



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M’INOTI, J.J.A.)

CIVIL APPEAL NO. 1 OF 2015

HUSSEIN KHALID & 16 OTHERS.....APPELLANTS

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

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

THE DIRECTOR OF PUBLIC PROSECUTIONS...3RD RESPONDENT

*(Appeal from the judgment and decree of the High Court at Nairobi, (Lenaola, J.) dated 26th August 2014*

in

H.C. PET. NO. 324 OF 2013)

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JUDGMENT OF THE COURT

This appeal arises from the events that took place around the Parliament in Nairobi, on 14th May 2013. On that day a group of members of the civil society in Kenya calling themselves the “**Occupy Parliament**” movement, organised a public demonstration outside the Parliament with the aim of presenting a petition to members of the National Assembly and Senators, and to express displeasure at their attempt to award themselves hefty salary increments. The *Occupy Parliament* movement no doubt drew inspiration from the “**Occupy Wall Street**” protest movement that started in September 2011 in *Zuccotti Park, New York*, and soon spread to other cities in the USA and the world, as a rallying call against corporate corruption and an advocacy platform for increased civic participation, economic equality, and democracy. (See *David Graeber, The Democracy Project, A History, A Crisis, A Movement, Spiegel & Grau, New York, 2013* and *Noam Chomsky, Occupy, Penguin Books, 2012*).

In the days preceding the demonstrations in Nairobi, the *Salaries and Remuneration Commission (SRC)*, which is established by **Article 230** of the Constitution with among others, the mandate of setting and regularly reviewing remuneration and benefits of all *State officers*, had published in the gazette new but considerably reduced salaries for Members of Parliament. **Article 260** defines State office to include the office of a Member of Parliament and therefore the SRC maintained that the review of remuneration of holders of the office of Member of Parliament fell squarely within its mandate. The Members of Parliament were of a different mind and considered SRC’s action an affront to the institution and their

dignity. Accordingly, they awarded themselves even higher salaries and made provision for the same in the budget of the **Parliamentary Service Commission**. Not satisfied with the allocation they had made, they in addition approved a motion to amend the Constitution and disband the SRC, accusing it of gross misconduct and violation of the Constitution. They also proposed to amend the Constitution and exclude themselves from the definition of “State officers”.

These manoeuvres by the Members of Parliament infuriated members of the civil society, who, organising under the banner of “Occupy Parliament” movement, resolved to demonstrate and picket the Parliament until it withdrew its anti-SRC initiatives. Towards that end, they served upon the police the notification required under the **Public Order Act**, evincing their intention to hold their peaceful public demonstration and procession to Parliament on 14th May 2013. The demonstration appears to have gotten off to a peaceful start and was even escorted by the police. Matters however took a rowdy and unruly turn when the demonstrators deposited a big pig with a litter of piglets outside the Parliament. On the bodies of the pigs were painted the names of some Members of Parliament as well as a corruption of the initials “MP” (Member of Parliament) to “MPigs”. The demonstrators proceeded to pour blood on the pavements, which the pigs started licking with glee. Subsequently the demonstrators literally occupied the streets by sitting down thereon in numbers, and effectively blocking other road users from the streets.

At that point the police moved in and forcefully broke up the demonstration. The sixteen **appellants** in this appeal were arrested at about 2.30 pm and detained at Parliament Police Station until about 7.30 pm when they were charged with an offence under the **Prevention of Cruelty to Animals Act, Cap 360** and released on free bond. On 20th March 2013 they appeared before the **Chief Magistrates Court, Milimani** and were each charged in **Criminal Case No. 685 of 2013**, with three counts, namely offensive conduct conducive to a breach of peace contrary to **section 94(1)** of the **Penal Code**; taking part in a riot contrary to **section 78 (1) and (2)** as read with **section 80** of the Penal Code and cruelty to animals contrary to section 3(1)(c) as read with **section 3(3)** of the **Prevention of Cruelty to Animals Act**.

The appellant’s bid to challenge the constitutionality and validity of the charges was rebuffed by the trial court after which they filed **Constitutional Petition No. 324 of 2013** in the High Court against **the Attorney General (AG), the Inspector General of Police (IG) and the Director of Public prosecutions (DPP)**, seeking a raft of remedies, among them a declaration that their arrest and detention was a violation of their rights under **Article 32** (freedom of conscience, religion, belief and opinion), **Article 33** (freedom of expression), **Article 36** (freedom of association), **Article 49** (the rights of an arrested person) and **Article 50** (fair hearing); a declaration that the charges against them were in contravention of their right to fair hearing and therefore unconstitutional; a declaration that the provisions of the Penal Code under which they were charged were vague, overly broad and unconstitutional limitation of their rights; and lastly an order quashing their criminal trial. The High Court subsequently stayed the trial of the appellants pending the hearing and determination of the petition.

The respondents opposed the petition through a replying affidavit sworn by **Inspector of Police, George Oduor Otieno** on 8th July 2013. They denied violation of any of the appellants’ constitutional rights and fundamental freedoms. They also contended that the arrest and prosecution of the appellants was justified and within the Constitution and the law.

**Lenaola, J.** (as he then was) heard the petition and dismissed the same by a judgment dated 26th August 2014. The learned judge held that to justify interference with the DPP’s constitutional power to prosecute, the court must be satisfied that he has not paid regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process as required by **Article 157(11)**; that the appellants had not established violation of Article 157 (11) by the DPP; that the police were entitled to arrest the appellants without warrants of arrest; that the arrest and detention of the appellants was within the law and did not constitute a violation of their rights and fundamental freedoms; that whether the appellants were informed of the reason for their arrest and of the charges against them in sufficient detail to enable them defend themselves were matters for the trial court; that the trial of the appellants had not commenced and that they therefore had an opportunity to apply and obtain from the prosecution any evidence they deemed necessary for their defence; and that the Penal Code provisions under which the appellants were charged were not unconstitutional. Accordingly, the learned judge declined to stop the

appellant's prosecution, thus provoking this appeal.

The appellants challenge the judgment of the High Court on some 14 grounds all of which they have addressed under four heads contending that the High Court erred by abdicating its constitutional duty or fettering its discretion; by ignoring or misapprehending the evidence on record; by concluding that their trial had not commenced; and by failing to properly determine, under Article 24, the constitutionality of the impugned laws.

Prosecuting the appeal on behalf of the appellants, **Mr Wanyoike**, learned counsel submitted that the learned judge fell into error by restricting his inquiry into the constitutionality of the appellants' prosecution only to Article 157(11), which obliges the DPP, in exercising his prosecutorial powers, to take into account public interest, interests of the administration of justice and the need to prevent abuse of the legal process. It was counsel's contention that the appellants had invoked the unlimited jurisdiction of the High Court under **Article 165(3)** for the determination of whether the impugned laws were inconsistent with or in contravention of the Constitution and whether their prosecution was in contravention of the Constitution. They had also invoked the court's unlimited supervisory jurisdiction over subordinate courts under **Article 165(6)**. In the appellant's view, by confining itself to Article 157(11) of the Constitution, the High Court improperly fettered its discretion or abdicated its constitutional duty. Relying on the judgments of the High Court in **Martin Nyaga Wambora & 3 Others v. Speaker of the Senate & 6 Others [2014] eKLR**, and in **Council of Governors & 3 Others v Senate & 53 Others [2015] eKLR**, the appellants submitted that Article 165(3) imposes a duty on the High Court to determine the constitutionality of the acts and laws they had complained of, and that Article 157(11) does not limit the supervisory jurisdiction of the High Court, though the court can properly take it into account.

The appellants further submitted that Article 157(11) was relevant in determining whether the DPP should initiate or continue a prosecution and that it is not the standard against which the court is to determine the constitutionality of a statute or a prosecution. They also faulted the court for failing to make any finding, even on the basis of Article 157(11), whether their prosecution was in public interest, in the interest of the administration of justice or an abuse of the legal process. They contended that their prosecution was in fact in violation of Article 157(11) because there was no formal decision to prosecute them; it took five hours for the police to decide what offence to charge them with; and that they were charged with the public order offences whilst the reason given for their arrest was cruelty to animals.

Turning to the second broad issue, the appellants submitted that the High Court erred by ignoring pertinent evidence that they had placed before it. They argued that by holding that there was no evidence to show whether or not they were given reasons for their arrest, the court ignored the deposition in their affidavit that they were not given such reasons. Similarly, it was contended that by holding that they were properly arrested without a warrant, the court ignored the evidence that after arrest, the appellants were charged only with cruelty to animals, which offence required a warrant of arrest. In the same vein the appellants submitted that the High Court ignored or misapprehended the evidence when it concluded that they were informed of the charges against them in sufficient detail; that the issue of defective charges did not raise constitutional issues; and that they ought to raise some of the constitutional issues before the trial court, whereas they had already done so but the trial court had declined to determine the same. On the authority of the decisions of this Court in **Republic v. Edward Kirui [2014] eKLR** and **Cecilia Gathoni & Another v. George Kariuki Kabugu [2013] eKLR**, we were urged to find that failure to consider evidence is a reversible error.

Next the appellants faulted the learned judge for concluding that their trial had not commenced and therefore their right to receive evidence in possession of the prosecution was not violated. They submitted that for purposes of Article 50, the trial commences when the accused person is charged in court.

Lastly the appellants submitted that the High Court erred by upholding the impugned laws as constitutional without undertaking the inquiry and analysis required by **Article 24**. It was submitted that before the court could determine that the impugned laws constitutionally limited their rights and fundamental freedoms, the High Court was obliged to determine whether the limitations were reasonable and justifiable in an open and democratic state based on human dignity, equality and freedom based on

the nature of the right and fundamental freedom that was limited; the importance of the limitation, the nature and extent of the limitation; whether enjoyment of the rights and fundamental freedoms would prejudice the rights and fundamental freedoms of others; and whether there are less restrictive means of achieving the purpose of the limitation.

The AG opposed the appeal submitting that none of the appellants' constitutional rights and freedoms had been violated. On the legality of the stoppage of the demonstration, it was submitted that the same was only stopped after it became rowdy and the demonstrators blocked the roads, thus inconveniencing other road users. The AG added that once the demonstration had ceased to be peaceful, the police were entitled to stop it for the sake of public order. He relied on the ruling of this Court in **Ferdinand Ndung'u Waititu & 4 Others v Attorney General & 9 Others, CA No. Nai. 140 of 2016** and urged that the appellants had a duty to ensure that their demonstration was conducted in an orderly manner. As regards freedom of conscience, religion, belief and opinion, and freedom of association, it was submitted that the appellants had failed to demonstrate how those rights were violated. On freedom of expression, the AG relied on the decision of the Supreme Court of India in **Pradha Dutt v. Union of India, 1 SC AIR 1982** and submitted that freedom of expression is not absolute and is subject to the rights and reputations of others. In this case, it was submitted, the right was properly curtailed when the appellants misconducted themselves at parliament building.

Turning to the appellants' right to be informed promptly of the reasons for their arrest, the AG submitted that they were in fact informed of the reasons for their arrest with reasonable promptness taking into account the riotous conditions under which they were arrested. Emphasis was laid on the fact that they were released later the same evening on free bonds, in which the offence for which they were to be charged was clearly indicated.

On the right to fair hearing, the AG argued that the appellant's trial had not commenced and therefore the right was not violated. It was further contended that the charges against the appellants were neither unconstitutional nor defective. On the authority of the judgment of the High Court in **William S. K. Ruto & Another v. Attorney General, HCCC No. 1192 of 2005**) and of this Court in **Meixner & Another v. Attorney General, CA No 131 of 2005**, it was submitted that it was the trial court which was best suited to deal with questions of defect of the charge or sufficiency of evidence to prove the offences alleged against the appellant. Lastly the AG submitted that the appellants had failed to establish the unconstitutionality of the provisions under which they were charged, which in any event were presumed to be valid and constitutional.

The IG and DPP filed joint submissions in which they opposed the appeal and supported the submissions made by the AG. They added that the arrest of the appellants without a warrant of arrest was lawful and permitted by section 29 of the Criminal Procedure Code; that the charges read to the appellants contained sufficient details to enable them defend themselves and did not violate their right to fair hearing; that whether or not the demonstration was lawfully stopped and whether or not the charges against the appellant were illegal or defective were matters for determination by the trial court; that the provisions under which the appellants were charged were not inconsistent with the Constitution; and lastly that the High Court properly declined to quash the charges against the appellants and to stop their trial because it was not demonstrated that the DPP had acted unlawfully.

That then is the summary of the background and the respective positions of the parties. To begin with, it is necessary to point out the close correlation between freedom of expression, freedom of association, and freedom of assembly, demonstration, picketing and petition. More often than not, freedom of association and freedom of assembly, demonstration, picketing and petition are illusory if they are straightjacket and treated in isolation and without regard to each other and to freedom of expression. The freedom of assembly, demonstration, picketing and petition guaranteed by Article 37 cannot have full meaning without freedom of association guaranteed by Article 36 and freedom of expression guaranteed by Article 33. While it is true that freedom to demonstrate, picket and petition may be exercised by a lone individual without vocal expression as in the case of a lone demonstrator with a placard, it is normally actualised and meaningful when exercised in association with others and through expression which may be by pure speech or symbolic speech such as placards, handbills, leaflets, T-shirts, and possibly, without deciding,

even messages on the bodies of pigs. Thus freedom of assembly, demonstration, picketing and petition will be emasculated if it is not underpinned by freedom of association and freedom of expression.

It must be emphasised that the freedom of expression, of association and of assembly, demonstration, picketing and petition are not among the fundamental rights and freedoms that cannot be limited under Article 25. Specifically freedom of assembly, demonstration, picketing and petition that is guaranteed by Article 37 has an important internal qualifier, namely, to enjoy it, a person must be peaceful and unarmed. It is plainly obvious to us that in terms of Article 37, persons who are not peaceful or who are armed cannot claim to be entitled to freedom of assembly, demonstration, picketing and petition.

The Public Order Act, Cap 56 was enacted to provide for, among others, public order. It has provisions for regulation of public gatherings, meetings and processions. **“Public gathering”** is defined in **section 2** to mean a public meeting, a public procession and any other meeting, gathering or concourse of ten or more persons in any public place. On the other hand the Act defines **“public place”** to mean any place to which the public or any section thereof are entitled or permitted to have access whether on payment or otherwise.

Consistent with the Constitution, **section 6(1)** of the Public Order Act makes it an offence for a person to attend a public meeting or procession while armed with an offensive weapon. A person desiring to hold a public meeting or procession is required to notify the regulating officer at least 3 days before the meeting of the venue, date and time of the meeting. In the case of a procession the person has also to notify route to be used. **Section 5(7)** of the Act specifically requires the organizer of the meeting or procession or his agent to be present throughout and to assist the police in the maintenance of peace and order.

**Section 5(8)** sets out the circumstances under which a public meeting or procession may be stopped, thus limiting the freedom of assembly, demonstration, picketing and petition guaranteed by Article 37. The provision empowers the regulating officer or a police officer of or above the rank of inspector to stop or prevent the holding of a public meeting or procession in which there is clear, present or imminent danger of breach of peace or public order. Such officer is further empowered to give or issue orders, among others, for the dispersal of the meeting or procession, having regard to among others, freedoms of others. Failure to comply with such an order is an offence and any person who continues to take part in such meeting or procession is guilty of the offence of taking part in an unlawful assembly under **Chapter IX** of the Penal Code and is liable for imprisonment for one year.

The offences with which the appellants were charged under the Penal Code, namely offensive conduct conducive to breaches of peace contrary to 94(1) of the Penal Code and taking part in a riot contrary to section 78 (1) and (2) as read with section 80 of the Penal Code are all in Chapter IX of the Penal Code. Those provisions must be read together with the Public Order Act in determining their constitutionality. Section 94 (1) of the Penal Code Provides Thus:

**“94. (1) Any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is 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 both.**

**(2) In this section “public gathering” means-**

**(a) any meeting, gathering or concourse of ten or more persons in any public place; or**

**(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.”**

On the other hand section 78 of the Penal Code provides:

***“78. (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 neighbourhood 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.***

***(3) When an unlawful assembly has begun to execute the purpose for which it assembled by a breach of the peace and to the terror of the public, the assembly is called a riot, and the persons assembled are said to be riotously assembled.”***

In this appeal the appellants duly complied with the notification requirement of the Public Order Act and it is common ground that the meeting or procession started peacefully with police escort but was stopped and the appellants arrested after it became rowdy following the deployment of pigs and occupation of the streets by the appellants. It is not for us to determine whether appellants’ conduct constituted offensive conduct conducive to breaches of peace or taking part in a riot. The issue before us is whether the arrest of the appellants was a violation of their freedom of assembly, demonstration, picketing, petition and by extension association and expression, and whether the provisions of the Public Order Act and the Penal Code that allow the police to stop a public meeting or procession and to prosecute them are unconstitutional.

While it is true that the High Court did not undertake the sequential analysing required by Article 24 before determining whether the impugned provisions of the Public Order Act and the Penal Code are unconstitutional, a plain reading of that Act and the Code against Articles 24 and 37 does not persuade us that impugned provisions are unconstitutional. As we have noted, the freedom of assembly, demonstration, picketing and petition guaranteed by Article 37 is circumscribed by the express requirement of the Constitution that it must be enjoyed peacefully and by persons who are unarmed. The issue before the trial court will be whether the appellants conducted themselves in a public place in a manner that was not peaceful.

The Public Order Act allows citizens to freely assemble, demonstrate, picket and petition authorities subject to the notification requirement. In our estimation the notification requirement is a reasonable measure for the police to ensure that the meeting or procession is conducted peacefully and that those involved in it are able to exercise their constitutional rights while at the same time not infringing on the rights of other persons, who have an equal right to access public spaces but are otherwise not involved or interested in the meeting or demonstration. The Act and the Code do not allow stoppage of meetings and processions unless there is clear, present or imminent danger of breach of peace or public order. The meeting or procession can be stopped only when it ceases being peaceful as required by the Constitution.

Turning to the criteria under Article 24 of the Constitution, there can be no dispute that the limitation is supplied by legislation, the Public Order Act and the Penal Code, which are laws within the meaning of that Article. By its nature freedom to assemble, demonstrate, picket and petition, is critical to a free society because it makes it possible for citizens to gather and express their views, stir public debate, search for truth, and participate in public affairs. Hence the basis of its limitation must be carefully scrutinized. Having regard to the following considerations namely; that by constitutional edict freedom of assembly, demonstration, picketing and petition must be enjoyed peacefully; the public order interest that informs the limitation of the right, namely the need to avoid disorder, violence to citizens, damage to property; the fact that under the Public Order Act and the Penal Code the right is limited only when there is clear, present or imminent danger of breach of peace; the need to ensure that the enjoyment of the appellants’ right does not prejudice the rights and fundamental freedoms of other users of public spaces and thoroughfares who are not involved in the meeting or procession; we hold that the impugned provisions of the Public Order Act and Penal Code are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. We need only point out that many democratic polities have similar public order legislation, such as the Public Order Act, 1986 of the United

Kingdom and the Regulation of Gatherings Act, 1993 of South Africa.

Having concluded that the stoppage of the appellants' meeting or procession was not a violation of their rights under Article 37 and that the provisions of the Public Order Act and the Penal Code under which the procession was stop are not unconstitutional, we must also conclude that the appellant's freedom of association and expression, which in this instance depended heavily on and were intertwined with their right to assembly, demonstrate, picket and petition were also not violated.

In view of what we have stated above, we would agree with the appellants that it was a misdirection on the part of the High Court to restrict its consideration of the petition to only whether the DPP, in the exercise of his powers, had paid due regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process as required by Article 157(11). Those provisions are more relevant where it is alleged that a prosecution is in bad faith and motivated by ulterior motives, even if *prima facie* it is lawful. In a case like the present where the appellants' complaint is that their prosecution is a violation of their rights and fundamental freedoms and that the legislation under which the prosecution is founded is equally inconstant with the Constitution and therefore null and void, the High Court is expected to evaluate the constitutionality of the impugned actions and legislation on the basis of the criteria set by Article 24 of the Constitution. Clearly the court erred by stating that it can ***only*** intervene where the DPP has flouted Article 157(11).

The appellants also contend that the charges against them based on the provisions of sections 78 and 94 the Penal Code are defective and unconstitutional. They aver that the charges do not contain sufficient detail and particulars and the statutory provisions are vague, uncertain and lacking in clarity. We would readily agree with the High Court that whether the charges are defective or not is an issue for the trial court. There are sufficient provisions in the Criminal Procedure Code, such as sections 89, 137, and 214 on how the charge should be framed, amended to comply with the law, and even dismissal of a charge that does not disclose an offence. There was no basis upon which the High Court could be requested to address such issue, which properly belong to the province of the trial court. (***See Wliiam S. K. Ruto & Another v. Attorney General*** (supra).

As to the alleged lack of clarity of the offences, we do not find the two provisions to be vague or uncertain. The ingredients of the offences of offensive conduct conducive to breaches of peace and taking part in a riot are clear enough for the appellants to know what conduct constitutes the offence and for the prosecution, what it has to prove. The alleged lack of definition of what constitutes breach of peace is more apparent than real, granted the many cases that have set out what constitutes a breach of peace, such as ***Mule v. Republic [1983] KLR 246*** and ***Tolley v. Republic [1983] KLR 315***.

Next is the issue whether the appellants' arrest was unlawful because of lack of a warrant of arrest. Section 29 (b) of the Criminal Procedure Code allows a police officer to arrest without a warrant, any person who commits a breach of peace in his presence. Similarly under the First Schedule of the Criminal Procedure Code, the offence of offensive conduct conducive to breach of the peace and riot are categorized as cognizable offence for which the police can arrest without a warrant. Accordingly and in view of the foregoing provisions, we do not see how the High Court erred by holding that the police could arrest the appellants without a warrant of arrest.

The appellants also contend that their right, as arrested persons, to be informed promptly of the reason for their arrest, which is guaranteed by Article 49, was violated. They contend that they did not know the reason for their arrest until about 7.30 pm, which was not prompt enough. The High Court held that there was no evidence that the right was violated and that in any case the appellants would be at liberty to raise the issue before the trial court.

It is clear enough that the Constitution demands that an arrested person to be informed promptly of the reason for his arrest. The rationale of the requirement is to be found in the premium that the Constitution, in Article 29, places on freedom and security of the person, and in particular the right not to be deprived of freedom ***arbitrarily*** or ***without just cause***. However in determining whether the appellants were informed promptly of the reasons for their arrest, regard must be had to the numbers of the arrested

persons and circumstances under which they were arrested. The 16 appellants were part of a large number of demonstrators. They have deposed that their arrest was conducted, to say the least, in a rather chaotic manner, involving the lobbing of teargas canisters, use of water cannons, attempts to secure several pigs that were let loose in the streets, and generally running helter-skelter by the demonstrators, the pigs and the police. In these circumstances and taking into account the numbers of suspects involved, we would not say that the appellants were not informed with reasonable promptness why they were under arrest. There is also the all-important constitutional question whether, even if we were to find that the appellants were not given the reasons for their arrest with due promptness, the interest of the administration of justice would be best served by quashing the appellants' prosecution or in their making a claim for damages for violation of a constitutional right. In the peculiar circumstances of this case, we prefer to take the view that the delay, if any, in informing the appellants that they were arrested for an offence under the Prevention of Cruelty to Animals Act should not vitiate the prosecution because the appellants had known the reasons for their arrest a few hours later and long before they were required to plead.

With respect we do not think there is any merit in the appellants' argument that they can only be prosecuted for offences under the Prevention of Cruelty to Animals Act because that is the only reason they were given for their arrest. In effect the appellants contend that, to be prosecuted for the offences under the Penal Code, they must have been informed that they were being arrested for those offences at the time of their arrest. It is possible, once an accused person has been arrested and informed of the reason for that arrest, to charge him with a different offence once the investigations are complete and disclose the new offence.

The provisions of **section 214** of the Criminal Procedure Code that allow the court to change, amend or substitute charges or to add a new charge anytime before the close of the prosecution case would be otiose if the contention of the appellants were correct, simply because the suspect would not have been informed of the new or substituted charge at the time of arrest. Similarly too the provisions of **section 179** of the same Code which empower the court to convict a suspect for a lesser offence which he was not charged with or informed of at the time of his arrest, would be dead letter. (See **Robert Mutungi Muumbi v. Republic, Cr App. No. 5 of 2013**).

Lastly is the appellant's contention that the High Court erred by holding that their trial had not commenced whilst they had already taken plea. What we understand the learned judge to mean is that for purposes of availing to the appellants the evidence in possession of the prosecution to enable them prepare their defences, the presentation of the prosecution case had not started. Accordingly, he found that there was sufficient time for the appellants to be supplied with that evidence. **Article 50(2) (j)** guarantees an accused person the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. That right had been recognised in this jurisdiction even before the promulgation of the current Constitution. (See **George Ngodhe Juma & 2 Others v. Attorney General, HC Misc. Cr. App. No 345 of 2001** and **Thomas Patrick Gilbert Cholmondeley v. Republic, Cr App. No. 116 of 2007**). In the latter case, this Court stated that the right of an accused person to access evidence in the possession of the prosecution is a continuing right, from the pretrial stage and as and when the prosecution obtains more evidence in the course of the trial.

We reiterate that view and add that we do not read Article 50(2)(j) to mean that the evidence must be availed to the accused person even before he has taken a plea. If that is possible, well and good. But as normally happens, all the evidence against the accused person is not available at the time of the plea. We would read the provision to require availing the evidence to the accused person, as early as is practicable but at any rate in advance of the presentation of the prosecution case, which is what the learned judge held.

It should be remembered that when the charges were read to the appellants, they objected to the same before the trial court and when that court overruled their objection, they moved to the High Court and obtained an order staying the proceedings. As of now therefore the prosecution has not adduced any evidence against the appellants and it would be a grave injustice to stop the prosecution on the basis that the appellants have not been given the evidence in possession of the prosecution even before the prosecution has started presenting its case.

Ultimately we are not persuaded that the High Court misdirected itself in a manner or to an extent that would justify interfering with its judgment. This appeal is accordingly dismissed in its entirety. The prosecution shall in any event avail to the appellants the evidence required under Article 50(2) (j) before presentation of the prosecution case. We make no orders on costs. It is so ordered.

**Dated and delivered at Nairobi this 22nd day of September 2017**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**