making reference to the fact that a detained person retains all the rights and fundamental freedoms in the Bill of Rights.

83. The DPP also submits that Section 52 of the *CPC* prescribes the manner in which proceedings ought to be conducted and provides that the evidentiary burden in subordinate courts be maintained in these proceedings. The DPP also relies on the decision in the case of *Mwagona & 3 others v Republic* (*supra*) and *Jacton Mlaivu Malalo & 5 others v Republic* Mombasa High Court Criminal Miscellaneous Application No 39 of 2010 to submit that if the stipulated procedures are followed, then the rights of the suspects under Articles 49 and 50 of the *Constitution* shall be maintained. It is his case therefore that the rights to fair hearing in the peace bond proceedings are still maintained in procedural and case law.

84. The DPP further submits that the peace bond inquiry is not a trial but a sui generis mechanism that is neither a criminal trial nor adversarial civil proceedings. It is his case that the rule of law, natural justice and fair hearing is followed in conducting the inquiry.

85. The DPP submits that the right against self-incrimination is only available where a person has been charged with a criminal offence as was held in the case of *Dr. Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and another* 2006 eKLR. He also argues that the application of the peace bond provisions to various categories of persons named therein is not discriminatory in so far as it meets the universally accepted principle of equality. The DPP has relied on various decisions in support of his position, among them *Gideon Mwangangi Wambua and another v Independent Electoral and Boundary Commission and 20 others* 2013 eKLR and *Charles Omanga and another v The Independent Electoral and Boundary Commission and 2 others* Petition No 2 of 2012.

86. The DPP submits that in order to construe the constitutionality of the peace bond provisions, due regard must be given to the requirements spelt out in Article 259 of the *Constitution*. The DPP relies the decisions in Centre for Rights Education and Awareness (CREAW) and 2 others v John Harun Mwau and others 2012 eKLR and Olum and another v Attorney General 2002 2 EA 508 to submit that the peace bond provisions have to be construed to advance the rule of law and to contribute to good governance, and further that they are an essential policing tool necessary for maintenance of law and order. It is the DPP's case that the peace bond process is one of the exceptions to the limitations of fundamental rights and freedoms in that it is reasonable and justifiable in a democratic society pursuant to Article 24 (1) of the *Constitution*. The DPP submits finally, on the authority of *Intalframe Limited v Mediterranean Shipping Company* 1986 KLR 54, that it is not competent to any court to proceed on an assumption that Parliament made a mistake, there being a strong presumption that Parliament does not make mistakes.

87. Mr Ashimosi reiterated that peace bonds are a policing, not a prosecutorial tool, that the detention of the petitioners for one year was occasioned by a judicial officer, and he therefore asked that the petition be dismissed with costs to the DPP.

Submissions by the Amicus

88. The Law Society of Kenya, in its submissions dated 5th May 2014, expresses surprise that draconian laws such as are contained in Sections 43-61A of the *CPC* still remain in independent Kenya's statute books. Learned Senior Counsel, Mr. Nzamba Kitonga, submitted that if the peace bond provisions had been subjected to judicial constitutional scrutiny, they could not have survived even under the old *Constitution*, and should not be allowed to continue one day longer under the current constitutional dispensation.

89. The Amicus impugns the peace bond process on the basis that it leads to conviction without an offence. According to the LSK, the provisions create an elaborate mechanism of law under which a person

can, without being charged and without any offence, be convicted and sentenced to punishment. The process, in LSK's view, begins with a person being convicted, for to be required to show cause, not to plead to an offence, is a conviction. The Amicus submitted that, under the peace bond provisions, one is being asked to show cause only for purposes of mitigating the sentence.

90. LSK compares the situation with that obtaining in civil proceedings under the *Civil Procedure Act* in which, at the time a civil debtor is required to show cause why he should not be committed to civil jail, the suit has long been heard and judgment delivered and so there is no question of whether he owes the money or not In LSK's view, this is the same scheme of law applied in the peace bond proceedings because, upon the information of a police officer without the commission of any offence, one is found guilty and the burden is placed upon him to mitigate. It is the submission of the Amicus that one must be charged with an offence known to law, a principle recognized under Article 50 (2) (b) and (n) of the *Constitution*, which is not the case under the peace bond proceedings.

91. The Amicus argues, secondly, that the peace bond provisions are arbitrary. It submits that the entire purpose and scheme of the *Constitution* is hostility to arbitrariness, as arbitrariness leads to lawlessness, abuse of office, abuse of process and impunity and is the antithesis of the rule of law and the principles of justice as understood in modern civilization. In its view, arbitrariness operates through imprecision, vagueness and unlimited discretion, which it considers the precise scheme of Sections 43-61A of the *Criminal Procedure Code*. The Amicus submits that the test for the police in such proceedings is his personal subjective opinion; that the Magistrate also has similar unchecked powers as there are no boundaries on what constitutes to show cause; and there is no trial to test when, how and whether cause has been shown or should be shown.

92. Thirdly, the Amicus takes the view that the provisions are discriminatory in application and effect. In its view, the police can pick one person out of ten people walking in the street on the basis that he seems likely to be dangerous. These sections therefore set the stage, not just for casual discrimination but in essence for the worst forms of discrimination such as tribal, religious and racial profiling, thus violating Article 27 of the *Constitution*. LSK further argues that to subject one set of Kenyans to a proper trial process and others to a different judicial process is in itself discrimination through the courts of law, which are supposed to be the defenders of the Bill of Rights and protectors of the *Constitution*.

93. The Amicus submits that the provisions of Sections 43-61A of the *CPC* not only run counter to specified Articles of the *Constitution* but also to its intent, tenor, letter and spirit. In its view, the only way the *Criminal Procedure Code* can be construed so as to conform to the *Constitution* is to exclude Sections 43-61A completely by declaring them unconstitutional, a jurisdiction that the Court is vested with by the *Constitution*.

94. Mr. Kitonga distinguished the case of *Dennis Mong'are* (*supra*) relied on by the respondents. He submitted that the *Constitution* had created a special purpose vehicle within a limited period of time to deal with vetting. The vehicle was blessed by the *Constitution*, unlike the peace bond provisions. He agreed with the petitioners and the interested party that the peace bond provisions should be declared unconstitutional.

Petitioners' Submissions in Reply

95. In his reply on behalf of the petitioners, Mr. Masinde argued that it was not correct, as argued by the respondents, that calling a person to execute a bond under the peace bond provisions complies with Article 49(1)(h). He submitted that a bond as contemplated under Article 49(1)(h) is not the same as a peace bond as such a bond is executed pending a charge or trial, which is not the case with a peace bond.

96. To the respondents' contention that the measures under the peace bond provisions of the *CPC* are preventive in nature, the petitioners argued that there are enough measures under Part VI of the *Penal Code*, section 24A - 26A, which are intended to be deterrent even to potential offenders.

97. With regard to the reference to section 31(4) of the *Anti-corruption and Economic Crimes Act* regarding travel documents, Mr Masinde submitted that detention under that section may amount to compelling reasons under Article 49(1)(h) for not releasing a person, and thus the intention was not the same as the peace bond provisions.

98. Mr. Kironji for IJM submitted in reply that any attempt or conspiracy to commit an offence are both offences under the *Penal Code* and there will be no gap left if the sections are repealed.

99. To the AG's submission that the intention behind the provisions was to prevent recidivism, Counsel submitted that the sections are not used to deal with recidivism but are used by police against poor persons. It was his submission that the law is discriminatory and irrational in that it assumes that because one has paid the bond, they will not commit an offence. Finally, Counsel submitted that the presumption of innocence is lost in the peace bond process.

Determination

100. Having read the parties' pleadings and considered their submissions, oral and written, I believe this petition raises one critical issue: whether Sections 43-61A of the *Criminal Procedure Code* are unconstitutional for violating the provisions of Articles 27, 28, 29, 49 and 50 of the *Constitution*.

101. The facts that have given rise to the petition have not been disputed by the respondents in any material way. The petitioners have alleged that they were arrested by police officers in the Kingeero and Wangige areas of Kikuyu and kept in custody for several days, in some cases four or five days. They were not charged with any offence, but were asked to execute a bond to keep the peace. The basis on which the Magistrate's Court asked them to execute the bond is that police officers swore affidavits to the effect that they had been investigating offences or had received complaints from the public with respect to the commission of offences, suspected that the petitioners were involved, but had no evidence on which to charge them with any offence. The petitioners were then asked by the Magistrate before whom they were presented under the provisions of Section 43-61A of the *CPC* whether they agreed to keep the peace; they agreed that they did, and were then required to execute bonds for various amounts, with sureties of the same amount.

102. Unable to raise the bond amounts, they were, as in the case of the 1st petitioner, taken to Industrial Area Remand Prison where they remained for various periods, in the case of the 1st petitioner, for 21 months. The petitioners state, as does IJM, that the petitioners and others in their situation were never told what charges they were arrested for; never underwent a trial, no evidence was presented against them, yet they were put through a process that ended with them serving various prison terms.

103. The respondents strongly support the provisions under challenge. The AG argues that the provisions are intended to prevent recidivism, that the peace bond is a preventive, not a curative tool, that is essential for policing. As Mr. Opondo argued in his oral submissions, the intention of the drafters of the provisions was to prevent recidivism: that the State did not want a situation where a person is brought to court all the time, hence the need to ask such suspected persons to keep the peace.

104. According to the State, the peace bond proceedings are sui generis in nature, not a trial per se, but an inquiry to which Article 50 of the *Constitution* does not apply. The State further argues, again in the words used by Learned Counsel, Mr. Opondo, that there are no charges in such proceedings, that what we have are suspected persons, not accused persons. The State's position, further, is that Article

49 does not apply to proceedings on a bond to keep peace as they are unique and do not fall either under Article 49 or 50.

105. These submissions by the State illustrate, more than anything else, the peculiarity of the peace bond proceedings. They illustrate also the need, identified by the petitioners, IJM and the Amicus, to subject them to the scrutiny of the *Constitution* and the human rights standards that it demands of all actions and legislation.

Applicable Principles

106. It is important to set out at the outset the principles that the Court must bear in mind in determining the constitutionality of a statute challenged as violating the *Constitution*.

107. The first principle to bear in mind is set out in the *Constitution* itself which, at Article 259, provides for the manner in which it should be interpreted. It requires that the *Constitution* should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and that contributes to good governance. Further, under Article 159(2)(e), the Court, in exercising its judicial authority, is obliged to protect and promote the purpose and principles of the *Constitution*.

108. The second principle to bear in mind is the principle of the supremacy of the *Constitution*. At Article 2, the *Constitution* provides that:

> 2.
>
> (1) This *Constitution* is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
>
> ....
>
> (4) Any law, including customary law, that is inconsistent with this *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of this *Constitution* is invalid.

109. The *Constitution* further requires that all acts are done in accordance with the national values and principles enunciated in the *Constitution*. These principles, set out in Article 10(2), and in particular (2)(b), include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.

110. A fourth important consideration is enunciated in the case of *Ndyanabo v Attorney General of Tanzania* [2001] EA 495, which is to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proving the contrary rests upon any person who alleges otherwise. However, this presumption is qualified by the *Constitution* of Kenya 2010 in respect to legislation that was enacted prior to its promulgation. Section 7 of the Transitional and Consequential Provisions, which contains provisions with respect to laws then in existence, requires that:

> 7.
>
> (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this *Constitution*. (Emphasis added)

111. The Court must also, in construing legislation, be guided by the object and purpose of the impugned statute in determining its constitutionality, which object and purpose can be discerned from the legislation itself- see *Murang'a Bar Operators and another v Minister of State for Provincial Administration and Internal Security and others* Nairobi Petition No 3 of 2011 [2011]eKLR, *Samuel G. Momanyi v Attorney General and another* Petition No 341 of 2011).

112. The Court is also guided by the principle that the *Constitution* should be given a purposive and liberal interpretation. In Re The Interim Independent Electoral Commission Constitutional Application No 2 of 2011 at para. 51, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of State v Acheson 1991(20 SA 805, 813) where he stated as follows:

> "The *Constitution* of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and..... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the *Constitution* must, therefore preside and permeate the process of judicial interpretation and judicial discretion." (Emphasis added)

113. In his submissions before me, Counsel for the DPP, Mr. Ashimosi, drew attention to a further consideration that the Court should have in mind-the provisions of Article 24. In his view, the peace bond provisions is one of the exceptions to the limitations of fundamental rights and freedoms and is reasonable and justifiable in a democratic society pursuant to Article 24 (1) of the *Constitution*.

114. These, then, are the principles that I shall use as a guide in determining whether, as argued by the petitioners, IJM and the Amicus, to declare the peace bond provisions unconstitutional, or to allow them to remain in the statute books as urged by the respondents.

Historical and Constitutional Context

115. Before considering the peace bond provisions, it is useful to consider the historical context in which the legislation was enacted, and the constitutional framework that we now operate under. The *Criminal Procedure Code*, as with a large number of penal legislation in Kenya, predates independence. It commenced in 1930, and a number of amendments were made to its provisions over the years. With respect to the provisions contained in Sections 43 to 61A, amendments were made on diverse dates between 1957 and 1971, with the bulk of the provisions making their way into legislation between 1957 and 1959. It cannot escape notice that this was a period in history that was characterized by the agitation for independence from colonial rule, and the attendant attempts by the colonial state to suppress dissent. The observance of human rights, the rule of law, non-discrimination and equal protection of the law were not hallmarks of that period.

116. While we had provisions protecting human rights under the repealed independence *Constitution*, the provisions of the 2010 *Constitution* have as their underpinning the protection of and respect for the inherent dignity and human rights of all, regardless of status. Thus, it spells out in specific terms the rights guaranteed to all citizens, and in particular, the rights which those who find themselves facing the criminal justice process are entitled to.

117. Article 27 contains the non-discrimination provisions. It states, at Article 27(1) and (2), which are relevant for present purposes, that:

> 27.

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

118. At Article 28, the *Constitution* recognizes the right to inherent dignity. It states that

28. Every person has inherent dignity and the right to have that dignity respected and protected.

119. Article 29 guarantees to everyone freedom and security of the person in the following terms:

29. Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

120. For those who get into conflict with the law and have to face the criminal justice process, Article 49 and 50 make specific provision. With regard to arrested persons, Article 49 states as follows:

49.

(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 is punishable by a fine only or by imprisonment for not more than six months.

121. For those who have been arrested, charged, and have to be tried with the commission of an offence, the *Constitution* provides certain guarantees under Article 50(2). Of relevance for present purposes are the following:

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this *Constitution*;

(e) to have the trial begin and conclude without unreasonable delay;

(f) ....;

....

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

....

122. The fair trial rights under Article 50(2) cannot, as provided under Article 25 (c), be derogated from. Article 25 states as follows:

Despite any other provision in this *Constitution*, the following rights and fundamental freedoms shall not be limited—

...

(c) the right to a fair trial; ....

123. Article 24, as submitted by the DPP, allows for the limitation of rights in certain circumstances. It states that:

> 24.
>
> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors....

124. As observed above, the legislation under consideration was enacted prior to the 2010 *Constitution*. It was not, as a result, enacted in accordance with the requirements of the 2010 *Constitution* set out at Article 24 with regard to legislation that limits fundamental rights and freedoms. It must, however, be considered against the dictates of the *Constitution*, bearing in mind the provisions of Section 7 of the Transitional and Consequential Provisions contained in Schedule 6 of the *Constitution* which are set out above.

125. I now turn to a consideration of the peace bond provisions against the above constitutional provisions.

The Peace Bond Provisions

126. Sections 43 to 61A of the *Criminal Procedure Code* which make provision for one to be required to execute a bond to keep the peace, are contained in the section of the *Criminal Procedure Code* titled: Prevention of Offences: Security for Keeping the Peace and for Good Behaviour

127. Under Section 43, a magistrate empowered to hold a subordinate court of the first class, when informed that a person is "likely to commit a breach of the peace or disturb the public tranquility, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility," is required to examine the informant on oath. The magistrate is thereafter empowered to require the person in respect of whom the information is laid to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding one year, as the magistrate thinks fit.

128. Such proceedings shall be taken, according to section 43(2), if the person or the place where the disturbance or breach of the peace is likely to take place is within the local limits of the Magistrate's Court. Section 43(3) gives a magistrate, who is not empowered to examine an informant under 43(1) or to require the execution of a bond, the power, when he has reason to believe that a person is likely to commit a breach of the peace or disturb the public tranquility, to issue a warrant for the arrest and detention of the person, and record his reasons for so doing, if he believes that a breach of the peace or disturbance cannot be prevented otherwise than by detaining the person in custody, and thereafter send him before a magistrate empowered to deal with the case, with a copy of his reasons.

129. Section 44 gives a magistrate similar powers to require the execution of a bond as in section 43(1) in respect of a person within the limits of his jurisdiction whom the Magistrate is informed on oath disseminates or attempts to disseminate, within or without those limits, either orally or in writing, or in any other manner, or has recently disseminated, or in any way abets the dissemination of matter which is likely to be dangerous to peace and good order within Kenya or is likely to lead to the commission of an offence; or matter concerning a judge which amounts to libel under the *Penal Code*.

130. Section 45 addresses the power of a magistrate to require a person who is taking precautions to "conceal his presence" within the local limits of the magistrate's jurisdiction, if there is reason to believe that the

person is taking those precautions with a view to committing an offence, to execute a bond to keep the peace.

131. Section 46 is in the following terms:

> Whenever a magistrate empowered to hold a subordinate court of the first class is informed on oath that a person within the local limits of his jurisdiction -
>
> (a) is by habit a robber, housebreaker or thief; or
>
> (b) is by habit a receiver of stolen property, knowing it to have been stolen; or
>
> (c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property; or
>
> (d) habitually commits or attempts to commit, or aids or abets in the commission of, an offence punishable under Chapter XXX, Chapter XXXIII or Chapter XXXVI of the *Penal Code*; or
>
> (e) habitually commits or attempts to commit, or aids or abets in the commission of, offences involving a breach of the peace; or
>
> (f) is so desperate and dangerous as to render his being at large without security hazardous to the community; or
>
> (g) is a member of an unlawful society within the meaning of section 4 (1) of the *Societies Act*, the magistrate may, in the manner hereinafter provided, require that person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the magistrate thinks fit, or why an order (hereinafter in this Part referred to as a restriction order) should not be made that he be taken to the district in which his home is situated and be restricted to that district during a period of three years:
>
> Provided that where a magistrate is of the opinion that, having regard to all the circumstances of the case, it is desirable that the person be restricted to some other district he may specify that the person shall be so restricted.

132. Section 47 sets out the manner in which the magistrate is to exercise the powers granted under section 43, 44, 45 or 46 of the *CPC*. The magistrate is required to make an order in writing setting out the substance of the information received; the district to which a person in respect of whom a restriction order is made is to be restricted for a period of three years; where a bond is to be executed, the amount of the bond, the term for which it is to be in force, and the number, character and class of securities, if any, required.

133. Section 48 requires that the order made under section 47 be read to the person against whom it is made if he is in Court, and if he so desires, its substance explained to him. If the person against whom the order is made is not in Court, the magistrate shall issue a summons requiring him to appear, or, if he is in custody, issue a warrant for his production in Court. The proviso to section 48 gives the magistrate power to order the arrest of a person "whenever it appears to the magistrate upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the magistrate) that there is reason to fear the commission of a breach of the peace, and that a breach of the peace cannot be prevented otherwise than by the immediate arrest of the person."

134. Section 50 requires every summons or warrant issued under section 49 to be accompanied by a copy of the order made under section 47, while section 51 allows the magistrate to dispense with the personal attendance of a person for sufficient cause and to permit him to appear by an advocate.

135. Section 52 of the *CPC* provides as follows:

> 52.
>
> (1) When an order under section 47 has been read or explained under section 48 to a person present in court, or when any person appears or is brought before a magistrate in compliance with or in execution of a summons or warrant issued under section 49, the magistrate shall proceed to inquire into the truth of the information upon which the action has been taken, and to take such further evidence as may appear necessary.
>
> (2) The inquiry shall be made, as nearly as may be practicable, in the manner prescribed by this Code for conducting trials and recording evidence in trials before subordinate courts.
>
> (3) For the purposes of this section, the fact that a person comes within the provisions of section 46 may be proved by evidence of general repute or otherwise.
>
> (4) Where two or more persons have been associated together in the matter under inquiry they may be dealt with in the same or separate inquiries, as the magistrate thinks just.

136. Section 53 makes provision for a magistrate to require a person to keep the peace and for subjecting the person to a restriction order; it states that the amount of a bond shall be fixed with due regard to the circumstances of the case and shall not be excessive. The section seems to contemplate the application of the process to minors by providing that

> (iii) when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

137. Sections 55-59 provide for proceedings subsequent to order to furnish security. Of particular note is section 58, which provides as follows:

> 58.
>
> (1) If a person ordered to give security does not give security on or before the date on which the period for which security is to be given commences, he shall, except in the case mentioned in subsection (2), be committed to prison, or, if he is already in prison, be detained in prison until that period expires or until within that period he gives the security to the court or magistrate who made the order requiring it.
>
> (2) When a person has been ordered by a magistrate to give security for a period exceeding one year, the magistrate shall, if the person does not give security, issue a warrant directing him to be

detained in prison pending the orders of the High Court, and the proceedings shall be laid as soon as conveniently may be before that court.

(3) The High Court, after examining the proceedings and requiring from the magistrate any further information or evidence which it thinks necessary, may make such order in the case as it thinks fit.

(4) The period, if any, for which any person is imprisoned for failure to give security shall not exceed three years.

(5) ....

138. Section 59 empowers a magistrate empowered to hold a subordinate court of the first class, if of the opinion that a person imprisoned for failing to give security may be released without hazard to the community, to make an immediate report of the case for the orders of the High Court, which may order that the person be discharged. Section 60 empowers the High Court at any time, for sufficient reasons to be recorded in writing, to cancel an order made under section 47 or section 53. Section 61 permits a surety for the peaceable conduct or good behaviour of another person to apply at any time to a magistrate to cancel a bond executed under the preceding sections, and sets out the procedure to be followed with respect to the cancellation of the bond.

139. The last provision of the peace bond sections is 61A. This section provides that a person subject to a restriction order who is found outside the district named in the order without the written permission of the chief officer of police of the district, or who fails to comply with any condition attached to that permission, shall be guilty of an offence and liable to imprisonment for a term not exceeding twelve months.

140. Briefly summarised, the following is what emerges from the above provisions: First, as argued by the respondents, the intention behind the peace bond statutes is to prevent the commission of crimes. The requirement to execute a peace bond is not based on evidence that one has committed a crime, but on suspicion or belief that one is likely to commit a crime, or disturb the public peace or tranquillity. Since these terms are not defined, they are purely subjective and dependent on the views of the informant or the magistrate.

141. The magistrate is required to examine the informant on oath about the suspect before he or she makes an order under Section 47. If satisfied that the information is correct, the Magistrate then bonds the suspect to execute a bond, with or without a surety, to keep the peace for a minimum period of one year and a maximum period of three years. Under these provisions, the suspect may be detained until the inquiry process is complete. They also give the magistrate power to order a person to be restricted in a particular district as a crime prevention measure, thereby restricting his freedom of movement.

142. The provisions require that the allegations that a suspect faces are explained to him, and he has a right to have an advocate appear on his behalf. They also require that during the inquiry process, the Magistrate may take any further evidence from the suspect, and further, that the inquiry is made as nearly as may be practicable, in the manner prescribed by the *Criminal Procedure Code* for conducting trials and recording evidence in trials before subordinate courts. With regard to the amount of the bond, the provisions require that it be fixed with due regard to the circumstances of the case and not to be excessive.

143. Any breach of the bond terms leads to imprisonment, as does failure to give security, the saving grace in such event, if such it may be called, being that the period for failing to give security shall not exceed

three years. A right of appeal from the decision of the magistrate to the High Court is provided under section 53.

144. The respondents submitted that the peace bond provisions were considered and held constitutional in the case of *Mwagona and 3 others v Republic* 1990 KLR 515-516. I have read the said decision. What the Court in that matter (Githinji J as he then was) addressed himself to was the proper procedure for carrying out the inquiry. He stated as follows at page 516 of the judgment:

> "It is argued in this appeal that the order to keep peace and to execute a bond is a nullity because the provisions of S 43, 47, 52 and 53 of the *Criminal Procedure Code* were not complied with. Those sections read together show the procedure to be followed as follows:-
>
> 1. The first step upon receiving information as provided in S 43(1) of *CPC* is to examine the informant on oath.
>
> 2. The second step as provided in S 47 of *CPC* is that, if the magistrates deems it necessary to require a person to show cause he should make an order in writing setting out the matters mentioned is S 47(a) – 47(c) of *CPC*.
>
> 3. After the order as above is made, the third step as provided in S 52(1) of *CPC* is for the magistrate to hold an inquiry into the truth of the information upon which the action has been taken.
>
> 4. The fourth step as provided in S 53(1) of the *CPC* is to make an order to execute a bond if upon inquiry, it is proved that it is necessary for keeping peace or maintaining good behaviour that the person should execute a bond.
>
> It seems clear that the magistrate must hold an inquiry conducted as provided in S 52(2) of CPR as nearly as the manner in conducting trials in criminal cases. It is also clear that it is after conducting the inquiry that the magistrate will come to the conclusion whether or not the information has been proved and if proved decide whether it is necessary for keeping peace that the person should be required to execute a bond."

145. After setting out the above steps to be followed with regard to the bond to keep peace, the Court stated:

> "The cardinal procedure of conducting criminal trials is that the person against whom the complaint is brought should be given a chance to defend himself. As there is no charge, the nature of the inquiry does not envisage the recording of a plea. Further, as there is no charge, I think that the person cannot be required to execute the bond merely because he accepts to sign the bond and before the magistrate has held a full inquiry and satisfied himself that the information is true."

146. The Court therefore did not, in the Mwagona v R case, address the question that this Court is asked to deal with in this petition: whether the provisions of Section 43-61A of the *CPC* are unconstitutional for violating the provisions of Article 27, 28, 29, 49 and 50 of the *Constitution*.

147. This Court must first ask the question that was alluded to by IJM: suppose the Magistrate's Court before whom a person is presented under the provisions of Section 43 of the *CPC* follows strictly the steps enunciated by Githinji J in the *Mwagona v Republic case*. Would the provisions be in conformity with the *Constitution*?

148. The Court fully appreciates the concern of the respondents with fighting crime. It also understands the concerns expressed by the AG about dealing with recidivism. The Court is, however, puzzled by one

point. We have a constitutional dispensation under which we have set out very strong safeguards under Article 49 for persons who have been arrested on suspicion of having committed crimes and are to be presented in Court to stand trial for those offences. We have equally strong and stringent safeguards under Article 50(2), from which the *Constitution* permits no derogation, for persons who have actually been charged with committing crimes and are undergoing trials.

149. How can we, at the same time, have in our statute books legislation that creates a class that is somewhere in the void, against whom no evidence has been found, and yet they are subjected to a process which, in the words used in Section 52(2) of the *CPC*, must be conducted as nearly as the manner in conducting trials in criminal cases, but for whom, if we agree with the respondents, no constitutional safeguards are provided?.

150. Opinion may be divided on this point, but in my view, the process to which the petitioner and others were subjected under the provisions of Section 43-61A of the *CPC* is a criminal process. The respondents term the procedure an inquiry to which the provisions of Article 49 and 50 do not apply, a sui generis process for the prevention of crime. Nonetheless, it is my view that it is a criminal process, with serious penal consequences, that falls outside the safeguards provided by the *Constitution* and the criminal justice process. Indeed, the bond to keep peace is expressly recognised as a punishment by the law: Section 24 of the *Penal Code*, which makes provision for the penalties that a Court may impose on a person convicted of an offence, states as follows:

> 24. The following punishments may be inflicted by a court -
>
> ....
>
> (h) finding security to keep the peace and be of good behaviour;

151. The AG submitted that the persons who are subjected to the process are "suspects', not accused or arrested persons, so they do not fall under the provisions of Article 49 or 50. This classification of the persons subjected to the peace bond process is indeed what appears to have been accepted in our law for a long time. In the case of *Dahir Omar Abdalla v Republic*, Criminal Appeal No 580 of 1981, the Court stated, with regard to the status of persons arrested with a view to their being bonded to keep peace, as follows:

> " We would like to mention in conclusion that the person against whom the information is made is strictly not accused of any offence so he is better referred to as "suspect" or "subject" rather than "accused'."

152. The question, though, must be asked: Who or what is a suspect? What is his place within our new constitutional dispensation based on human rights, non-discrimination and the rule of law?

153. The *Concise Oxford English Dictionary* defines the verb 'suspect' as "believe (something) to be probable or possible; believe (someone) to be guilty of a crime or offence, without certain proof". As a noun, a 'suspect' is defined by the same Dictionary as "a person suspected of a crime or offence". *Black's Law Dictionary*, 9th Edition, defines the verb suspect as "To consider (something) to be probable. To consider (something) possible. To consider (a person) as having probably committed a wrongdoing, but without certain truth."

154. What the provisions of Sections 43-61A do is permit a member of the public or, as is evident from the material before me, most of the time, the police, to swear an affidavit stating that they suspect that someone has committed or is likely to commit a crime. It does not require that the suspicion be in respect to a particular offence, or in circumstances which would justify such suspicion and would

accord with the definition of "reasonably suspect," defined in Black's Law Dictionary as "To consider (something) to be probable under circumstances in which a reasonable person would be led to that conclusion. To consider (someone) as having probably committed wrongdoing under circumstances in which a reasonable person would be led to that conclusion."

155. In the case of the petitioners and others similarly situated as detailed in the affidavit of Mr. Shamalla sworn on behalf of IJM, it would appear that they are arrested first, kept in custody without any charges being levelled against them, then presented before a Court on the basis that they are suspected of being likely to commit a crime.

156. The police readily confess, as does Inspector Linyerera in his affidavit before this Court, that they have no evidence on which to charge the person arrested. Since they do not have evidence, the person should be bonded to keep the peace. If he does not agree to be bonded, or if bonded, he is unable to meet the terms of the bond, he is imprisoned for a term not exceeding three years.

157. How, one may ask, do the police determine who is likely to commit an offence, and who should therefore be taken before the Court to be bonded to keep the peace and be of good behaviour? Is it by one's dress? Their height or weight? Their manner of walking? Their hair?

158. How can it be lawful for one to be arrested, taken before a Court of law, and compelled to execute a bond, outside the provisions of Article 49, and upon failing to meet the terms, be sent to prison? How can it be lawful for a person, as in the case of the 1st petitioner, to spend almost two years in prison, without having been subjected to a trial, been given the evidence on the basis of which he was brought before the Court, or had a chance to cross-examine or face his accusers? How can this be permissible with respect to mere suspicion that because there is lawlessness and crimes committed in a particular locality, the police can arrest, and the court lock up, persons on mere suspicion that they are likely to commit crimes? Does this not lead to the worst form of profiling, that those who "appear suspicious", for want of a better word, because of their poverty, racial or ethnic origin, or their economic status, should be rounded up, taken to court with no evidence of a crime being committed, yet end up in prison?

159. The respondents have argued that the rights of those bonded are protected under Article 51, which provides that:

> 51.
>
> (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.
>
> (2) A person who is detained or held in custody is entitled to petition for an order of habeas corpus.

160. This Article, however, does not detract from the fact that the petitioners were denied the rights of due process to which a person in respect of whom criminal conduct is alleged is entitled to under Article 49 and 50. All it implies is that if one is lawfully held in custody or prison, one is still entitled to fundamental rights except those that are limited by his status as a convicted person, or a person lawfully in custody after an arrest. It does not ameliorate the violation of the petitioners' rights resulting from the application of the peace bond provisions.

161. There has been at least one occasion when Parliament in Kenya had an opportunity to deal with the peace bond. The Hansard of 1st April, 2003 reflects that during debate on the Criminal Law (Amendment) Bill, the then Member of Parliament for Kebete, Mr. Muite, expressed the views of the then Departmental Committee on the Administration of Justice and Legal Affairs and stated as follows:

> "I have witnessed people cry... If you go to page 200 of the Bill we are discussing, you will see Clause 24 which is amending Section 24 of the *Penal Code*. Part "H" talks about finding security to keep the peace and be of good behaviour. You will remember the Attorney General talked about vagabonds in this House yet Part "H" has not been amended. My Committee has recommended that Part "H" be deleted.
>
> This is aimed at punishing poverty. When the police; anywhere in the country, cannot find an offence with which to charge an innocent person who is poor and does not appear to have any means of livelihood, they will take him to the magistrate and say that they want that person bound to keep peace. There is no threat that the individual was about to commit any breach of peace and yet he is bound and told to provide security to keep the peace and be of good behaviour.... Perhaps the time has now come for us not to punish poverty. Therefore the Committee is recommending that Part "H" in Section 24 of the *Penal Code*, that is so much abused by the police be deleted."

162. That provision of the *Penal Code* was not deleted or repealed, and it may be argued that as a punishment imposed after one has been tried and convicted of an offence, it is constitutional. However, Parliament did not then go further to consider the provisions of Sections 43-61A of the *CPC*, under which one is required to execute a bond on suspicion that he is likely to commit a crime, and without having been tried to establish his guilt or innocence. As Mr. Muite then observed in Parliament, the peace bond provisions target the poor, those who are perceived to be in the lower echelons of society, and therefore more 'likely' to commit crimes. Almost invariably, the targets are poor young men, who have not been tried and found guilty of any crime, but nonetheless spend time in prison with convicted, often hard-core criminals. It is doubtful whether this helps avoid the recidivism that the State says it wishes to avoid.

163. Having addressed my mind to these provisions on the basis of the material before me, and having weighed them against the benchmarks set by the *Constitution*, I am constrained to agree with the petitioners, IJM and the Amicus that the peace bond provisions are arbitrary, discriminatory, and really cannot withstand the principles of our *Constitution*. If one is suspected of having committed a specific crime, then by all means let him be arrested and charged in Court in accordance with the law, with all the rights to which an arrested or accused person are entitled to. As submitted by the petitioners and IJM, the matters addressed by section 46 of the *CPC* are already covered by the *Penal Code*.

164. The respondents have argued that sections 43-61A are akin to section 31 of the *Anti-corruption and Economic Crimes Act*, and have placed specific reliance on Section 31(4). This section provides as follows:

> (1) On the ex parte application of the Commission, a court may issue an order requiring a person to surrender his travel documents to the Commission if—
>
> (a) the person is reasonably suspected of corruption or economic crime; and

(b) the corruption or economic crime concerned is being investigated.

(2) If a person surrenders his travel documents pursuant to an order under subsection (1), the Commission—

(a) shall return the documents after the investigation of the corruption or economic crime concerned is completed, if no criminal proceedings are to be instituted; and

(b) may return the documents, at its discretion, either with or without conditions to ensure the appearance of the person.

(3) .....

(4) If a person fails to surrender his travel documents pursuant to an order under subsection (1), the person may be arrested and brought before the court and the court shall, unless the court is satisfied that the person does not have any travel documents, order that the person be detained pending the conclusion of the investigation of the corruption or economic crime concerned.

(5) ....

165. However, as is clear from the provisions set out above, these provisions in no way resemble the provisions of the *CPC* under challenge. The intention behind Section 31 of the *Anti-corruption and Economic Crimes Act* appears to be to ensure that the person under investigation remains within the jurisdiction. On the other hand, a person subjected to the peace bond under Section 43-61A is not suspected of anything in particular, and does not have any option but to execute the bond, failing which he ends up in prison.

166. The respondents have also tried to justify the peace bond provisions on the basis that they exist in other jurisdictions, and they have specifically cited Canada. Like the provisions in Kenya, the peace bond provisions in Canada have their origins in the English Common law, dating back centuries. As was submitted by IJM, The Law Commission (Law Com. No 222) (The Brooke's Report) recommended that the powers to bind over to keep the peace, provided for in England under the Justices of the Peace Act, 1961 and at common law, be abolished without replacement. It noted at paragraph 1.18(2) that the power to bind over to keep the peace and be of good behaviour was no longer defensible if modern views of proper practice and procedure are to be respected. It also noted that because many of the forms of anti-social behaviour for which a binding over was formerly used are now subject to criminal statutes, there are now no areas in which the retention of the power could be justified by modern standards of practice and procedure.

167. The Commission also noted that the binding over process was in contravention of Articles 5, 6, 10 and 11 of the *European Convention of Human Rights*, which guarantee to everyone the right to liberty and security of the person, the right to a fair and public hearing, the right of a person charged with a criminal offence to be informed of the nature and cause of the charge facing him, the right to freedom of expression and freedom of assembly and association with others respectively. These rights correspond with rights under the Bill of Rights in our *Constitution* some of which I have already alluded to.

168. Thus, while the peace bond may have been recognised under the common law and provided for in legislation in other common law jurisdictions such as the United Kingdom and Canada, and while it may still be in force in these jurisdictions, it has, as in the case of the United Kingdom, been under

consideration vis a vis international conventions and constitutional safeguards of due process and the rights of the individual.

169. Certainly, in our circumstances and the express provisions, tenure and spirit of the 2010 *Constitution*, the provisions of the peace bond process are indefensible. Whichever way one looks at it, the provisions of the peace bond process under the *CPC* cannot meet constitutional muster. I therefore find and hold that Sections 43-61A of the *Criminal Procedure Code* are unconstitutional for violating the provisions of Articles 27, 28, 49 and 50(2) of the *Constitution*, and are therefore null and void. It is also worth observing that section 61A of the *CPC*, which empowers a magistrate to confine a person within a particular district, contravenes the right of citizens to freedom of movement under Article 39.

Disposition

170. I have come to the conclusion that the provisions of Sections 43-61A of the *Criminal Procedure Code* are unconstitutional for violating the petitioners' rights under Articles 27, 28, 29, 49 and 50(2) of the *Constitution*, and I therefore issue the following order:

    i. A Declaration be and is hereby issued that Sections 43-61A of the *Criminal Procedure Code* Cap 75 of the Laws of Kenya are unconstitutional for violating the provisions of Articles 27, 28, 29, 49 and 50(2) of the *Constitution* of Kenya 2010 and are therefore null and void.

171. The petitioners have prayed for compensation for the violation of their rights through the application of the peace bond to them. The Court recognises that an injustice has been done, over many decades, to many people. It was an injustice that resulted from provisions in the law, whose constitutionality had not been tested. In the circumstances, it would place an undue burden on the tax payer to order that the State pays compensation to the petitioners, for then it would need to make similar recompense to all those others who have been subjected to the peace bond statutes. In the circumstances, I am not able to make any orders for compensation to the petitioners.

172. With regard to costs, which are within the jurisdiction of the Court, I direct that each party bears its own costs of the petition.

173. In closing, I must express my gratitude to the parties for their well researched pleadings and submissions, and the courtesy they extended to each other and the Court during the proceedings.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 27TH DAY OF MARCH 2015

MUMBI NGUGI

JUDGE

Mr Masinde instructed by the firm of Boniface Masinde & Co. Advocates for the petitioners

Mr Opondo instructed by the State Law Officer

Mr Kitonga instructed by the firm of Nzamba Kitonga & Co Advocates for Amicus Curiae

Mr Ashimosi & Ms Ngalyuka instructed by the Director of Public Prosecutions for the 3rd respondent

Mr Demas Kiprono for the KNCHR, a proposed interested party