



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.324 OF 2013

BETWEEN

HUSSEIN KHALID AND 16 OTHERS.....PETITIONERS

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

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

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

JUDGMENT

Background

1. The 1st Petitioner, Hussein Khalid, is the Executive Director of an entity known as Muslims for Human Rights (MUHURI) and together with the other Petitioners, all Civil Society Activists, they are the Accused persons in **Criminal Case No.685 of 2013** at the Chief Magistrate’s Court, Milimani, Nairobi. They are facing the following charges;

- i. Offensive conduct conducive to a breach of peace contrary to **Section 94(1)** of the **Penal Code**.
- ii. Taking part in a riot contrary to **Section 78(1)** and **(2)** as read with **Section 80** of the **Penal Code**.
- iii. Cruelty to Animals contrary to **Section 3(1)(c)** as read with **Section 3(3)** of the **Prevention of Cruelty to Animals Act Cap 360 Laws of Kenya**.

2. The above criminal charges arose from the events of 14th May 2013 when the Petitioners and others organized and participated in a demonstration to protest alleged attempts by members of the National Assembly to remove Commissioners of the Salaries and Remuneration Commission from office and thereby set their own remuneration and benefits. The demonstration was dubbed, “*Occupy Parliament*” and in accordance with the law, the organisers notified the Inspector-General of Police, 2nd Respondent, of their intention to hold the demonstration and since no objection was raised, the same proceeded as planned.

3. On the material day, the demonstration took place with the Petitioners and others marching peacefully from Uhuru Park and along Kenyatta Avenue, Moi Avenue and Harambee Avenue in Nairobi. The 2nd Respondent deployed police officers along the said roads and they provided security and cleared traffic to facilitate easy movement by the demonstrators. When they reached Parliament Building however, things took a dramatic turn as some pigs were released and blood poured on the street. As the pigs nonchalantly gobbled up the blood, the demonstrators sat down on the tarmac and their leaders loudly addressed them and decried the alleged actions of the Members of Parliament. At that point, the police reacted and lobbed teargas canisters on the demonstrators and ordered them to disperse. The pigs were also collected and taken away while all the Petitioners were later arrested at about 2.30 p.m. and detained at Parliament Police Station. They were bonded and released after 7.30 p.m. and on 20th May 2013, they were charged with the offences elsewhere set out above.

4. When they appeared before the Chief Magistrate, Milimani Law Courts, to take plea, the Petitioners declined to do so and through their Counsel, argued that the Charge Sheet was incompetent and that the 2nd and 3rd Respondents had violated a number of the Petitioners' rights and freedoms during the demonstration, arrest and arraignment in Court. They also applied that the Charges should all be declared invalid and in the alternative, that the matter should be referred to the High Court for determination of the above and other constitutional questions allegedly arising.

5. On 26th May 2013, the Chief Magistrate delivered a Ruling in which he refused to invalidate the Charges and declined to frame any question for determination by the High Court and instead directed that the Petitioners should plead to the Charges. Their prosecution was stayed later on by this Court pending the hearing and determination of the Petition herein and it is the above series of events that triggered the Petition.

Case for the Petitioners

6. It is the Petitioners' common case that the action of the 2nd Respondent in stopping the demonstration was illegal and unconstitutional because the organisers of the same had notified the Police of the intention to hold it according to the requirements of the law and the latter was well aware that the demonstrators had planned that the Parliament Building would be their final destination. That the demonstration was being conducted in furtherance of rights enshrined in **Articles 33 and 37** of the **Constitution** and the action of the Police in violently disrupting and stopping it were illegal and not tenable, constitutionally.

7. In addition, that by arresting, detaining and charging them and in some cases violently so, and without informing them of the reasons for their arrest until 7.30 p.m. on 14th May 2012, then their rights as enshrined in **Article 49** of the **Constitution** were blatantly violated.

8. Regarding the specific charges that they are facing, the Petitioners have argued that;

- i. *The charge regarding cruelty to animals contrary to **Section 3(1)(c)** as read with **Section 3(3)** of the **Prevention to Cruelty to Animals Act, Cap.360** was preferred without any particulars as contemplated by law and therefore the Petitioners are unable to properly answer the said charge.*
- ii. *The three charges emanate from the same transaction and yet it is not legally tenable that one could be properly charged with the offence of "offensive conduct to a breach of peace contrary to **Section 94(1)** of the **Penal Code**" and at the same time with the offence of "taking part in a riot contrary to **Section 78(1) and (2)** as read with **Section 80** of the **Penal Code**". The argument made in that regard is that peace exists during the commission of the first offence but that as regards the latter, there is no peace at all. That therefore their continued prosecution on such untenable charges is an abuse of Court process and a violation of their freedom of the security of the person.*

9. In any event, they have also argued that the language of the charges is vague and uncertain and that when the Charge Sheet uses the words "whereby a breach of the peace is likely to be occasioned" it

presupposes a futuristic breach. Such a charge, it is further argued, goes against the well established principle of criminal and constitutional law that a criminal offence must have both an act and a mental element. To deprive them of their freedom on the basis of such a charge is therefore a violation of **Article 29** of the **Constitution**.

10. Lastly, that the offences of breach of the peace as well as that of the offence of riot seek to limit the freedoms of expression, assembly, demonstration and picketing in a manner that cannot be justified under **Article 24** of the **Constitution** and specifically, that the Charge of breach of the peace is not proportionate because on the face of it, a person can be charged in contemplation of an offence or effectively for doing nothing at all.

11. That for the above reasons, the Petitioners seek the following orders;

- a. *A declaration that the arrest, detention of the Petitioners violated their rights under Articles 32,33,36,49 and 50 of the Constitution.*
- b. *A declaration that the charges leveled against the Petitioners are illegal and unconstitutional because they fail to meet the standards set out in Article 50 of the Constitution.*
- c. *A declaration that the statutory provisions under which the Petitioners are charged are unconstitutional in that they are vague, too broad or seek to limit the freedoms of expression, assembly, demonstration and picketing in a manner incompatible with Article 24 of the Constitution.*
- d. *An order to bring to the High Court for quashing the trial of Criminal Case Number 685 of 2013 (Republic versus William Omondi and 16 others)*
- e. *A declaration that Sections 78 (1) and (2) and 94(1) of the Penal Code Cap 63 Laws of Kenya are unconstitutional therefore null and void.*
- f. *Costs of this Petition.*
- g. *Any other or further relief that this Court may deem fit and just to grant.*

Case for the 1st Respondent

12. The 1st Respondent, the Attorney General, filed written Submissions dated 9th December 2013 and Ms. Jennifer Gitiri argued the case on his behalf.

13. Learned Counsel submitted that while the Constitution guarantees the enjoyment of fundamental rights and freedoms by all Kenyans, such enjoyment must be within the confines of the law. That in any event, enjoyment thereof should not prejudice the rights and fundamental freedoms of others as those rights are not absolute and are subject to the restrictions imposed by **Article 24** of the same **Constitution**. She relied on the decision in **National Citizens Forum Initiative & 3 Others vs The Governor of the County of Nairobi & 4 Others General** in **Petition No.397 of 2013** to support that proposition.

14. Regarding the pending **Criminal Case No.685/2013**, it is her Submission that no reasonable cause has been given to warrant its quashing and in any event, the evidence to be tendered in support of the Charges should be tested at the trial Court regard being had to the standard and burden of proof imposed on the Prosecution. Further, that no evidence had been placed before this Court to show that the Petitioner would not be accorded a fair trial in the Magistrate's Court.

15. As for the specific criminal charges that the Petitioners are facing, it is the 1st Respondent's case that the offences in **Sections 78(1)(2)** and **94(1)** of the **Penal Code** are worded in a language that would give effect to **Article 24** of the **Constitution** and are designed to protect the rights of other Kenyans from

offenders who work to disturb public order and peace.

16. Lastly, that the arrest, detention and prosecution of the Petitioners is neither unlawful nor unprocedural and the Petition aims at circumventing justice and that therefore the same ought to be dismissed.

Case for the 2nd and 3rd Respondents

17. The 2nd and 3rd Respondents, the Inspector General of Police and the Director of Public Prosecutions, by Submissions dated 4th December 2013 opposed the Petition and Ms. Katherine Kithikii argued their joint case.

18. While agreeing with the Petitioners that the 2nd Respondent was aware of and had received notification of a peaceful demonstration to protest the alleged attempt by Members of Parliament to fix their own remuneration, they state that the demonstrators, including the Petitioners, initially conducted themselves in a peaceful and non-violent manner but became disruptive at Parliament Building area and despite warnings to remain peaceful, the demonstrators refused to heed the warnings and the Police decided to stop the demonstration and later arrested the Petitioners. That the Petitioners were the same day released on free bond upon confirmation of charges well within 24 hours of their arrest and they were then arraigned in Court and charged with the offences elsewhere set out above.

19. As for the Charges themselves, it is their case that;

- i. **Section 89(5) of the Criminal Procedure Code** empowers and requires a trial magistrate to consider the formal charge and where he is of the opinion that the same falls short of disclosing an offence, he may refuse to admit it and **Section 214 of the Code** further empowers him to amend, substitute or alter the Charge Sheet in substance or form, at any stage of the trial before the close of the Prosecution's case. That in that regard, the trial Magistrate upon hearing the Petitioners on their objection to the Charges reached the decision that an offence had been revealed and that the Charges were admissible.
- ii. The Charge Sheet contains offences which are indicative and as such have sufficient particulars to enable the Petitioners respond to them and the Charges are also properly framed and provide reasonable clarity under **Section 137 of the Criminal Procedure Code**.
- iii. The offences in the Charge Sheet are distinct and contain specific elements to be proved and **Sections 107 and 109 of the Evidence Act** are applicable as regards the standard and burden of proof to be met by the Prosecution.
- iv. Regarding arrest, it is their contention that arrest during the on-going demonstration without a warrant was done in accordance with **Section 29(a) and (b) of the Criminal Procedure Code** and was therefore lawful.
- v. On alleged constitutional violations, it is their case that neither **Articles 19, 20, 21, 29, 33, 37, 39, 50 and 51 of the Constitution** have been violated as alleged and all actions by the Respondents were undertaken in accordance with the law and the Constitution.
- vi. Further, that under **Articles 243, 245(4), (5) and 244(c) of the Constitution** as read with **Section 24 of the National Police Service Act**, there were sufficient grounds to stop the demonstration. In any event, that action was taken to maintain law and order and also to preserve the peace, all reasonable limitations under **Articles 24 and 25 of the Constitution**. In addition that the freedoms guaranteed under **Articles 33 and 37 of the Constitution** can be limited in such circumstances including by the application of the **Public Order Act, Cap.56 Laws of Kenya**.
- vii. That the investigations, arrest and arraignment of the Petitioners was done in accordance with

Article 157(4), (6) and (10) as well as **Article 245(5)** of the **Constitution**. In addition, the Petitioners were informed of the reasons for their arrest, released on free bond within 24 hours and therefore no proper complaint can be made in that regard.

viii. That all the issues raised in the Petition are matters for the trial Court and relying on the dictum in **Paul Ng'ang'a & 2 Others vs AG, Petition No.518 of 2012**, they seek orders that the Petition should be dismissed as it is misconceived and is merely intended to obstruct a lawful prosecution and is therefore also an abuse of Court process.

Determination

20. I should begin by stating that it is the law that where criminal prosecution has been undertaken by the Director of Public Prosecutions under the mandate conferred by **Article 157(6)** of the **Constitution**, the Court can only interfere under **Article 157 (11)** thereof where any of the principles in that Sub-Article are flouted. That Sub-Article, for avoidance of doubt, provides as follows;

(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

(10) ...

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

21. There is now a long list of authorities revolving around the above principles – see for example **Kulei vs AG and Others [2014] eKLR, Petition No.66 of 2012.**

22. I reiterate the above finding and will take the same approach in this matter. But to address the specific complaints in the instant Petition, it is best to address each of the issues raised separately as I hereby do below.

Prayer (a) - A declaration that the arrest, detention of the Petitioners violated their rights under Articles 32, 33, 36, 49 and 50 of the Constitution hence it was unconstitutional.

23. **Article 32** provides for the freedom of conscience, religion, belief and opinion.

Article 33 provides for freedom of expression

Article 36 provides for the freedom of association

Article 49 provides for the rights of arrested persons and **Article 50** provides for fair hearing.

24. The Petitioners contend in the above regard that their arrest was illegal since there was no warrant for such an arrest and that their rights above were therefore violated. The 2nd and 3rd Respondents on the other hand maintain that the arrest without a warrant was in accordance with **Section 29 (a) and (b)** of the Criminal Procedure Code and they add that the Petitioners are in any event charged with several counts arising from the same transaction.

25. **Section 29** aforesaid provides that a police officer may, without an order from a magistrate and without a warrant arrest;

(a) Any person whom he suspects, upon reasonable grounds, of having committed a cognizable offence.

(b) Any person who commits a breach of the peace in his presence.

26. **Part one** of the Code defines a cognizable offence as that for which a police officer may, in accordance with the First Schedule or under any law for the time being in force, arrest without a warrant.

27. The First Schedule lists offences that are not subject to any arrest warrant to include riot, offensive conduct conducive to breaches of the peace and threatening breach of the peace, among others.

28. In this particular case, according to the Replying Affidavit of the 2nd and 3rd Respondents, it is stated that the Petitioners were fully aware that Parliamentary proceedings were under way at Parliament Building but nevertheless they participated in a disruptive demonstration in the manner stated in the Charge Sheet.

29. On my part and from a clear reading of the First Schedule to the Code, it follows that the charge of offensive conduct conducive to breach of peace and the charge of taking part in a riot contrary to **Section 80** of the **Penal Code** do fall within the ambit of the offences in the First Schedule for which the Police do not require warrants for any arrest in that regard and that is all there is to say on that aspect of prayer (a).

30. Regarding the offence of cruelty to animals, it carries a maximum possible sentence of six months and it therefore falls within the ambit of “*offences under other laws.*” It therefore follows that for one to be charged with such an offence, the arresting officer requires an arrest warrant.

31. From the foregoing and in the totality of things, I hereby find that the Police were justified in arresting the Petitioners without any warrants. Furthermore, the mere fact that the third count requires a warrant does not render the arrest unlawful since in any event, the offences are alleged to have been committed in the presence of Police officers.

32. In that regard and as I understand it, “***a police officer is entitled to effect an arrest without a warrant, so long as he has reasonable grounds for entertaining the suspicion at the material time. Subsequent events may show that the officer was in error at the time but the arrest will not thereby be rendered unlawful.***” - per (**Patrick Kiage, Essentials of Criminal Procedure in Kenya**). This has also been the law for more than a century as may be seen from the sentiments of Lord Diplock in **Dillion v O’Brien and Davis (1887) 16 Cox CC 245** where he stated that;

“In the case of an arrest, reasonable grounds for belief of guilt at the time of arrest are sufficient justification, though subsequent information or events may show those grounds to be deceptive.”

I agree and I reiterate my findings above.

Breach of the Petitioners’ rights upon arrest.

33. It is the Petitioners' case that their arrest and detention for about five hours was a violation of their right as set out in **Article 49 (i) (a)** of the **Constitution**.

34. **Article 49 (1)** provides that an arrested person has the right;

“(a) To be informed promptly, in a language that the person understands, of; the reason for the arrest, the right to remain silent and the consequences of not remaining silent.

(b) ...”

35. Whereas there is no evidence before me that the Petitioners were or were not read the above rights, the issue can properly be raised at the trial Court and the arresting office would be questioned on the issue. To raise it as the basis for quashing the trial cannot be in the best interests of justice. I also recall that in the 1966 U.S. Supreme Court Case of **Miranda vs Arizona**, the reason Miranda's conviction was quashed was because of statements that he had made to the police without him being advised of his rights and not the non-advise of the rights *per se*. In the instant case, no complaint has been made that the non-reading of the **Article 49(1)(a)** rights if at all, has prejudiced the Petitioners in any way and I am not convinced that this is a sufficient reason to overturn the whole trial.

Breach of the right to a fair hearing

36. The Petitioners argue that the Police breached their rights to a fair trial by not;

- (a) Informing them of the charge, with sufficient detail to enable them answer to it.
- (b) Allowing them adequate time and facilities to prepare a defence, noting that they were not notified of the charges at the time of arrest.
- (c) Informing them in advance of the evidence that the Prosecution intends to rely on.
- (d) Allowing them reasonable access to the evidence.

37. It is the Respondents' submission in answer to the above complaints that at the time of plea taking, the Petitioners were fully aware of the charges preferred against them which subsequently led to their taking pleas. In addition thereto, the Respondents state that the hearing of the matter is yet to commence pending the determination of this Petition and that there is no evidence of an unfair trial at the Magistrate's Court.

38. In that regard, the Replying Affidavit sworn by George Oduor reveals that further investigations were carried out which revealed evidence of several other offences to which the Petitioners were duly informed about and which were read out before the Chief Magistrate at Milimani Court on 20th May 2013. It is also important to note that the Petitioners, through their advocates, opposed the plea taking process declaring the charges unconstitutional which objection was overruled by the Magistrate and the Petitioners' plea of "*not guilty*" was accordingly recorded on 23rd May 2013. They were subsequently released on cash bail.

39. From the above, it is my view that the Chief Magistrate's Court acted in accordance with the provisions of **Section 207 (1)** of the CPC which provides that the substance of a charge must be stated to the accused person by the Court, and he must be asked whether he admits or denies the truth of the charge.

40. I also believe that from the matters placed before me, the Petitioners' contention that their right to be informed of the charge, with sufficient detail to answer it, is invalid because they were indeed informed of all the charges with sufficient detail to answer them and they even objected to the said charges.

41. In saying so, I adopt the position of the Court in the case of **Republic v Yonasani Egalu and Others (1965) 9 EACA** where it was held that;

“It is most desirable that not only every constituent of the charge be explained to the accused person, but that he should be required to admit or deny every constituent part thereof and that what he says should be recorded in a form which would satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally.”

42. Furthermore, **Section 134** of the CPC requires that every charge or information shall contain, and shall be sufficient, if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.

43. **Section 137(a)** of the CPC further requires that the Statement of an offence should offer a brief description in ordinary language, avoiding as far as possible the use of technical terms and that it is not necessary to put all the elements of the offence within the Statement.

44. The above notwithstanding, the Court in **Stephen Chege v Republic (1983) EKL**R stated that it is essential and imperative that the charge should clearly set out the offence that the accused person is charged with.

45. **Section 137(a)(i)** and **(ii)** of the CPC also provides that if the offence charged is one created by a statutory enactment, it must contain a reference to the Section of the enactment creating the offence.

46. **Section 137(iv)** then goes further to stipulate that the forms set out in the Second Schedule or forms conforming as nearly as possible to them, may be used in cases to which they are applicable; and in other cases, forms to the same effect or conforming thereto may be used in the same manner and that the statement of offence and the particulars of offence may be varied according to the circumstances of each case.

47. It is the Petitioners’ argument in that regard that despite the above provisions of the law, the charges lack sufficient content so as to put them on notice as to what case is being laid against them and so that they may prepare and present their defence.

48. I have considered the law and the arguments by the Petitioner and it is my view that there is no evidence before me that the trial Court did not follow the above procedure or adhere to the law as set out above and in any event, I wish to reiterate the sentiments of the Court in the case of **William S. K Ruto and Another v AG Civil Suit No.1192 of 2005** where the learned Judges stated thus;

“In our view, it is not for this court to determine whether or not the charges as framed disclose an offence. There are adequate provisions in the CPC for instance Section 89 (5) which can be used to address that issue. The applicants only need to move the trial magistrate to strike out the charge for being incompetent or the prosecution can seek to substitute the charges. The fact that a charge is defective/incompetent does not raise a constitutional issue.”

49. I agree and also wish to reaffirm what I had stated earlier that the contention that the charges are vague was settled by the Chief Magistrate’s Court and furthermore, issues of competency of charge sheets are matters perfectly within the jurisdiction of the trial court and are catered for under **Section 89(5), 137** and **214** of the Criminal Procedure Code.

The right to have adequate time and facilities to prepare a defence.

50. The above issue is a corollary to the matter addressed above and the Petitioners argue that the taking of plea in the criminal trial was unconstitutional in that they were being asked to answer to a case for which they did not have details of or evidence about. They further argue that the purpose of **Article 50(2)(b)** and **(j)** of the Constitution is to ensure that an accused person is not made to plead to charges where there are no details or credible evidence to support the alleged offence or where there are no reasonable prospects of conviction.

51. To determine the above matter, I will briefly outline the trial process in criminal proceedings. In **(Essentials of Criminal Procedure in Kenya. Para 9.1 supra)**, the author states that;

“After an accused person appears in court under arrest and pleads not guilty to the charge, the stage is set for the court to hear the case with a view to determining or establishing whether the complaint against the accused is true. It may hear the complainant and his witnesses as well as receive any other evidence immediately after the plea or on such date as it may fix”

52. In that context therefore, the right to adequate time and facilities for the preparation of a defence at the hearing by an accused person must therefore mean, at least, the opportunity to adequately prepare his defence. Such preparation may take the form of reasonable adjournments where needed and reasonably sought, as well as opportunity to receive and view, beforehand, the evidence that the Prosecution intends to adduce. In fact the right to pre-trial discovery is now well established and the giving of the Charge Sheet, witness’ statements, investigations diaries, experts’ reports, copies of documents and exhibits is basic to every trial in Kenya.

53. **Article 50 (2) (a)** of the **Constitution** also provides that every accused person is to be presumed innocent until the contrary is proved. In this case, the Petitioners are still innocent until proven otherwise. It is my view therefore that the taking of plea is a stage in the criminal process after which the Court decides on whether to proceed on with a case at that time or at some other date. It is after the plea taking stage that the Court will analyze the evidence before it with a view to establishing the innocence or guilt of the accused person.

54. It is worth noting that in this case, the trial has not commenced and I stopped it pending the determination of this Petition and therefore even the pre-trial processes have not been undertaken.

55. In addressing such a situation, the Court in the case of **Dennis Edmond Apaa and 2 Others v Ethics and Anti-Corruption Commission and Another, Petition No.317 of 20012** observed as follows;

“The Cholmondeley case does not support the proposition that all the witnesses and evidence must be disclosed in advance of the trial. The case of R v Ward cited by the Court of Appeal is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50 (2) (j) that guarantee the right “to be informed in advance” cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and the right of disclosure is protected by the accused being informed of the evidence having reasonable access to it. This right is to be read together with other rights that constitute the right to a fair trial.”

56. I am duly guided and in any event, **Article 50 (2) (c)** guarantees the accused the right “to have adequate facilities to prepare a defence.” I reiterate that this means that a duty is cast on the Prosecution to disclose all the evidence to enable adequate preparation by the defence, throughout the trial.

57. I also wish to adopt the dictum in the case of **Thuita Mwangi and 2 Others v Ethics and Anti-corruption Commission and 3 Others (2013) Petition 153 of 2013 consolidated with Petition 369 of 2013** where it was held that;

“The right to be provided with material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.”

58. I agree with the above erudite finding and from all the above, I am unable to find that the Petitioners’

right to a fair trial has been violated as alleged.

Was the stoppage of the demonstration unconstitutional and illegal?

59. **Article 24** of the **Constitution** provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom including; the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and that the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

60. It is also important to note that **Article 25** provides for fundamental rights and freedoms that may not be limited and it states them to include;

- (a) Freedom from torture and cruel, inhuman degrading treatment or punishment,
- (b) Freedom from slavery or servitude,
- (c) The right to a fair trial,
- (d) The right to an order for *habeas corpus*.

61. In the context of this Petition and with the above background in mind, **Section 7** of the **Public Order Act** provides that an organizer of every public meeting or public procession or his authorized agent shall be present throughout the meeting or procession and shall assist the Police in the maintenance of peace and order at the meeting or procession.

62. **Section 8(b)** of that **Act** also provides that where in any public gathering or other meeting or procession in which, having regard to the rights and interests of the persons participating in such gathering, meeting or procession, there is clear, present or imminent danger of a breach of the peace or public order, the Police may, for any of the purposes aforesaid, give or issue such orders, including orders for the dispersal of the meeting, procession or gathering as are reasonable in the circumstances, having regard to the rights and freedoms of the persons in respect of whom such orders are issued and the rights and freedoms of others.

63. In that regard and without saying more, I associate myself with the 1st Respondent's submission that the right to assemble and to demonstrate under the Bill of Rights is not absolute and is subject to reasonable regulation that is consistent with **Article 24** of the **Constitution**. (A position which was upheld by the Court in **National Citizens Forum and 3 Others v The Governor of Nairobi and 4 Others. (supra)**)

It is however and my firm position that it is not open for this Court to determine whether the Police lawfully stopped the demonstration as that is a matter germane to the criminal trial and is best left for the Magistrate's Court. That is all to say on the above issue.

Prayer (b) - A declaration that the charge leveled against the Petitioners are illegal and unconstitutional because they fail to meet the standards set out in Article 50 of the Constitution.

64. Without saying more than I should on this aspect of the Petition, I choose to adopt the sentiments of Warsame, J. in **Michael Monari and Anor v The Commissioner of Police and 3 Others Misc Application 68 of 2011** where he stated thus;

"It is not the duty of the Court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the Court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any

evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”

65. I agree with the Learned Judge and while reiterating what I have stated elsewhere above, I decline to grant the orders sought in this regard and re-affirm the position that the fact that a charge is defective/incompetent does not raise a Constitutional issue and that the trial Court is competent to handle that issue as was done in the present case. Any aggrieved party can thereafter file an appeal to challenge any adverse a decision thereby made.

Prayer (c) - A declaration that the statutory provisions under which the Petitioners are charged are unconstitutional in that they are vague, too broad and or seek to limit freedoms of expression, assembly, demonstration and picketing in a manner incompatible with Article 24.

66. The statutory provisions alluded to above are **Sections 94(1) , 78(1) and (2)** as read with **Section 80** of the **Penal Code** and **Section 3(3)** of the **Prevention of Cruelty to Animals Act**.

67. **Section 94** aforesaid provides that any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behavior with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned is guilty of an offence and is liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both.

Section 94(2) further defines a “**public gathering**” as;

“(a) Any meeting, gathering or concourse of ten or more persons in any public place.

(b) Any meeting or gathering which the public or any section of the public or more than fifty persons are permitted to attend or do attend, whether on payment or otherwise or

(c) Any procession in, to or from a public place.”

Section 78 provides that;

“(1) When three or more persons assemble with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighborhood reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly.

(2) It is immaterial that the original assembling was lawful if, being assembled; they conduct themselves with a common purpose in such a manner as aforesaid.”

68. **Section 80** then provides that any person who takes part in a riot is guilty of a misdemeanor.

69. **Section 3(3)** of the **Prevention of Cruelty to Animals Act** on the other hand provides that a person guilty of an offence of cruelty to animals shall be liable to a fine not exceeding three thousand shillings or to a term of imprisonment not exceeding six months, or to both.

70. In the above context, it is my view that the object of the said provisions (**Sections 94(1), 78 1) and (2) and 80** of the **Penal Code**) firstly, is to promote and maintain peace/public peace and order and the provisions do not in any way prohibit the rights set out above but they only place limitations thereto. In addition, **Article 33(3)** of the **Constitution** provides that in the exercise of the right to freedom of

expression, every person shall respect the rights and reputation of others.

71. **Article 37** of the **Constitution** further gives every person the right, peaceably and unarmed, to assemble, to demonstrate, to picket and to present Petitions to public authorities.

72. It is quite clear that both the Constitution and the two provisions in the Penal Code seek to advocate for peace and peaceful assembly and there is *per se* no conflict between all those provisions.

73. In any event, as earlier stated, **Article 24** of the **Constitution** places limits on the enjoyment of certain rights and freedoms and the rights provided under **Articles 33** and **37** are not unlimited but may be curtailed in appropriate circumstances. In this particular case, it is my view that the Penal Code only limits the enjoyment of the said rights under circumstances where persons enjoying those rights, disrupt the enjoyment of the same by others rights by committing or threatening a breach of peace.

74. Further, the Petitioners and others had all, at the beginning of the demonstration, been peaceful and were even under the escort of the Police. It is their alleged acts of blocking a section of Harambee Avenue and thereby causing fear of terror to motorists, confining a pig with several piglets at the gate of Parliament, among others, that led to the stoppage of the demonstrations. Whether this fact created any offence with the Petitioners as offenders is not for this Court to determine. It is also worth noting that the Petitioners are still innocent unless proved otherwise by the trial Court in the pending criminal case.

75. It cannot in the circumstances be said that their arrest and charge was unconstitutional and I have said why and I therefore agree with the decision in **National Citizens Forum Initiative and 3 Others v The Governor of the County of Nairobi (supra)** where it was held that;

“These rights are not absolute (the right to assemble protected by Article 37) and are subject to reasonable regulation that is consistent with the provisions of Article 24 of the Constitution.....thus, in the circumstances of this case, it would be reasonable for the County Government, to provide for the regulations of traffic, meetings along thoroughfares and open public spaces apart from those public places specifically designed for open and public meetings. It is true that the Petitioners have a right to assemble but this right must be exercised in such a manner as not to interfere with other citizens’ rights”.

76. I agree fully and I decline to grant the orders sought above.

Prayer (d) - An order to bring to the High Court for quashing the trial of Criminal Case No. 685 of 2013.

77. I have already stated that the State’s prosecutorial powers are vested in the Director of Public Prosecutions (DPP) under **Article 157** of the **Constitution** and the decision to institute criminal proceedings by the DPP is discretionary and such exercise of power is not subject to the direction or control by any authority as **Article 157(10)** stipulates.

78. These provisions are also replicated in **Section 6** of the **Office of the Director of Public Prosecutions Act No. 2 of 2013** in the following terms;

“(6) Pursuant to Art 157 (10) the Director shall –

(a) Not require the consent of any person for the commencement of criminal proceedings.

(b) Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) Be subject only to the Constitution and the law.”

79. In the case of **Githunguri v Republic (1985) KLR 34**, the Court observed as follows, regarding the

Attorney-General's powers to institute proceedings under the Repealed Constitution;

“The AG in Kenya by Section 26 of the Constitution is given unfettered discretion to institute and undertake criminal proceedings against any person “in any case in which he considers desirable so to do”..... this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy.....”

80. I am duly guided and I stated earlier, the Court may intervene where it is shown that criminal proceedings have been instituted for other reasons other than the honest enforcement of criminal law, or otherwise an abuse of the Court process. As Kuloba J. observed in, **Vincent Kibiego Saina v AG. High Court Misc Civil Appl. No. 839 of 1999 (unreported)** at pages 20, 21;

“If a criminal prosecution is seen as amounting to an abuse of the process of the court, the court will interfere and stop it. This power to prevent such prosecutions is of great Constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court, the court will unhesitatingly step in to stop it.”

81. Further, in **Meixner and Another v AG, (2005) 2KRL** the Court held that;

“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial Court.”

82. In **Paul Ng'ang'a Nyaga and 2 Others v AG and 3 Others. Pet 518 of 2012**, the Court stated that;

“there is a clear public interest in ensuring that crime is prosecuted and that a wrongdoer is convicted and punished. It also follows from this that it will generally be in public interest to prosecute a crime where there is sufficient evidence to justify the contrary e.g unless there is some countervailing reason not to prosecute”..... if the petitioners or any other party for that matter, are charged with a penal offence, they have the right to be presumed innocent until proved guilty according to law in a public trial at which they have had all the guarantees necessary for their defence.”

83. I agree with all the above statements and reiterate the holding in **Francis Mbugua v Commissioner of Police and 2 Others Pet. No. 79 of 2012** where the Court stated as follows and in agreement with the holding in **Elory Kraneveld v AG and 2 Others. Pet No. 153 of 2012**;

“Whereas every person has a right to the protection of the Constitution, it is not in all cases that orders as prayed should be granted. I say so because the Petitioner has conveniently forgotten that the Constitution must be read holistically for its real meaning and import to be discerned. Our judicial system is not one where a judge is granted such powers as to investigate criminal complaints. That power lies in Article 157 (4) of the Constitution. Further, whether or not the investigations leading to the petitioner's arrest disclosed an offence is not for this court to determine as I am not seized of the evidence to be presented against him. The petitioner has literally jumped the gun because he has presented his defence of innocence not before the trial Court but this Court. His actions are premature.”

84. In that regard, the Petitioners in this case have submitted that the totality of the conduct of the Police seen in the context of their response to a peaceful demonstration raise suspicion about their partisan actions in stopping the protests, detaining, charging, arresting and pursuing prosecution of these sixteen Petitioners. I disagree and it is my view that it is not the duty of this Court to go into the merits or demerits of the case that they have been charged with at the lower Court as that is the duty of the trial Court. To my mind, the Petitioners seem to be avoiding the trial Court by seeking the orders in this Petition and this Court cannot countenance such an action.

85. In saying so, I agree therefore with the holding in the case of **Kuria and 3 Others v AG (2002) 2 KLR 69** where it was observed as follows at pages 79 and 80;

“There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution..... There is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even manipulation of court process so as to seriously depreciate the likelihood that the applicants might not get a fair trial as provided under Section 77 of the Constitution..... The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which is immense. There is public interest underlying every criminal prosecution, which while being zealously guarded, at the same time there is a private interest on the rights of the accused person to be protected, by whichever means..... Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence, an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of the court process or that there is a danger to the right of the accused person to have a fair trial.”

From the foregoing, I hereby decline to grant an order for quashing the proceedings and trial in **Criminal Case No.685 of 2013 (R V William Omondi and 16 Others)**.

Prayer (e) - A declaration that Section 78 (1) and (2) and 94 (1) of the Penal Code are unconstitutional therefore null and void.

86. In this regard, I choose to adopt what I have stated in this judgment with regard to prayer (c) of the Petition. I have addressed this matter in the said part of my judgment and I see no need to repeat my findings.

Conclusion

87. This Court takes alleged violations of the Bill of Rights very seriously. Without the Bill of Rights, the Constitution will be rendered a “*feel good*” document. However, parties seeking orders with regard to such alleged violations must read the Constitution as a whole and contextualise it properly. A selective reading of it and a selective approach to what is only beneficial to such parties will receive no consideration from the Court.

88. Lastly, since the Petition is without merit, it is hereby dismissed and as the criminal proceedings are yet to be concluded, let each party bear its own costs.

89. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAORIBI THIS 26TH DAY OF AUGUST, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Miss Kithiki for 3rd Respondent

Mr. Sekwe holding brief for Miss Gitiri for 1st and 2nd Respondent

No appearance for Petitioners

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE