REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 13 OF 2015

IN THE MATTER OF ARTICLES 22(1), 23, 165, 244, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED VIOLATION OR INFRINGEMENT OF CONSTITUTIONAL RIGHTS OF THE PERSON TO WIT ARTICLES 25, 27, 28, 39, 47, 50 94(5), 157 AND 243 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 22(2) & (3) AND 165(6) & (7) OF THE CONSTITUTION AND THE RULES MADE THEREUNDER; THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

TABITHA SEII…..……..1ST PETITIONER

ESTHER SEII…….2ND PETITIONER

AND

COUNTY GOVERNMENT OF UASIN GISHU.....1ST RESPONDENT

COSMAS K. KERICH.....2ND RESPONDENT

RHODA RUGUT.....3RD RESPONDENT

LUCY MWANIKI.....4TH RESPONDENT

HURRY SIMBIRI.....5TH RESPONDENT

LINDA CHEBII.....6TH RESPONDENT

ELDORET MUNICIPAL COURT/ELDORET CHIEF

MAGISTRATE'S COURT.....7TH RESPONDENT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS……INTERESTED PARTY

JUDGMENT

[1] The two Petitioners herein, **Tabitha Seii** and **Esther Seii**, filed this Petition on **17 August 2015** contending that on or about **14 May 2015**, they were illegally, unlawfully and maliciously arrested and detained by the 2nd, 3rd, 4th, 5th and 6th Respondents without any justifiable cause; and that they were thereafter arraigned before the Eldoret Chief Magistrate's Court, situated at the 1st Respondent's premises, commonly known as the Municipal Court, charged with various counts under the Municipal Council of Eldoret By-Laws of 2009. It was their contention that the Municipal Council of Eldoret By-laws of 2009 not only have no force of law, but also that the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents have no legal mandate or authority to arrest, detain, charge, arraign or prosecute them in court without reference to the Police (National Police Service) or the Office of the Director of Public Prosecutions (ODPP), the Interested Party herein.

[2] It was further the averment of the Petitioners that on promulgation of the **Constitution of Kenya, 2010**, which was followed by the enactment of the **County Government Act, No. 17 of 2012**, the Municipal Council of Eldoret was succeeded by the County Government of Uasin Gishu, the 1st Respondent; and the **Local Government Act, Chapter 265** of the **Laws of Kenya** pursuant to which the By-Laws were formulated, was accordingly repealed by dint of **Section 134** of the County Government Act. Hence, the Petitioners contend that since then, the powers to arrest, detain and charge anybody, are vested in the National Police Service in accordance with **Article 243** of the **Constitution**; while the prosecutorial powers are vested in the Office of the Director of Public Prosecutions under **Article 157(4)** of the **Constitution**; and therefore that it was unlawful for the 1st to 6th Respondents to arrest and prosecute their own cause without reference to either the National Police Service or the ODPP.

[3] In paragraphs 20 to 30, the Petitioners set out the provisions of the Constitution that were infringed in their case and averred that, as a result of their arrest, detention and subsequent arraignment in court, their freedoms have been curtailed; and that they have been subjected to criminal proceedings that are tainted with procedural irregularities, irrationalities and illegalities; yet they are entitled to have their dignity upheld and their right to equal protection of the law respected under **Article 27(1) and (2)** of the **Constitution**. Accordingly, the Petitioner prayed for the following remedies:

> **[a]** A declaration that their arrest, detention and prosecution in Eldoret Municipal Court/County Court through **Eldoret Chief Magistrate's Court Criminal Cases Nos. 954 and 955 of 2015,** respectively, is unlawful and unconstitutional;
>
> **[b]** A declaration that the constitutional rights and fundamental freedoms of the Petitioners as outlined in the Petition were and are likely to continue being breached by the Respondents requiring them to attend court for trial in response to the charges that have no force of law in Kenya;
>
> **[c]** A declaration that the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents were motivated by ulterior motives unrelated to the cause of criminal justice in its election and zeal to charge and prosecute the Petitioners;

[d] A declaration that the decision and election to charge the Petitioners was selective and discriminative, and informed by ulterior motives, wholly unrelated to any cause for criminal justice;

[e] A declaration that the 1st, 2nd, 3rd, 4th and 5th Respondents have no legal mandate or authority to institute criminal proceedings against the Petitioners without following the due process of the law and in particular, without reference to National Police Service and the ODPP;

[f] An order prohibiting the 7th Respondent from receiving and or continuing to entertain the charges filed against the Petitioners;

[g] An order for compensation/damages under **Article 23(3)** of the **Constitution of Kenya** for the injuries suffered by the Petitioners due to the unlawful deprivation of their rights and for the unconstitutional conduct of the 1st-6th Respondents.

[h] Any further orders, writs, declarations as the Court may deem appropriate, fair, just and fit.

[i] That the 1st-6th Defendants be condemned to pay the costs of this Petition.

[4] A careful perusal of the record herein shows that, although a Notice of Preliminary Objection was filed on **24 May 2016** on behalf of the 1st Respondent, no specific response to the Petition was made by the 2nd, 3rd, 4th, 5th or 6th Respondents. There was, likewise, no response made by the Interested Party, the **ODPP**. Be that as it may, the Notice of Preliminary Objection dated **23 May 2016** was premised on the following grounds:

[a] That the Petition together with the Notice of Motion herein are misconceived, frivolous, bad in law, vexatious and discloses no ground for issuance of conservatory orders;

[b] That the Petition does not meet the legal threshold established by the court in **Anarita Karimi Njeru vs. Republic** (No. 1) [1979] KLR

[c] That the Petition and Notice of Motion application are contra- statutes, based on and tainted with illegalities, thus bad in law, misconceived, incompetent and an abuse of the court process;

[d] That the Petition offends the following provisions:

[i] Article 157(12) of the **Constitution;**

[ii] The Urban Areas and Cities Act, No. 13 of 2013;

[iii] Transition to Devolved Government Act, 2012;

[iv] Article 191 of the **Constitution;**

[v] Section 27 of the **Interpretation and General Provisions Act, Chapter 2** of the **Laws of Kenya.**

[e] That the issuance of conservatory orders sought is a sanction of the illegalities perpetuated by the Petitioners and goes against the principle of *ex dolo malo non oritur actio*.

[f] That the Petition as filed, and the prayers sought therein, are an abuse of the court process.

[5] In support of the Petition, the 1st Petitioner averred that she is one of the Directors of the Great Rift Girls Educational Centre in Wareng County Council; and that on or about the **14 May 2015**, the 2nd – 6th Respondents stormed into the said school and caused mayhem, thereby interrupting learning sessions;

their claim being that the school was operating without a permit. She further averred that the 2nd – 6th Respondents attempted to arrest the school principal and dragged her towards their vehicle, which was parked about 200 metres away; and that because she was present and witnessed the incident in the company of her sister, the 2nd Petitioner, they immediately drove towards the 2nd-6th Defendants; and followed them to the offices of the County Government of Uasin Gishu (formerly the Municipal Hall).

[6] The 1st Petitioner further averred that at the County Offices, she demanded to know why the 2nd-6th Respondents had assaulted the principal; but they reacted by clamping her car, arresting and placing both herself and the 2nd Petitioner in custody, claiming that she was running a school without a single business permit; while the allegation against the 2nd Petitioner was obstructing arrest. She added that they were not given an opportunity to give any explanation, but were straightaway placed in the 1st Respondent's cells, where they were held for more than 5 hours before being charged and arraigned before the County Court.

[7] At paragraph 11 of her affidavit, the 1st Petitioner set out the charges levelled against her to be:

> **[a]** Trading without Single Business Permit contrary to by-law 1 as read with By-law 16(1) of the Municipal Council of Eldoret (Licensing of Premises and Traders) By-laws, 2009;
>
> **[b]** Failing to pay conservancy fee contrary to By-law 7 as read with By-law 18(1)A of the Municipal Council of Eldoret (Conservancy and Environment By-laws 2009.

[8] It was the averment of the 1st Petitioner that she denied the charges and was released on cash bail of **Ksh. 5,000/=.** She annexed to her affidavit copies of the Certificate of Registration for the school issued by the Ministry of Education **(Annexure TS 1),** the Charge Sheet filed before the County Court **(Annexure TS 2),** a copy of the Single Business Permit issued to the school by the Wareng County Council **(Annexure TS 4)** as well as copies of some of the witness statements, among other documents. It was the assertion that the 2nd-6th Respondents were actuated by malice in arresting and charging them as they did. She listed the particulars of illegality, irrationality, and impropriety in paragraph 30 of her affidavit as follows:

> **[a]** Storming the Great Rift Girls Educational Center without notice;
>
> **[b]** Causing mayhem and interrupting learning sessions at the said school;

[c] Assaulting the principal of the said school;

> **[d]** Arresting and detaining her in the cells for more than 5 hours without legal mandate or authority to do so;
>
> **[e]** Arraigning her in court on criminal charges without legal mandate or authority to do so;
>
> **[f]** Charging her with charges that have no legal foundation, force of law and or basis;
>
> **[g]** Despite having obtained all the requisite documents from the Ministry of Education and the Wareng County Council to run the school, the 1st-6th Respondents still harassed and bullied her without any justifiable cause and/or reason;
>
> **[h]** Despite the 1st-6th Respondents being aware that the said school is not within the jurisdiction of the defunct Municipal Council of Eldoret and hence not governed by the By-laws of the Municipal Council of Eldoret, they still stormed the school and harassed the principal, the students and other members of the school.

[9] It was on account of the foregoing that the 1st Petitioner claimed that she suffered damage for which she seeks compensation in this Petition. She added, vide her Further Supporting Affidavit sworn on **28**

May 2019 that she is a senior citizen and a holder of the Moran of the Burning Spear (MBS), and has served this country in various capacities including Member of Parliament and Ambassador; and therefore ought to have been treated with respect and dignity by virtue of the provisions of **Article 57(c)** of the **Constitution**. She annexed to the Further Affidavit a copy of her appointment letter to the ambassadorial post to augment her assertions.

[10] The 2nd Petitioner likewise relied on her affidavit sworn on **17 August 2015** and deposed that she is a retired Chief Inspector of Police (Prisons); and that she was in the company of the 1st Petitioner on **14 May 2015** when the incident complained of herein took place and was therefore subjected to the same treatment as the 1st Petitioner. She added that, on arrival at the County premises, and as she was trying to park their car, she was pulled and dragged out of the car and thrown to the ground by the 4th, 5th and 6th Respondents and thereby sustained an injury on her hand; and that she was thereafter detained alongside the 1st Petitioner at the 1st Respondent's cells for 5 hours before being arraigned before the County Court for obstruction contrary to By-law 6(3) as read with By-law No. 13 of the Municipal Council of Eldoret (Hawkers) By-laws, 2009.

[11] The rest of the 2nd Petitioner's averments were, by and large, similar to the averments of the 1st Petitioner herein. She also put in a Further Affidavit to introduce copies of her promotion letter dated **6 February 2013** and retirement notice dated **31 October 2013**. She likewise complained that, despite her age of 65 years, she was harassed and bullied by the 2nd-6th Respondents without justifiable cause; adding that her constitutional rights were violated, including her right under **Article 57(c)** of the **Constitution** to be treated with dignity and respect.

[12] Directions were given that the Petition be canvassed by way of written submissions and, to that end, ample time was given to the parties to enable compliance. It is noteworthy, however, that only Counsel for the Petitioners had complied as of **17 September 2019** when the matter was reserved for Judgment; and having perused and considered the Petitioners' written submissions, wherein a total of 8 issues were proposed by Counsel for the Petitioners for the Court's consideration, I would reduce the issues to the following:

> **[a]** Whether the Petition meets the threshold set in **Anarita Karimi Njeru vs. Republic** (supra);
>
> **[b]** Whether the Respondents had the powers, mandate and authority to arrest, charge and prosecute the Petitioners;
>
> **[c]** Whether the Respondents violated and or infringed the constitutional rights of the Petitioners;
>
> **[d]** Whether the Petitioners are entitled to compensation and if so, the quantum.

[13] I have given due consideration to the Petition, the averments in the Supporting Affidavit sworn by the 1st Petitioner on **17 August 2015** and the annexures thereto. I have likewise given paid due attention to the submissions made by Counsel for the Petitioner. I note from the court record that the interlocutory application for conservatory orders was compromised on **9 September 2015**, whereupon orders were made by consent staying the proceedings in **Eldoret Chief Magistrates Criminal Cases Numbers 954 of 2015: Republic vs. Tabitha Seii** and **Eldoret Chief Magistrate's Criminal Case No. 955 of 2015: Republic vs. Esther Seii**, pending the hearing and determination of this Petition; and therefore I deem any reference to the Notice of Motion in the Grounds of Opposition as spent and proceed to consider the issues abovementioned in turn.

[a] On whether the Petition meets the threshold set in Anarita Karimi Njeru Case:

[14] One of the points raised in the 1st Respondent's Notice of Preliminary Objection is the point that the Petition was not pleaded with the requisite specificity and therefore does no accord with the principle laid in **Anarita Karimi Njeru Case,** in which it was held that:

> **"…if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."**

[15] A perusal of the Petition does reveal that that the facts relied on by the Petitioners have been set out in paragraphs 1 to 19 thereof. The breaches complained of have also been set out at paragraphs 30 to 40 of the Petition. The provisions of the Constitution relied on by the Petitioners have, likewise, been clearly articulated in paragraphs 20 to 29 of the Petition. And, in Section D of the Petition, the Petitioners clearly set out the remedies sought by them. I would thus take the view that the Petition does meet the minimum threshold set for it and dismiss the argument that it is frivolous, vexatious or bad in law. In this regard, I am in full agreement with the position taken by **Hon. Odunga, J**. in **Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & Another** (supra) that:

> **"On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in Anarita Karimi Njeru vs. Attorney General (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation…"**

[16] Indeed, in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** the Court of Appeal expressed the view that:

> **"We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."**

> **[b] Whether the Respondents had the powers, mandate and authority to arrest, charge and prosecute the Petitioners:**

[17] The contention of the Petitioners herein is that they were arrested detained, charged and arraigned before the County Court by the 2nd-6th Respondents who are all employees of the 1st Respondent; and that their prosecution was undertaken by one **Mr. Kiptoo**, who is equally an employee of the 1st Respondent. The Petitioners challenged the Respondents' mandate on the basis of **Articles 242** and **157(6)** of the Constitution which bestow the powers of arrest and prosecution on the National Police Service and the ODPP, respectively.

[18] Nevertheless, the Petitioners acknowledged in paragraphs 15, 16 and 17 of the Petitioner that the 1st Respondent is the successor of the Municipal Council of Eldoret created pursuant to Section 12 of the repealed **Local Government Act, Chapter 265** of the **Laws of Kenya**; and that by dint of **Sections 259 and 260** of the **Local Government Act,** the 1st Respondent had powers and mandate to arrest and

prosecute any person offending its By-laws. In the premises, it is untenable for the Petitioners to, in the same vein, turn round and challenge the 1st Respondent's mandate and powers, particularly in the light of **Sections 7 31 and 33** of the Transitional and Consequential Provisions set out in the Sixth Schedule to the Constitution. Moreover, Section 6 of the Sixth Schedule expressly recognizes that:

> **"Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under this Constitution."**

[19] More importantly, **Section 18** of the Sixth Schedule is explicit that:

> **"All local authorities established under the Local Government Act (Cap. 265) existing immediately before the effective date shall continue to exist subject to any law that might be enacted."**

[20] Thus, it is manifest that the framers of the Constitution intended for there to be a smooth and phased out transition from the old constitutional order to the new with as little disruption as possible, appreciating that the process of enactment of all the requisite legislation needed to fully implement the new Constitution would require time. It is, consequently, my finding that, during the transition period, the Respondents had the mandate to arrest, charge and prosecute the Petitioners and therefore that the submission by their Counsel to the effect that this was a botched private prosecution in respect of which the laid down procedure was not adhered to is entirely without merit.

[21] As to whether the arrest and prosecution of the Petitioners was merited is an entirely different matter altogether. As the factual basis of the Petition was not controverted by the Respondents, there is no dispute that the Petitioners' arraignment was premised on the By-laws of the Municipal Council of Eldoret of 2009. The Petitioners annexed the respective charge sheets to their Supporting Affidavits. Thus, the Petitioners have every right to question their prosecution, noting that the same was commenced in 2015, long after the enactment and coming into force of the **County Governments Act, 2012**. Hence, it was the submission of Counsel for the Petitioners that the said By-laws do not exist; and that at any rate, the Respondents opted to rely on Grounds of Opposition and did not seize the opportunity to demonstrate validity of the said By-laws.

[22] Under the repealed **Local Government Act**, an elaborate procedure was set out in **Part XIV** for the formulation of By-laws; and by dint of **Section 204** of the Act, it was a requirement that such By-laws be approved by the Minister for Local Government to have the force of law. Hence, in **County Council of Murang'a vs. Douglas Kariuki Muchoki [2011] eKLR** it was held that:

> **"…The Appellant was enjoined to show the trial magistrate that it had obtained approval of the relevant By-laws from the Minister. It is not in dispute that the Appellant had impounded the Respondent's motor vehicle registration No. KAY 394 M on 28th November 2007 when Section 201A of the Local Government Act was already in operation. There was no evidence presented by the Appellant to the trial magistrate that it had submitted its By-laws to the Minister for fresh approval. On this score, the trial magistrate cannot be faulted. The Appellant did not produce a copy of the By-laws nor did it cite the gazette notice or any official publication indicating the approval of the By-laws."**

[23] Granted the primacy of the question as to the validity of the Municipal Council of Eldoret By-laws of 2009 to this Petition, it was imperative for the 1st Respondent to demonstrate, not only that the said By-laws were duly approved in terms of **Section 204** of the repealed **Local Government Act**, but also that the same were valid under the transitional provisions as **of 14 May 2015** when the two Petitioners were charged; which obligation has not been discharged herein.

[24] The foregoing notwithstanding, authorities abound to show that the best forum for testing the validity of a charge is the trial court itself. For instance, in **Erick Kibiwott & 2 Others vs. Director of Public**

Prosecution & 2 Others [2014] eKLR it was held that:

> **"…In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. Dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. There mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings…"**

[25] Accordingly, I subscribe to the view that since **Section 89(5)** of the **Criminal Procedure Act** affords the trial court an opportunity to interrogate the validity of a charge, it was a jumping of the gun, in my considered view, for the Petitioners to take up the issue as a constitutional matter. Indeed, in the case of **Murang'a vs. Douglas Kariuki Muchoki [2011] (supra)** that was drawn to my attention by Counsel for the Petitioners, the matter went through the due process of hearing before the lower court and was dealt with by the High Court in its appellate jurisdiction.

[26] Secondly, and more importantly, **Article 50(1)** of the **Constitution** provides that:

> **"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."**

[27] It is manifest therefore, that the essence of **Article 50(1)** of the Constitution is the concept of a fair hearing; and it envisages the context of the fair hearing to be a public hearing before **"…a court or, if appropriate, another independent and impartial tribunal or body…"** in which the accused is afforded all the safeguards set out in **Article 50(2)** of the **Constitution.** It is therefore immaterial at this point that the charge is hopeless; and that the criminal case is bound to fail. It is for the foregoing reasons that the trial court must be accorded deference it deserves as it ensures compliance with the aforestated provisions of **the Constitution**; because the Constitution itself recognizes that the subordinate courts, being its own creatures pursuant to **Article 162** and **169** of the **Constitution,** have the mandate and competence to hear and determine allegations such as the charges laid against the Petitioners herein.

[28] In the premises, I would follow **Michael Sistu Kamau & 12 Others vs. Ethics and Anti-Corruption Commission & 4 Others [2016] eKLR**, wherein a three-judge bench held that:

> **"The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial … "**

[29] It is also of paramount importance to stress the point that the decision of the Respondents to charge and prosecute was not a final decision. **Hence inHalsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74**the opinion is expressed, which I find apt, to the effect that:

> **"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may**

be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."

[c] <u>Whether the Respondents violated and or infringed the constitutional rights of the Petitioners:</u>

[30] The Petitioners alleged that their rights under **Articles 25, 27, 28, 29, 47 and 50** were violated by the manner of their arrest, incarceration, arraignment and prosecution. In respect of **Article 25** it was submitted that the trial of the Petitioners is unfair in so far as it is unlawful; while in respect of **Article 27,** the contention of the Petitioners was that they are entitled to equal protection of the law. They deprecated the manner of their arrest and confinement for 5 hours at the 1st Respondent's cells for 5 hours. The Petitioners further contended that they were not accorded fair administrative action as contemplated under **Article 47** of the Constitution; adding that Article **50** of the Constitution guarantees presumption of innocence until the contrary is proven, and that no one should be convicted for an act or omission that is not an offence in Kenya.

[31] However, as has been pointed out herein above, the whole essence of arrest, charge, arraignment and prosecution of the Petitioners was to ensure compliance with the constitutional dictates for a fair trial. Conviction or otherwise can only be arrived at the tail end of the process. At this point no conviction on the impugned By-laws has or can be registered. It is therefore premature to conclude that **Article 50** rights of the Petitioner have been violated. And, as pointed out herein above, the trial court is best placed to determine the validity of the charges preferred against the Petitioners pursuant to **Section 89(5)** of the **Criminal Procedure Code.**

[d] <u>Whether the Petitioners are entitled to compensation and if so, in what quantum</u>?

[32] In this regard, it was submitted that the two Petitioners are senior citizens of this country and retired civil servants who are deserving of dignified treatment by dint of **Article 57** of the **Constitution**. Accordingly, their Advocate submitted that they are entitled to compensation for the unlawful manner of their arrest, confinement and prosecution. Thus, Counsel urged that the Court considers awarding general, exemplary and aggravated damages amounting to **Kshs. 14,000,000/=** for the 1st Petitioner and **Kshs. 10,000,000/=** in the case of the 2nd Petitioner. He relied on **<u>Daniel Njuguna Muchiri vs. Barclays Bank of Kenya Ltd & Another [2016] eKLR</u>** and **<u>Standard Newspapers Limited & Anothr vs. Attorney General & 4 Others [2013] eKLR.</u>** It is noteworthy however that the **<u>Daniel Njuguna Muchiri</u>** case is distinguishable from the facts of this case in more ways than one. It was a civil suit not only for malicious prosecution, but also for defamation and abuse of the legal process. The plaintiff therein had been subjected to prosecution in a full trial for, i*nter alia*, stealing and obtaining money by false pretences; and had been acquitted by the trial court after a period of two years. The Defendant had also been accused of having placed a notice in the press, which was defamatory of the Plaintiff, to the effect that he had been charged with stealing and had appeared before the Chief Magistrate to answer the charges. In any case, the total award was **Kshs. 3,000,000/=.**

[33] Likewise, the **<u>Standard Newspapers Ltd Case</u>** involved facts totally different from the facts at play herein. The agents of the Respondents therein had invaded the premises of the Petitioner and proceeded to search and seize its equipment in circumstances that were found to have breached the Petitioner's rights

under **Articles 76 and 79** of the retired **Constitution**. The Court noted that the acts complained of took place over a period of an hour in which there was wanton destruction of the Petitioner's property. Nevertheless, the Court awarded a global sum of **Kshs. 5,000,000/=** and came to the conclusion that exemplary or aggravated damages, such as have been proposed herein, are not awardable in a constitutional matter. It held thus:

> **"…it is my finding that the order of exemplary damages is not an appropriate relief to grant in the circumstances. I note that considerable progress has been made towards the protection of fundamental rights and freedoms, including protection of the media, beginning with the promulgation of the Constitution of Kenya 2010 and the guarantees to the media contained therein. The situation has changed considerably for the better over the last seven years, and I see no need to 'punish' the State or unduly burden the tax payer by way of high awards in damages…"**

[34] Having found that the Petition is premature, it would be out of order to rule that the Petitioners are not entitled to compensation. The outcome of the lower court matter will determine which way the Petitioners would wish to go. As pointed out in the above excerpt from the **Michael Sistu Kamau Case**, the avenue for compensation by way of a claim for malicious prosecution is one of the options still available to the Petitioners. Nevertheless, in this particular Petition, it is my finding that no compensation is due for purposes of **Article 23(3)(e)** of the Constitution; and that were I to find for the Petitioners, I would have considered a global award of **Kshs. 500,000/=** for each of the two Petitioners to be reasonable in the circumstances.

[35] In the result, I find the Petition to be devoid of merit and the same is hereby dismissed; but given the circumstances, I order that each party shall bear own costs of this Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF DECEMBER 2019

OLGA SEWE

JUDGE