REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga CJ, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ)

PETITION NO. 21 OF 2017

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

(Being an Appeal from the Judgment and decree of the Court of Appeal at Nairobi dated 22nd September 2017 in Civil Appeal No.1 of 2015)

JUDGMENT

I. INTRODUCTION

[1] This is an appeal filed as of right under Article 163(4)(a) of the Constitution against the decision of the Court of Appeal at Nairobi (*Makhandia, Ouko & M'Inoti JJ.A*) dated 22nd September 2017 in *Civil Appeal No.1 of 2015*. The Appellants seek several declaratory reliefs against alleged violations of their constitutional rights arising from their participation in a demonstration dubbed "*Occupy Parliament*" held on 14th May 2013. In particular, they seek the following orders:

(i) This Appeal be allowed.

(ii)A declaration that the arrest and detention of the Appellants violated their rights under Articles 29, 32, 33, 36, 49 and 50 of the Constitution hence it was unconstitutional.

(iii) A declaration that the charges leveled against the Appellants are illegal and unconstitutional because they fail to meet the standards set out in Article 50 of the Constitution.

*(iv) An order to bring to the Supreme Court for quashing of the trial of Criminal Case No. 685 of 2013 (**Republic versus William Omondi and 16 Others**).*

(v) A declaration that sections 78(1) and (2) and 94(1) of the Penal Code Cap. 63 of the Laws of Kenya are unconstitutional therefore null and void.

(vi) Costs of this Appeal.

(vii) Any other or further relief that this Honourable Court may deem fit and just to grant.

II. BACKGROUND

[2] The Appellants, together with other members of the Civil Society Organization, and some members of the public organized demonstrations dubbed "Occupy Parliament' to protest the actions of the then Members of Parliament (MPs) to scrap out the Salaries and Remuneration Commission (SRC) and inflate their salaries and benefits. They duly notified the 2nd Respondent of their intentions, and he did not raise any objection.

[3] On 14th May, 2013, the demonstrations started at Freedom Corner in Uhuru Park, Nairobi, through the streets of the City. Reaching Parliament buildings, the demonstrators sat down and some of them made speeches criticizing the alleged greed and actions of the MPs. By the gates of Parliament were pigs on whose bodies were painted a 'corruption' of the initials *"MP"* to *"MPigs"* and names of some Members of Parliament.

[4] Later on, the demonstrations were dispersed by the police with the Appellants being arrested. They were detained at Parliament Police Station until the hour of

7pm when they were informed that they will be charged with the offence of cruelty to animals. It is alleged that during the period of detention, the Appellants and their counsel were given conflicting information relating to the action the police intended to take; ranging from being told they would be released unconditionally, charged with offences relating to cruelty to animals, or charged with offences relating to offensive conduct conducive to a breach of peace. They were subsequently released on free bond and required to report back to Parliament Police Station on 17th March 2013.

[5] On 17th March 2013, on return to the police station, they were instructed to report to the Chief Magistrate's Court in Milimani on 20th May 2013 to be arraigned. They duly appeared before the Chief Magistrate's Court on the set date and were charged with the following offences: (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 and (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*.

[6] The Appellants objected to taking plea, raising issues of violations of their constitutional rights during their demonstrations, arrest and arraignment in court. They urged that the Magistrate's Court finds invalid the charges and/or refer the constitutional questions they raised to the High Court. The Court in a ruling made on 26th May 2013, dismissed the Appellants' requests and directed that they take plea. This Ruling aggrieved the Appellants and they sought recourse in the High Court.

a) High Court

[7] They filed a *Constitutional Petition No.324 of 2013* against the Respondents arguing that the stoppage of the demonstrations, the manner of their arrest, detention, charge, arraignment and plea taking, the manner the charges were

stated to the Petitioners, the various provisions under which they are charged and the totality of violations is illegal and unconstitutional and therefore rendered their continued prosecution unconstitutional.

[8] The Appellants' common case was that the 2nd Respondent's actions in stopping the demonstration was illegal and unconstitutional because the organizers of the demonstration had notified the police of the intention to hold it in accordance with the law and that the demonstrations were being conducted in furtherance of fundamental rights under Articles 33 and 37 of the Constitution. They urged that the action by police in violently disrupting the demonstration was untenable and illegal under the Constitution. In addition, that their rights under Article 49 of the Constitution were violated in the manner of arrest, detention without charging and in some cases violently so, and in lack of informing them of the reasons for their arrest and detention until 7.30 pm on 14th May 2012.

[9] They also challenged the charge relating to *cruelty to animals* on the grounds that the language of the charge is vague and uncertain and that their deprivation of freedom on the basis of such a charge violates Article 29 of the Constitution. The Appellants justified their conduct under Article 24 of the Constitution arguing that the offence of breach of peace and that of riot sought to limit the freedoms of expression, assembly, demonstration and picketing against Article 24 of the Constitution.

[10] As a consequence, they sought the following reliefs:

a) *A declaration that the arrest and detention of the Petitioners violated their rights under Articles 32, 33, 36, 49 and 50 of the Constitution;*
b) *A declaration that the charges levelled against the appellants and 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.*

[11] The petition was opposed by the Respondents who asserted that the arrest, detention and prosecution of the Appellants were neither unlawful nor unprocedural and that the petition aimed at circumventing justice. In particular, the 2nd Respondent argued that the investigations, arrest and arraignment of the Appellants was done in accordance with Article 157(4), (6) and (10) as well as Article 245(5) of the Constitution and that all the issues raised in the petition were matters for the trial Court.

[12] The High Court, *Lenaola J,* (*as he then was*) in a Judgment delivered on 26th August 2014 dismissed the petition holding *inter alia* that the police were justified to arrest without warrant, that the right to fair trial was not violated and that the constitutionality of the 2nd Respondent's actions and matters raised by the Appellants were germane to the trial itself and it was not for the Constitutional Court (High Court) to go through the merits and demerits of the case as that is the duty of the trial Court. Further, that the fact that the charge sheet is defective/incompetent does not raise constitutional issues and the Magistrates Court was competent to deal with the issues and that the Constitutional Court may only interfere where it is shown that under Article 157(11) of the Constitution,

criminal proceedings have been instituted for reasons other than enforcement of criminal law or otherwise abuse of the court process.

b) Court of Appeal

[13] Further aggrieved, the Appellants appealed to the Court of Appeal raising four main grounds, to wit, that the High Court erred in *(i) abdicating its constitutional duty or fettering its discretion, (ii) by ignoring or misapprehending the evidence on record, (iii) by concluding that the trial had not commenced and (iv) by failing to properly determine, under Article 24, the constitutionality of the impugned laws*.

[14] In a judgment delivered on 22nd September 2017, the Court of Appeal stated that it was not its role to determine whether the Appellants' conduct in the demonstrations constituted offensive conduct conducive to breaches of peace or taking part in a riot. It held that the only issues before it were: *whether the arrests 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.*

[15] The appellate Court held that despite the High Court having failed to undertake the sequential analyzing 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 did not persuade the appellate Court that they were unconstitutional. The Court found that the impugned provisions are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and 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. It further held that the issue of whether or not the charges are

defective is an issue for the trial Court and that there was no merit in the Appellants' argument that they can only be prosecuted for offences under the Prevention of Cruelty to Animals Act just because that was the only reason for their arrest. It also dismissed the allegations of being arrested without a warrant of arrest as the alleged offence was a cognizable offence.

[16] As regards allegations of breach of Article 49 for not being promptly informed of the reasons for their arrest, the Court held that the delay 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. Considering Article 50(2)(j), the Court held that the provision does not mean that the prosecution's evidence must be availed to the accused person even before they have taken a plea. In the Court of Appeal's opinion, the provision required evidence to be availed to the accused person as early as possible but at any rate in advance of the presentation of the prosecution case. Hence, it found that the prosecution having not yet adduced any evidence against the Appellants, it would be a grave injustice to stop the prosecution on the basis that the Appellants had not been given the evidence in possession of the prosecution even before the prosecution had started presenting its case.

[17] Ultimately, the Court of Appeal dismissed the appeal in its entirety. The Appellants have now moved this Honourable Court on a further appeal under Article 163(4)(a).

III. PETITION BEFORE THE COURT

[18] The appeal before this Court is premised on 11 grounds which we summarize thus: that the Court of Appeal erred in law in:

(i) failing to determine issues properly raised by the Petitioners in the Petition;

(ii) determining that the police were justified in arresting the Appellants without a warrant;

(iii) finding that the Appellants had not demonstrated what prejudice they suffered as a result of the alleged violation of their Article 49 rights and that their right to a fair trial were not breached as provided by Article 50 of the Constitution;

(iv) finding that a defective or incompetent charge does not raise a constitutional issue in that Articles 50(2) and 29(a) of the Constitution can be a basis of invalidating a defective/incompetent charge;

(v) finding that the stoppage of the demonstrations by the police was not illegal and unconstitutional, and that it was a justifiable limitation of a right in an open and democratic society under Article 24 of the Constitution;

(vi) determining that the statutory provisions under which the Petitioners were charged were not unconstitutional; and

(vii) failing to consider and determine the issue whether the refusal by the Magistrate to hear and determine the constitutional challenge was improper.

[19] The Appellants anchor their petition on Articles 29, 32, 33, 36, 49, 50, 157 and 163(4)(a) of the Constitution; sections 78(1) and (2) as read with section 80 and 94(1) of the Penal Code, and section 8 of the Magistrates Court Act, 2016. They delineate the following issues for determination:

1. *Whether the arrest, detention and possible prosecution against the Appellants contravenes the Petitioners' rights enshrined in Articles 32 (freedom of conscience, religion, belief and opinion), 33 (freedom of expression), 36 (freedom of association), 49 (rights of arrested persons) and 50 (fair hearing) of the Constitution and are therefore unconstitutional.*

2. *Whether the manner in which charges were brought and the charges levelled against the Appellants are unconstitutional and illegal as they fail to meet the standards set out in Article 50(2)(j) of the Constitution.*
3. *Whether sections 78(1) and (2) and 94(1) of the Penal Code, Cap 63 of the Laws of Kenya are unconstitutional for being vague, too broad and unclear therefore null and void.*
4. *Whether the failure of the Magistrate to hear and determine a constitutional question is/was unconstitutional.*

IV. SUBMISSIONS

(a) Appellants'

[20] The Appellant's filed their written submissions on 15th February 2018. The submissions run into 52 pages. We consider this to be very verbose and repetitive, a fact acknowledged by the Appellants themselves when '*for brevity'* they collapsed the 11 grounds of appeal into only six. We reiterate that parties and counsel should embrace brevity and precision in their submissions before this Court and adhere to the directions of the Court, particularly by the Deputy Registrar, as regards the content and limit of their pleadings and/or submissions.

[21] The Appellants case was canvassed before the Court by Counsel Messrs Waikwa Wanyoike, Ochiel Dudley and Ms Christine Nkonge. Their submissions were anchored on the following six issues:

(a) *Whether the Magistrate's failure to apply the Constitution to the questions raised in the trial was improper.*
(b) *Whether the Petitioners' arrest without informing them of the reasons for arrest was unconstitutional and contrary to Article 49(1) of the Constitution.*

(c) *Whether the Respondents' arrest of the Appellants for a non-cognizable offence without a warrant of arrest was unlawful and arbitrary.*

(d) *What is the effect of the illegalities on the validity of the Petitioners' prosecution?*

(e) *Whether failure to inform the Petitioners promptly and in detail of the charges against then was unconstitutional and contrary to Article 50(2)(n).*

(f) *Whether the 2nd Respondent's disruption and prohibition of the demonstrations on 14th May 2013 was unconstitutional and unlawful.*

(g) *Whether sections 78(1) and (2) and 94(1) of the Penal Code, Cap 63 as well as section 3(1)(c) of the Prevention of Cruelty to Animals Act, Cap 360 are unconstitutional for being vague and for want of mens rea.*

[22] On the first issue, it was submitted that both the High Court and the Court of Appeal erred in upholding the Magistrate Court's stance that it could not adjudicate on the constitutional questions raised before it in the limited context of the criminal trial. Referring to Articles 1, 19(1), 20(1) and (4), 21(1), 22(2), 24(3), 159 and 169(1)(a) of the Constitution, the Appellants submitted that the Magistrate's Court is the first locus for exercise of judicial authority in nearly all criminal trials. Thus Magistrate's Courts are therefore the earliest venue for the enjoyment of the right to fair-trial and foremost for one to raise complaints about violation of rights of arrested or accused persons. They hence urged that it would be an empty exercise of judicial authority bestowed by the Constitution to hold that a Magistrate's Court can adjudicate a criminal trial without *applying* Articles 49 and 50(2) to the facts before it.

[23] While conceding that the jurisdiction to *interpret* the Constitution belongs to the High Court in the first instance, Counsel Mr. Waikwa contended that the

Magistrate's Courts have to apply the Constitution. It was submitted that Article 10 of the Constitution expressly recognizes, within the ambit of judicial reasoning, the difference in function and scope between the normative processes of interpretation and application of the Constitution. In this regard, they referred to the ***Case concerning the Factory at Chorzow (Claim for Indemnity) (Jurisdiction)*** [1927] P.C.I. J. (Ser.A) No.9 (July 26), at para 115 where *Ehrlich J* dealt with the meaning of the words "interpretation and application." They also cited the East Africa Court of Justice discussion of the dichotomy between norm interpretation and application in ***Attorney General of the United Republic of Tanzania v Anthony Calist Komu,*** Appeal No.2 of 2015 where it was stated that *"…strictly speaking when the meaning of the treaty is clear, it is "applied" not "interpreted". Interpretation is the secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty or when they are susceptible to different meanings."*

[24] On this basis, it was urged that all that the Magistrate's Court had to do was to identify the constitutional norm in Articles 49 and 50(2) on rights of arrested persons and the right to fair trial and having done so determine the consequences of the facts before it. Cited in this regard were the cases of ***Cornel Rasanga Amoth v Jeckonia Okungu Ogutu,*** [2017] eKLR wherein the Political Parties Dispute Tribunal's power to apply the Constitution in political party disputes before it was upheld, and ***Republic v Chairman, Political Parties Disputes Tribunal ex parte Susan Kihika Wakarura,*** [2017] eKLR to the effect that the subordinate court's entitlement to apply the Constitution in matters which they ordinarily have jurisdiction was upheld.

[25] The second issue was *whether the Appellants' arrest without informing them of the reason for their arrest was unconstitutional for being contrary to Article 49(1)(a)*. The Appellants argued that Articles 21, 20(3), 29(a) and 49(a) guaranteed the rights of individuals. They referred to the case of **Miranda v Arizona,** 384

U.S. 436 (1966) where the warning on the right to remain silent and the accompanying explanation that anything said can and may be used against the individual in court was formulated. They also cited international instruments in urging that liberty and security of the person is protected and referred to rule 2 of the Arrest and Detention Rules in the National Police Standing Force Orders which demands that a police officer must conduct a clear and unbiased assessment of the facts before arresting any person.

[26] Reliance was placed on the **Case of Stepuleac v Moldova** 8207/06 in which the European Court of Human Rights reiterated that having a 'reasonable suspicion' *presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.* Also mentioned was the decision of the Supreme Court of Canada in ***R v Storrey*** [1990] 1 S.C.R. 241 and ***Case of Shamaye v Georgia and Russia*** (Application No.36378/02). On this basis, it was submitted that none of the Appellants was informed of the reason for their arrest, the right to remain silent, and the consequence of not remaining silent. That they were arrested without a warrant of arrest, yet the offence of cruelty to animals requires one, and that they were informed of the reason for their arrest 5 hours later. Their arrest, they submitted, offends Article 49(1)(a) of the Constitution, is invalid unless justified under Article 24 of the Constitution.

[27] They faulted the Courts reliance on the number of people arrested and the fact that the information for their arrest had been validly given 5 hours later, as opposed to the point of arrest to justify the limitation. It was their case that the right to be informed of the reasons for arrest serves other utilitarian goals. First, giving of reasons for arrest is antecedent to a fair trial, Secondly, it signals the commencement of the privilege to remain silent and not self-incriminate. Thirdly, it affords one an opportunity to challenge the lawfulness of the arrest. (see European Court of Human Rights decision in the ***Case of Fox, Campbell and***

Hartley v United Kingdom (Application No.12244/86; 12383/6***)*** *at para 40).* Fourthly, as held by the Supreme Court of Sri Lanka in ***Piyasiri v Nimal Fernando*** [1988] LKSC 4, it affords one an opportunity to explain or absolve oneself in cases of mistaken identity leading to the arrest.

[28] The Appellants were emphatic that absent grounds for arrest, the police lack the power to interfere with their free movement. They faulted the Court of Appeal finding that even though the Appellants had not been given the reasons for their arrest with due promptness, they had known the reasons a few hours later. They urged that this explanation was not in line with Article 24 of the Constitution. They urged that failure to inform them of the reason for their arrest at the time of arrest was unconstitutional. They referred to the affidavit of Gacheke Gachihi in which it is deponed that the police haggled among themselves and their seniors (some of whom were absent at the point of arrest) of the charges to pefer against the Appellants. They urged that the failure to inform the reason for their arrest at the time of arrest was unconstitutional and that this failure enabled the police to concoct grounds for the arrest *post facto*.

[29] The third issue submitted on was in regard to *the consequence of the violation of the Appellants' rights on the validity of the prosecution*. The Appellants faulted the holding by the High Court and the Court of Appeal, that the delay in informing them of their rights should not vitiate the prosecution because they had known the reasons for their arrest a few hours later and long before they were required to plead. They relied on Article 50(4) of the Constitution and submitted that all the evidence obtained from their arrest was obtained in violation of their rights and is inadmissible.

[30] Fourthly, the Appellants challenged their arrest as having been tainted with illegality for having been *made without a warrant for a non-cognizable offence*. Counsel Mr. Waikwa submitted that having been informed that they had been

arrested for offences relating to cruelty to animals, which offence is punishable with a maximum sentence of 6 months, a warrant of arrest was mandatory under section 29 of the Criminal Procedure Code as read with the First Schedule. They urged that the Respondents bore the onus of proving the lawfulness of the arrest under Article 24(3) of the Constitution and that the Respondents made no attempt to justify that the limitation of the Appellants' rights was lawful and necessary in a democratic society.

[31] As regards *the issue of the failure to inform the Appellants promptly and in detail of the charges against them*, it was submitted that this was unconstitutional. They contended that Article 50(2) of the Constitution, Article 14(3)(a) of the ICCPR, and section 134 of the CPC all provide for prompt information of the charges against an accused. They submitted that a trial begins to run as soon as a person is arrested as held in ***Case of Eckle v Germany*** [1982] ECHR 4 and faulted the learned judge in conflating *trial* with *hearing* of criminal case.

[32] They submitted that on 26th May 2013 the Magistrate's Court issued a ruling requiring them to take plea. They requested for disclosure of the details of the charge and the evidence to be relied on pursuant to Article 50(2)(b) and (j), which information the prosecution did not have. When the charge sheet was eventually given to them, it was framed in a vague manner and they had difficulty in taking the plea, hence objected to it. Despite the Appellants raising this, they submit that the High Court agreed with Magistrate Court that the charges were not vague, a decision upheld by the Court of Appeal.

[33] The Appellants faulted the superior Courts on this finding asserting that the charges in the charge sheet were framed in a vague manner. That the charges bore little relationship between the incidences and the elements of the offences and all the accused had been wrongly treated as if they had identical involvement. Buttressing their submission that the charges must be clear and unambiguous,

they cited the case of ***Kamasisnki v Austria*** [1989] ECHR 24, ***S v Wannenburg*** (A483/04) [2005] ZAWCHC 37, 2005, and a 1903 Sri Lanka decision of ***King v Ponniah*** NLR 216 of 8[1903] LKCA 58; (1903) 8 NLR 216. They argued that the charges lacked sufficient content so as to put the accused on notice as to what case is being laid against them so that they may prepare to present their defence.

[34] They contended that there is such a stark lack of connection between the elements of the offence under the Statute and the incidences of 14th May 2013 as to amount to a grave abuse of the process of law. Further, they urged that the elements of the offences need to be proved individually against each accused and that the lack of effort to discern between individuals involvement and responsibilities in the incidences of 14th May 2013 confirms that the police action was an abuse of process aimed at limiting the Appellants' rights to freedom of expression and right to assembly.

[35] It was urged that the Respondents had not sought to justify the limitation of their right to detailed and prompt information on the charges as reasonable or justifiable in an open and democratic society taking into account the factors in Article 24 of the Constitution. They urged that this failure to promptly inform the Appellants of the charges in sufficient detail to enable them answer through the appropriate plea was unreasonable and unjustifiable, hence unconstitutional.

[36] The Appellants asserted that the 2nd Respondent's disruption and prohibition of the demonstrations on 14th May 2013 was unconstitutional. It was submitted that under Articles 20(1), 21(1), 238(2)(b) and 244(c) of the Constitution, the police have an obligation to *observe, respect, protect* and *promote* the freedom of expression; and the right to assemble. Further, that under section 61 of the Sixth Schedule of the National Police Service Act, a police officer must always attempt to

use non-violent means first and force may only be employed when non-violent means are ineffective.

[37] The Appellants took issue with the 2nd Respondent who did not announce that the demonstration had become unlawful having rightfully assisted the demonstration at the beginning by clearing traffic and guiding the demonstrators in their walk from Freedom Corner in Uhuru Park and up to the gates of Parliament. They submitted that it was the 2nd Respondent who, at the gate of Parliament, while the speeches were going on and without warning, lobbed tear gas canisters at the Appellants, assaulted some of the demonstrators sometime causing bodily harm on them and dragged away demonstrators and used canons erected on military vehicles to spray and assault the demonstrators with water

[38] Citing cases by the European Court of Human Rights, South African Constitutional Court and from Russia, they argued that it is settled law that where demonstrators do not engage in acts of violence, public authorities must show a certain degree of tolerance towards peaceful gatherings. Urging that the limitation did not conform to Article 24(1) of the Constitution, they relied on the case of ***Schwabe and M.G. v Germany*** that the expression "necessary in a democratic society" implies that the interference corresponds to a "pressing social need" and in particular, that it is *proportionate* to the legitimate aim pursued.

[39] They submitted that the reasons stated in the affidavit of George Odiwuor Otieno were no sufficient reason for a blanket ban on the demonstrations and that the present situation is comparable to the case of ***Barankevich v Russia Application*** No.10519/03 where the European Court of Human Rights found that "*instead of considering measures which could have allowed . . . assembly to proceed peacefully, authorities imposed a ban on it. They resorted to the most radical measure denying the applicant the possibility of exercising his rights to freedom of . . . assembly.*" In this regard, the submitted that the Respondents had

a duty to reflect on the possible alternative to ensure the demonstration continued peacefully other than taking the 'most radical measure' of dispersing the demonstrators.

[40] Lastly, Counsel Ms Nkonge faulted the Court of Appeal for holding *that although the High Court had not undertaken a sequential analysis required under Article 24 before determining whether the impugned provisions were unconstitutional, a plain reading of the provisions of the Acts against Articles 24 and 37 of the Constitution shows that a limitation of the rights by the law is reasonable and justifiable in an open and democratic society*. She submitted that sections 78(1) and (2) and 94(1) of the Penal Code as well as section 3(1)(c) of the Prevention of Cruelty to Animals Act are unconstitutional. That the sections of the Penal Code are "vague" and the section of the Prevention of Cruelty to Animals does not provide for *mens rea*.

[41] In particular, it was urged that there is no definition of "a breach of the peace" as used in section 78 of the Penal Code in defining the unlawful assembly and riot. Further that section 3(1)(c) of the Prevention of Cruelty to Animals Act, provides that "*a person shall be guilty of an offence of cruelty if he conveys, carries, confines or impounds an animal in a manner or position as to cause that animal unnecessary suffering*". This, it was submitted lacks any *mens rea* yet a penalty of a fine not exceeding three thousand shillings or to a term of imprisonment not exceeding six months, or both is imposed.

[42] Consequently, it was urged that in determining whether the interference was "prescribed by law" for the purpose of Article 24 analysis, it is now trite that a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. They cited the cases ***Aids Law Project v Attorney General & others***

[2015] eKLR regarding the constitutionality of section 24 of the HIV and AIDS Prevention and Control Act and ***Geoffrey Andare v Attorney General*** [2016] eKLR where section 29 of the Kenya Information and Communication Act was found to be so vague, broad and uncertain.

[43] They faulted the Court of Appeal for resorting to case law such as the case of ***Mule v Republic*** [1983] KLR 246 and ***Tolley v Republic*** [1983] KLR 315, in holding that the impugned provisions were not vague or uncertain because *"what constituted breach of peace was more apparent than real, granted the many cases that had set out what constitutes a breach of peace."* It was argued that by resorting to caselaw as opposed to clear wording of the Statute to hold that the law was not vague, the Court of Appeal offended the principle of legality espoused in Article 50(2)(n) that requires criminal law especially one that limits fundamental rights and freedoms to be clear enough to be understood and precise enough to cover only the activities rationally connected to the law's purpose.

[44] They submitted that the principle of legality has deep rooted connection with the rule of law, which is a national value and principle of governance under Article 10 of the Constitution. That the principle has achieved the status of *jus cogens* or peremptory norm of international law taking priority over all other customary law and even treaty obligations and therefore forms part of the Laws of Kenya under Article 2(5) of the Constitution. Hence, the Appellants faulted the Court of Appeal for misapprehending the issue before it when it held that the impugned sections of the law were not vague or uncertain based on the subjective interpretation in case law.

[45] They submitted that criminal offences which carry a possible punishment of imprisonment should not be strict liability offences, but require both an *actus rea* and *mens rea* element. In this regard, they cited the decision of the Supreme Court of Canada in the case of ***R v Vaillancourt [1987] 2 SCR 636.*** They urged that

as all three offences, subject of this matter, carry with them the possibility of imprisonment as punishment, upto 6 months for a breach of the peace and cruelty to animals, and upto 2 years for a riot, the necessity for a *mens rea* requirement is furthered.

(b) 1st Respondent's

[46] The Honourable Attorney General filed his written submissions on 23rd January 2018. His case before the Court was urged by Counsel Mr. Onyiso. He delimited the following as the issues for determination:

1) *Whether section 78(1) and (2) and 94(1) of the Penal Code are unconstitutional.*
2) *Whether the Petitioners' arrest without a warrant of arrest was lawful.*
3) *Whether the arrest and detention of the petitioners was contrary to Article 32 of the Constitution that guarantees the freedom of conscience, religion, belief and opinion.*
4) *Whether the stoppage of the demonstration and arrest of the appellants was illegal or unconstitutional.*
5) *Whether the arrest and detention of the Appellants breached their rights to freedom of expression under Article 33 of the Constitution.*
6) *Whether the arrest and detention of the Appellants violated their rights to freedom of association under Article 36 of the Constitution.*
7) *Whether the Appellants' rights to be informed promptly of the reason for their arrest was violated contrary to Article 49 of the Constitution.*
8) *Whether the Appellants' right to a fair hearing was violated.*

[47] From the onset, Counsel Mr. Onyiso underscored that all the issues raised by the Appellants are issues to be dealt with by the trial Court. He urged that these are issues that are being raised before even plea is taken, hence as of yet, there is no

evidence before the Court to enable the Court act on any of the allegations. In the circumstances, he contended that it was not unreasonable for the Magistrate to say he had no jurisdiction as his jurisdiction is based on evidence. He urged, for instance, that it is difficult to determine whether the stoppage was justified or not without evidence being adduced.

[48] Disabusing the allegations of unconstitutionality of sections 78(a), (2) and 94(1) of the Penal Code, the Attorney General submitted that there was nothing uncertain or vague with section 94(1) as the same is couched in simple, clear and unambiguous language and that there was no need for an elaboration of the phrase a 'breach of peace' for the same is self-explanatory. He cited the case of ***Jonnah Tusasirwe & 10 others v Council of Legal Education & 3 others*** [2017] eKLR in urging that the first rule in statutory interpretation is the use of the Statute's plain language.

[49] It was urged that there is an elaboration on how a breach of peace arises: through use of threatening, abusive or insulting words or behavior with intent to provoke a breach of peace. Counsel was assertive that both components of *act reus* and *mens rea* were present in the offence of breach of peace: the acts of use of threatening, abusive or insulting words or behavior, and the *mens rea* is 'with intent to provoke a breach of the peace or whereby a breach of peace is likely to be occasioned. The Attorney General submitted that the limitation was well within the provisions of Article 24 of the Constitution and did not infringe on the freedoms of expression, assembly, demonstration or picketing in an unjustifiable manner. That if the same were not limited in an open and democratic society, chaos would reign.

[50] The Attorney General was emphatic that the offence of breach of peace is not unconstitutional and that the Appellants had failed to discharge the burden of proving otherwise. The Cited the case of ***SUSAN WAMBUI KAGURU & 7***

others v ATTORNEY GENERAL & another, [2013] eKLR where the Court held that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very laws that are passed by their representatives in accordance with their delegated authority.

[51] The allegations of the defectiveness of the charges for lack of containing specific offences against them or the particulars thereof were opposed. It was submitted that in any event, these are not issues to be dealt with by this Court as they are not constitutional in nature. In this regard, reference was made to the persuasive decision of ***WILLIAM S. K. RUTO & ANOTHER v ATTORNEY GENERAL*** [2010] eKLR, where the Court 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 applicant 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."***

[52] On arrest without warrant, the Attorney General urged that section 29(b) of the CPC allows the police to arrest without a warrant and that under the First Schedule of the CPC, the offence of offensive conduct conducive to breach of the peace and riot are categorized as cognizable offences for which the police can arrest without a warrant. Hence the arrest was okay. He disabused the allegations that the arrest was contrary to Article 32 of the Constitution that guarantees the freedom of conscience, religion, belief and opinion submitting that there is no evidence that the Respondents interfered with these rights. Citing ***Anarita Karimi Njeru*** (1979) KLR 154, it was submitted that where one alleges a contravention or threat of contravention of a constitutional right, he must set out

the right infringed and the particulars of such infringement or the act. Contrary to this, he urged that the Appellants had failed to discharge this burden.

[53] As regards stoppage of the demonstrations, Counsel Mr. Onyiso submitted that the determination of the issue requires evidence; hence it cannot be determined away from the Magistrate's Court. However, he urged that it was not illegal or unconstitutional as the right as provided for in Article 37 is not absolute and can be limited under Article 24(1)(d) to ensure that rights and freedoms of others are not prejudiced. Cited in this regard was the case of ***Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others,*** Civil Application No. NAI 140 of 2016, [2016] eKLR. He also disabused the allegations that the arrest and detention breached the rights of expression under Article 33. He submitted that persons exercising this right must respect the rights and reputation of others. He referred to ***Karua v Radio Africa Ltd T/A KISS FM Station and others,*** (2006) 2KLR 375 where it was stated that *"in striking the balance certain controls on the individual's freedom of expression may inappropriate circumstances be acceptable in order to respect the sensibilities of others."*

[54] Allegations of breach of right to freedom of association were disabused submitting that the Appellants failed to set out how this right was contravened and by whom. He contended that the Appellants were not coming to Parliament to associate with parliamentarians or any other person, but were coming to ridicule Parliamentarians. It was further added that it is not an attribute of the right to freedom of association to ridicule others. No one has the right to associate with others for the purposes of ridiculing others.

[55] In regard to the right to be informed promptly of the reason for their arrest under Article 49, it was submitted that it was not violated. That they were arrested in the afternoon and the police took considerable time quelling the riots and

arresting them. By 7.00 o'clock, they were bonded and they were released from police. Hence, reasonable time was taken to inform them of the reasons for their arrest.

[56] Allegations of breach of Article 50 as regards fair hearing were also disabused. The Attorney General submitted that it did not make sense for this allegation to be made yet the trial had not yet begun. Hence this argument was premature. Asked by the Court (*Ibrahim, SCJ*) in the course of the hearing when trial begins, Counsel Mr. Onyiso answered that it was once the plea is taken, since before plea taking, the accused does not know the charges against him. It was urged that in considering the right to fair hearing, the interests of both the accused and the State should be considered. In this regard, they cited ***Zanner v Director of Public Prosecutions,*** Johannesburg (2) SACR 45 (SCA) 2 ALL SA.

[57] However, in order to achieve the balance between the rights of the Appellants and the State, it was urged that it is important that plea has to be first taken. That this will instill public confidence in the criminal justice system as the public perception would be that in the administration of justice, there are no sacred cows, be they ordinary people or NGO operatives. And as to whether the impending trial will be fair, should be determined by the trial Court which would be in a position to assess the evidence.

(c) 3rd Respondents'

[58] The 2nd and 3rd Respondents were represented by Counsel Mr. Okello. The DPP filed his written submissions on 27th November 2018 in which he reiterates the submissions made at the Court of Appeal and at the High Court and the affidavit filed in reply to the petition before the High Court, sworn by Inspector George Oduor Otieno.

[59] It was the DPP's submission that the offences the Appellants are facing are cognizable and as such empowers the 2nd Respondent to arrest without a warrant of arrest. He submitted that at the time the Appellants were committing the crimes upon which the charges are premised, the police were present and as such, made the arrest when it was clear that the Appellants had committed an offence.

[60] The DPP reiterated the justification of limitations under Article 24 and submitted that the rights to freedom of conscience, religion, belief and opinion, expression and association were not violated. They urged that the Court of Appeal correctly applied the law and the Constitution when they held that these are not rights and freedoms that cannot be limited under Article 25 and further that "*persons who are not peaceful or who are armed cannot claim to be entitled to freedom of assembly, demonstration, picketing and petition*.

[61] He further submitted that the Magistrates Court have no jurisdiction to determine matters that relate to the alleged violation or infringement of a constitutional right or freedom by virtue of Article 23 and the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms Freedoms) Practice Rules, 2013* made by the Chief Justice under Article 22(3).

[62] On the issue of a defective charge sheet, the DPP reiterated that the allegation did not raise a constitutional issue to be determined by this Court but rather it is an issue for the trial Court under section 89(5) of the Criminal Procedure Code which requires a magistrate to form an opinion of whether a formal charge presented discloses an offence and shall make an order refusing to admit the same.

[63] He disabused the unconstitutional allegations of section 78(1) & (2) and 94 of the Penal code and submitted that these sections give effect to Article 24 of the Constitution as they seek to protect the rights of others. He referred to the Court of Appeal judgement where it held that: *"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". It was further urged that the crime of cruelty to animals is a strict liability offence. As regards, reliance on case law for definition of the components of this offence, it was submitted that case law is also law and in any event, where a statute is not clear, courts are supposed to develop the law that clarify the issue.

[64] The DPP submitted that the Appellants failed to prove violation of their fundamental freedoms and rights and/or infringement of any law or regulation or abuse of discretion and breach of rules of natural justice. He asserted that the judgment of the Court of Appeal was well reasoned, researched and dealt with each and every issue set for determination. He thus urged this Court to dismiss the appeal with costs to the Respondents.

V. ISSUES FOR DETERMINATION

[65] From the foregoing rival submissions of the parties, we crystallise the following as the constitutional issues for determination:

(i) *Whether the arrest, detention and charging of the Appellants contravened their fundamental rights and freedoms enshrined in the Constitution under Articles 32, 33, 36, 49 and 50 and are therefore unconstitutional.*

(ii) *Whether the manner in which charges were brought and the charges levelled against the Appellants are unconstitutional and illegal as they fail to meet the standards set out in Article 50(2)(j) of the Constitution.*

(iii) *Whether sections 78(1), 78(2) and 94(1) of the Penal Code are unconstitutional for being vague, too broad and unclear therefore null and void.*

(iv) *Whether the failure of the Magistrate to hear and determine a constitutional question is unconstitutional.*

(v) *Costs*

VI. ANALYSIS

(a) Whether the arrest, detention and charging of the Appellants contravened their fundamental rights and freedoms enshrined in the Constitution under Articles 32, 33, 36, 49 and 50 and are therefore unconstitutional.

[66] To effectively address this issue, we will evaluate the alleged violations as regards each specific article of the Constitution. It is common ground that the Appellants, in furtherance of their right to freedom of conscience, thought, belief and opinion, expression and association as guaranteed under Articles 32, 33 and 36 sought to protest the actions of Members of Parliament via demonstrations dubbed 'occupy parliament' held on 14th May 2013. The organisers of the protest notified the 2nd Respondent who had no objections.

Alleged breach of Articles 32 (freedom of conscience), 33 (freedom of expression) and 36(freedom of association)

[67] Undeniably, on the day of the demonstrations, the Appellants began their demonstrations peacefully and were escorted by the 2nd Respondent until at some point, when the demonstrations were stopped by the Police. This, to the Appellants, was unlawful as no announcement was made to the effect that the demonstrations were now unlawful and that the police were not justified in arresting them without warrants.

[68] Determining this issue, the High Court held that it was not open for the Court to determine whether the police lawfully stopped the demonstrations as the issue was germane to the criminal trial and was therefore best left for the Magistrates's Court in light of the presumption of innocence in favour of the Appellants. In the same breadth, the Court of Appeal held that the issue before the trial Court (Magistrate's court) will be whether the Appellants conducted themselves in a public place in a manner that was not peaceful to warrant the intervention of the 2nd Respondent.

[69] The appellate Court distilled, and in our view rightly so, the constitutional question arising being 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 the Appellants are unconstitutional. Despite faulting the High Court for not having done a sequential analysis required under Article 24 of the Constitution before determining whether the impugned provisions were unconstitutional, the appellate Court had recourse to the plain reading of the provisions of the said statutes against the provisions of Articles 24 and 37 of the Constitution and found the provisions valid. It stated in this regards thus:

> ***"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."***

[70] The Court of Appeal further found the limitation of the rights under Article 32, 33 and 36 by the Public Order Act and the Penal Code to be reasonable and justifiable in a democratic society and pursuant to the tenets of Article 24 of the Constitution. It held thus:

> ***"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.'

[71] We are in agreement with the Court of Appeal. The limitation to the freedoms of assembly, demonstration, picketing and petition is a well settled principle for order in the society and does not violate the rights provided for in the Constitution. The High Court aptly noted this in the case of ***Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others*** [2016] eKLR thus:

"...the Constitution itself has provided claw-backs. Demonstrators, picketers and petition-presenters must do so "peaceably and unarmed". Assemblies, picketing and demonstrations which are not peaceful are excluded from the protection of the Article. If they consist of violence to or intimidation of the public then the assembly or the demonstration ought to be stopped. Likewise participants in assemblies, picketers and demonstrators must not be armed. Weapons as well as defensive or protective contraptions which breed or stimulate aggression ought not to be possessed by the demonstrators or picketers.

33. The spirit of the constitutional claw-back is to ensure that the rights of others within the vicinity of the place of assembly or of the demonstrators or picketers are also not interfered with. Thus in the South African case of Fourways Mall(Pty) Ltd vs South African Commercial Catering [1999] 3 SA 752 , it was held that the Constitution as well as statute law does not protect picketers who proceed in a manner that interferes with the rights of the public or assault others. The court, in interpreting Section 17 of the South Africa's Constitution which is pari

materia with our Constitution at Article 37, was clear that the Constitution does not encourage a volatile environment in a protest march."

[72] The Court continued thus:

"34. It certainly would be an antithesis of constitutional values and principles if picketers and demonstrators are allowed to participate in non-peaceful demonstrations or pickets whilst armed with implements set to stimulate aggression. It is therefore no surprise when the Constitution itself limits the right to assemble, to demonstrate, to picket and to present petitions.

35. My preliminary view is also that the Public Order Act (Cap 56) contrary to popular views does not limit the right to demonstrate or to assemble. It instead seeks to preserve and protect the precious right to public assembly and public protest marches or processions by regulating the same with a view to ensuring order. Part III of the Public Order Act seeks to regulate public meetings and processions by providing for the need to notify the police service and also the power of the police service to stop or prevent a public meeting where appropriate and where it is obvious it will not meet the constitutional objectives. Under the same Part III, the Public Order Act also prohibits the possession of "offensive weapons" at public meetings and processions. In my view, it is a small price to pay to ensure that the assembly or demonstration is peaceful by involving a body enjoined to ensure security, safety and order. Both the participants as well as the non-participants are assured of protection through involvement of security officials."

[73] Notably, Article 33(2) and (3) of the Constitution expressly excludes the freedom of expression from conduct and acts that extends to advocacy for hatred that constitutes vilification of others. The said provisions states:

> ***"33(2) The right to freedom of expression does not extend to***
>
> ***(a) propaganda for war;***
>
> ***(b) incitement to violence;***
>
> ***(c) hate speech; or***
>
> ***(d) advocacy of hatred that-***
>
> ***(i) constitute ethnic incitement, vilification of others or incitement to cause harm; or***
>
> ***(ii) is based on any ground of discrimination specified or contemplated in Article 2794).***
>
> ***(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others."***

[74] It therefore emerges that the exercise of the right to freedom of expression comes with a counter obligation for respect to the rights and reputation of others. However, limitations based on grounds of vilification of others or respect of the right and reputation of others are matters to be subjected to judicial determination based on specific facts rather than a *carte blanche* and unilateral imposition. This determination of facts is a matter that can be only legitimately undertaken by a trial Court in evaluation of the evidence presented before it.

[75] Consequently, we agree with the Court of Appeal that the rights in Articles 32, 33 and 36 are not prima facie violated by the provisions of the Public Order Act and the Penal code. The limitations granted in these statutes are legitimate as the said rights are not absolute. We hasten to add that for the Appellants to successfully bring themselves within the realm of constitutional challenge of the said Public Order Act, they ought to plead with specificity the alleged provision and

the manner in which it is inconsistent with the Constitution. A general attack to legislation does not suffice.

[76] We also note that no provision of the Public Order Act and the Penal Code was referred to or analyzed in the High Court's determination on the issue or by the Court of Appeal in exercise of its appellate jurisdiction. Hence, for this Court to venture into such a determination at the first instance, it will rightly be a stretch of our jurisdictional contours under Article 163(4)(a) of the Constitution. Hence, while we hold that the limitations to Articles 32, 33 and 36 are not unconstitutional, a determination of whether in a particular case the limitation was illegal is a factual issue to be done on a case to case basis. In this matter, this is an issue that needs a consideration of the evidence as regards what happened on the material day. We agree that this analysis is a preserve of the trial Court.

Alleged breach of Article 49 (rights of arrested persons)

[77] The Appellants also argue that their arrest violated Article 49 of the Constitution. They argued that they were not informed of their rights under Article 49 at the time of arrest and detention between 2.30PM and 7PM. The High Court held that whereas there was no evidence before it indicating whether or not the Appellants were read their Article 49 rights, the issue can be raised at the trial and to raise it as a basis to quash their trial cannot be in the best interests of justice.

[78] From the Record before us, just like the High Court, we are also unable to determine whether the Appellants were read to their rights under Article 49 (1) (a) of the Constitution, to wit: *the reason for the arrest, the right to remain silent and the consequences of not remaining silent*. From the Record, it is discernable that the Appellants and their advocates were in communication with the police for the period between 2.30PM being the time of arrest and 7PM when the Appellants were released. As part of this communication, the Appellants were eventually

informed that they would be charged with the offence of cruelty to animals, having earlier been informed of other offences relating to conduct conducive to breach of peace.

[79] We also note that when the Appellants were eventually charged before the Magistrate's Court, the offences were not much different from what they had been informed at the police station. The provision of Article 49 (1) (a) refers to the information being availed to an arrested *promptly*. No timeline has been given as to what amounts to promptly. The only indication of time frame under the said Article 49 is found in sub Article (1)(f) which relates to the reasonable time of 24 hours within which an arrested person should be brought before a court. In that context, the Appellants were in custody for about 5 hours well within the 24 hour timeline and by the time they left police custody they had an idea of what they could be charged with. Further, having been arrested while being involved in a demonstration, the Appellants would have reasonably been expected to be charged with the offence.

[80] Be that as it may, it is a legal practice within the criminal justice system for the Prosecution to amend a charge sheet so as to include new charges or exclude other charges. This provision will be illegitimate and/or rendered otiose if this Court was to hold that the Appellants or an accused person has to informed of the offence that he/she will be charged with immediately upon his/her arrest and the police cannot charge him for another offence. It is also true that while a person may be arrested for one offence, in the course of processing the accused, other offences may come to light, which offences the Police are at liberty to also charge the accused person with. It would be preposterous to expect the police to avail the particulars of such an offence to the accused person at the point of arrest.

[81] Consequently, we are not satisfied that the Appellants were not *promptly* informed of the reason for their arrest under the circumstances. In any event, the

Appellants were arrested in course of live demonstrations; they would reasonably be expected to have known that the cause of their arrest is their involvement in the demonstrations. It is also evident that the accused were released from police the same day they were arrested with directions that they report back to the Police. We find this to have been in compliance with Article 49(1)(h) which provides that "*an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released*."

[82] We hasten to add that in any event, this Court cannot go further to determine the question as to how the Appellants were arrested. To delve into the specific particulars of the arrest is a matter of evidence and may require the testimony of the arresting officers to be weighed against the Appellants' testimony. This is in excess of our jurisdiction as presently invoked and is a matter squarely with the jurisdiction of the trial Court.

Alleged breach of Article 50 (fair hearing)

[83] The Appellants' disputation regarding the alleged breach of Article 50 arises from the alleged failure to be given evidence or particulars of offences they were to face prior to their arraignment in court. They also contended that the charges were vague contrary to Article 50(2)(j) of the Constitution. They were adamant that a trial commences at arraignment and not after plea is taken. The Appellants' position was not shared by the High Court or the Court of Appeal. At this juncture, we seek to only address ourselves to the issue of fair hearing.

[84] It is worth pointing out the said Article 50 has two facades – fair hearing under Article 50(1) and fair trial under Article 50(2) of the Constitution. With respect to the right to fair hearing, *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. Applying this to the appeal before us, it does not come out that the Appellants were denied an opportunity to have redress before the courts. In fact, they were required to appear before the Magistrates court and when they appeared, they were charged accordingly.

[85] Dissatisfied with the process at the Magistrate's court and based on their perceived constitutional violations, they petitioned the High Court to seek redress. The Appellants got a reprieve to the extent that their prosecution was stayed pending the determination of their petition before the High Court. This in our view espouses the attributes of what a fair hearing entails and there is no basis for the Appellants' argument in this regard. Hence, the allegations of breach of the right to fair hearing by being allegedly denied the evidence and particulars of the offences, prior to the taking of plea, have no merit. Fair hearing in Article 50(1) of the Constitution speaks to the right to access a court of law that is independent and impartial.

[86] In alleging breach of the right to fair hearing before even arraignment in court, the Appellants have put the cart before the horse. It is the Appellants who are removing themselves within the guarantees of Article 50(1) by not subjecting themselves to the trial Court's jurisdiction where their innocence may be affirmed or guilt proved. In any event, the criminal justice system has full cushion against the violations alleged by the Appellants which the trial Court is ably equipped to address when raised by an accused person legitimately in the course of the trial. We have discussed this issue in this judgment in the subsequent paragraphs below.

[87] The upshot is that we find that the police in arresting, detaining and charging the Appellants did not violate the Appellants' rights under Articles 32, 33, 36, 49 and 50. The rights provided for in these articles are not absolute and the police may in the course of their work, limit their enjoyment by way of carrying out arrests for alleged committal of offences. However, where a party is aggrieved with the

manner those limitations, and/or arrests are done, he/she has recourse in a court of law either filing a constitutional petition under Article 23 of the Constitution or raising the issues within the trial upon being charged. However, an apprehension or allegation of breach of the rights in Articles 32, 33, 36, 49 and 50 cannot be a sufficient reason for quashing criminal proceedings or for one not taking plea. The criminal justice system, with its components such as plea taking, arraignment and trial are legitimate causes and do not violate any constitutional right and freedom.

(b) Whether the charges and the manner they were brought flout the Appellants' constitutional rights under Article 50(2)(j); and are unconstitutional.

[88] It is the Appellants' argument that the manner in which the charges were brought and the charges levelled against them are illegal and unconstitutional, for failing to meet the standards set out in Article 50(2)(j) of the Constitution. Article 50(2)(j) provides:

> ***"50(2) Every accused person has the right to a fair trial, which includes the right –***
>
> ***...***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence"***

[89] The High Court found that a trial commences after plea is taken. Following on that the Court of Appeal did not construe the provisions of Article 50(2)(j) to mean that the prosecution's evidence must be availed to the accused person even before he has taken plea as the Appellants urged it to do so. Instead, the appellate Court found that the provision requires that evidence be availed at the earliest practicable time but in advance of the presentation of the prosecution case.

[90] Indeed, it is salutary practice for the trial Court to satisfy itself that an accused person has all the reasonable facilities for his defence and the prosecution discloses all documents before commencement of trial. However, an accused person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the court. This minimum obligation on the accused person triggers the court's duty to ensure the documents are supplied before commencement of the trial. We are persuaded by the holding of *Ngugi J*, in ***Republic v Francis Muniu Kariuki*** [2017] eKLR), where he aptly captured these duties and obligations. The Judge, inter alia stated:

> ***"18. Our case law has now established without a doubt that it is the Prosecution's duty to provide the witness statements to an Accused Person and the Trial Court's duty to ensure compliance with the constitutional requirement. Article 50(2)(c) and (j) are quite clear and the Courts have said as much: the right to adequate time and facilities for the preparation of one's defence includes the right to receive beforehand the evidence that the Prosecution intends to adduce against the Accused. At a minimum, this right includes the right to receive a copy of the charge sheet, witness' statements and copies of any documents which will be relied on at the trial.***
>
> **.....**
>
> ***23. However, an Accused Person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the Court. This minimum obligation on the Accused Person triggers the Court's duty to ensure the documents are supplied before commencement of the trial."***

[91] Further, our jurisprudence is replete with authorities to the effect that presentation of evidence is a continuous process during the trial process provided that the accused has not been put to his defence. We draw an answer to the Appellants' complaints under Article 50(2)(j) of the Constitution from the case of ***Dennis Edmond Apaa and Others v Ethics and Anti-Corruption Commission,*** Nairobi Petition No. 317 of 2012, [2012]eKLR which dealt with the issue of disclosure of documents by the prosecution as follows:

> ***"[26] [T]he 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 this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c)guarantees the accused the right, "to have adequate facilities to prepare a defence.***
>
> ***[27]<u>This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence ….. The obligation to disclose was a continuing one and was to be updated when additional information was received.</u>"***

[92] Note also that the 2nd and 3rd Respondents are not prevented from continuing investigations or even receiving new evidence once the accused has been charged and in the course of trial. The duty of the prosecutor is to bring the new information and evidence to the attention of the accused and for the court to give the accused the opportunity to interrogate the new evidence and adequate time to prepare his

defence ***(See George Taitumu v Chief Magistrates Court, Kibera & 2 others*** *[2014] eKLR****).***

[93] It is also worth noting that the right to a fair trial under Article 50(2)(j) accrues to an accused person, as opposed to an *arrested* person whose rights are provided by Article 49 of the Constitution. Consequently, for the Appellants to legitimately allege violation of their Article 50(2)(j) right, they must first put themselves within the protection of that Article. They must first accept to be transformed from '*arrested persons'* to *'accused persons'*. Hence, they must first take plea and let the trial process commence. Suffices it to say that the right provided under Article 50(2)(j) is to be enjoyed in the course of the trial.

[94] Trial is neither defined by the Constitution nor the Criminal Procedure Code (CPC). The **Black's Law Dictionary 9th edition**, defines a trial as a *formal judicial examination of evidence and determination of legal claims in an adversary proceeding*. This inevitably leads to our conclusion that a trial can only be premised on an offence or offences for which one is accused. The offences are contained and specified in a charge which under section 134 of the CPC 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 charged.

[95] Under section 89(5) of the CPC, proceedings are instituted against a person when a formal charge is made or presented before a Magistrate when the accused person who was arrested without a warrant is brought before the Magistrate. Prof. PLO Lumumba in his Book **Criminal Procedure in Kenya** (Law Africa) at page 73 notes that a criminal trial commences *when an accused is called to take his place in the dock*. He further states that plea taking marks the commencement of the trial process in a criminal court. Thus after a decision has been taken to prosecute an accused person, he/she is brought before a court of law to plead to the charges laid against him/her.

[96] Where the magistrate is of the opinion that a complaint or formal charge made or presented does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order. Otherwise, once the person is brought before the magistrate, they are required to plead under the provisions of section 207 of the CPC whereby the substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

[97] It therefore follows that someone is first arrested, then presented to the court and accused by way of charge before taking plea. In that context, the provisions merely restate that the substance and particulars of the charge are given in form of a statement. At no point is there mention of evidence being adduced at the point of charge and/or plea. This is because of the possibility that the trial may not proceed in respect of the charge if the Magistrate is of the opinion that no offence is disclosed.

[98] In this matter, the Appellants have not clearly come out in our view whether they seek to challenge this aspect of the CPC in the wider context of the criminal justice system. Be that as it may, we again, re-emphasize that challenge to the constitutionality of a legal provision must be pleaded with specificity and the case before us falls short of that. As the trial had not begun in this matter, we find that no cause of action could arise as alleged by the Appellants under Article 50(2)(j) of the Constitution. Accordingly, we see no need to disturb the findings of the superior courts below on this matter.

(c) Whether sections 78(1),(2) and 94(1) of the Penal Code are unconstitutional for being vague, too broad and unclear therefore null and void.

[99] The Appellants challenged the constitutionality of the above provisions of the Penal Code. However, in their written submissions as filed, they also challenged the constitutionality of the provisions of section 3(1)(c) of the Prevention of Cruelty to Animals Act, Cap 360 for lack of *mens rea*.

[100] From the onset, we reiterate that under Article 163(4)(a) of the Constitution, this Court is clothed with appellate jurisdiction. Hence it is not legitimate for parties to raise new arguments at this juncture of litigation before this Court. From the record, it is clear that at no time did the Appellants submit on the constitutionality of the Prevention of Cruelty to Animals Act before the High Court or the Court of Appeal. From the issues as framed by the High Court, the Appellants made a general challenge to the offences for which they had been charged with. As such, no determination was made in that respect to clothe us with the requisite jurisdictional basis to make a determination on the constitutionality or otherwise of the Prevention of Cruelty to Animals Act.

[101] The call to declare a provision of the law as unconstitutional is a fundamental call that cannot be made at an advanced stage of litigation, like at this appellate level. This is why the Constitution provides the High Court, under Article 164(2)(d) with the jurisdiction to determine *"the question, whether any law is inconsistent with or in contravention of [the] Constitution." Ibrahim, SCJ* captured this in his concurring opinion in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*** [2013] eKLR, when he expressed his reservations for the Court's consideration of a constitutional issue tangentially raised in the course of submissions and yet not formally pleaded, thus:

> ***"[147] There is no record of any pleading that addresses the issue of the unconstitutionality of Section 14. The only time the word 'unconstitutional' appears in the pleadings is in the affidavit of one David Kiprop Malakwen, Company Secretary to the first respondent...***

...

[151] The declaration of a law as being unconstitutional is a weighty matter, that has a bearing on the doctrine of separation of powers. It amounts to holding that the legislature in exercise of its legislative mandate, as bestowed upon it by the Constitution, acted ultra vires. A Court being moved to undertake such a declaration must proceed with utmost caution and care. Such caution does not in any way bear the stigma of timidity on the part of the Court; but it evidences fidelity to the doctrine of the separation of powers.

[152] The Court must be clear, that what is being sought is a declaration of a particular provision of the law as unconstitutional; and all interested parties must be given ample notice and time to make submissions on the question of constitutionality, or otherwise. It is my humble view that the Attorney-General, as the chief legal adviser of the Government, ought to be given an opportunity to be heard. He advises the Government on the various Bills which the executive arm originates, some of which once enacted as Acts, may form the subject of a declaration of unconstitutionality.

[153] It is my opinion that the Supreme Court, or even the High Court, ought not to decide upon the constitutionality or unconstitutionality of a statutory provision, without the involvement of the Attorney-General as a respondent or as amicus curiae. The constitutionality of legislative provisions ought not to be determined as between private parties alone: because statutory laws belong to, and affect the people of Kenya and the State; it is not a private matter, but rather, it is of a public nature, and it affects the public interest.

[102] As a consequence, we find the constitutional challenge to section 3(1)(c) of the Prevention of Cruelty to Animals Act, improperly before us.

[103] As regards sections 78(1) and (2) as read with sections 80 and 94(1) of the Penal Code, the High Court was of the view that the ingredients of the offences of *'offensive conduct conducive of breach of peace'* and '*taking part in a riot'* are not vague and uncertain. Further, that the limitations contained in the provisions statutes establishing those offences are permissible under Articles 24 and 37 of the Constitution. To the trial judge, both offences seek to advocate for peace and peaceful assembly and there is *per se* no conflict between all those provisions. The appellate Court agreed with the trial Court adding that the alleged lack of definition of what constitutes breach of peace is more apparent than real as there are many cases that have set out what constitutes a breach of peace.

[104] It is a well-known tenet of the Constitution that a person cannot be convicted (after trial) of an offence unless it is an offence in Kenya (Article 50(2)(n) of the Constitution). This makes it mandatory that the charges have to be based on an offence known to law. The charge is a succinct description of the offence and the particulars and it should not contain any evidence. However, the particulars must be clear enough to enable the accused person to know what offence he is charged with. The CPC provides that if the offence charged is one created by enactment it shall contain a reference to the section of the enactment creating the offence.

[105] It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it will not only

have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence (s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount.

[106] We hasten to add that even upon trial, if it is found that the accused was arrested and charged with an offence unknown in law, he/she still has recourse in the civil justice system by way of seeking damages. The remedy for an apprehension of such a 'mis-trial' happening, where it has not been proved is not to vitiate the trial itself. It will be pragmatic that the Appellants let the trial commence and conclude, during which trial they raise all the issues they have as against the law under which they are charged, if successful, it is only then that they will pursue their rights in civil proceedings.

[107] Consequently, we find the allegations of unconstitutionality of the impugned sections to be without merit.

(d) Whether the failure of the Magistrate to hear and determine a constitutional question is unconstitutional.

[108] This issue was the first grievance raised by the Appellants. As soon as they were arraigned before the Magistrates Court to answer to the charges, they objected to the plea taking raising constitutional questions. They asked the court to refer the constitutional questions to the High Court. Upon hearing their application, the magistrate disallowed their request and the Appellants were instead ordered to take plea. This prompted the petition before the High Court.

[109] As we have not had the benefit of the trial court's record, we are not in a position to address ourselves as to the exact account of events that transpired on

that day. We have also not had sight of the petition filed at the High Court to ascertain how this issue was articulated. Nevertheless, from the judgment and decree by the High Court, we note that this issue was neither part of the framed issues for determination nor were there any reliefs sought arising from the issue. Accordingly, the issue was neither determined by the High Court nor the Court of Appeal. Specifically in the Court of Appeal, the grounds of appeal were summarized thus:

> ***"The appellants challenge the judgement 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."***

[110] Apparently, the Appellants had raised the issue in their written submissions filed at the High Court. It is their argument that by virtue of Article 20 of the Constitution, the Bill of Rights applies to all law and binds all state organs and persons. With that basis, they contend that it is lawful to raise constitutional issues in all courts including before Magistrates. The Appellants thus fault the Magistrate for refusing to deal with constitutional matters or accord the Appellants' counsel a reasonable chance to be heard. The Appellants contend that the practice by the Magistrate's Court in that regard is a violation of the Constitution and in their view the matter requires clarification and leadership from the courts. They cite *Cameron J.* in the South African case of ***S. v Molao Lucas Sekgobela***, A963/2006, Transvaal High Court, in submitting that in Kenya, as in South Africa, all courts, including Magistrate's Court must entertain constitutional points, and may indeed raise them of their own motion if necessary. None of the Respondents submitted on this head.

[111] With the above context, the question becomes whether the issue of the jurisdiction of the Magistrate's Court over the enforcement of the bill of rights falls within our jurisdiction. But even before we answer the question, we point out that the issue has been determined by other courts before as we shall highlight.

[112] Considering the gravity of the issue that touches on jurisdiction of the Magistrates court and it being a point of law, there is need for this Court to express itself appropriately, albeit in passing. It is now settled, including by this Court, that jurisdiction is a fundamental matter in the dispensation of justice. ***In the Matter of Interim Independent Electoral Commission*** [2011] eKLR, this Court rendered itself on the issue of jurisdiction as follows:

> ***"Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution; by statute law, and by principles laid out in judicial precedent."***

Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.

[113] The instructive constitutional provisions, as relate to the jurisdiction of the Magistrates Court are Articles 169(1)(a) and (2) of the Constitution. As it relates to the authority to uphold and enforce the Bill of Rights, Article 23(2) of the Constitution provides that *Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights*. Hence, save for this provision in Article 23(2), the Court with power to hear and redress allegations of violations of the Constitution at the first instance is the High Court pursuant to Article 23(1) which provides that, *"the High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or*

infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."

[114] The Court of Appeal (*Waki, Ouko & M'inoti, JJA*) affirmed this in the case of ***Daniel Maingi Muchiri v Jubilee Insurance Company Ltd*** [2017], when it declined the invitation to consider enforcement of the Bill of Rights at the first instance. It stated thus:

> ***"...this Court (Court of Appeal) enforces constitutional rights and fundamental freedoms in the context of an appeal, that is to say, after the High Court has first considered the alleged violations and made a determination thereon.*** **Section 3(2)** ***cannot be read to give this Court original jurisdiction as the appellant claims. The powers akin to those of the High Court that are vested in this Court by that subsection are exercisable only when the Court is hearing and determining an appeal and not for purpose of enabling the Court to exercise original jurisdiction like the High Court."***

[115] The Court of Appeal affirmed the High Court's jurisdiction thus:

> ***"If the appellant still has any doubt that it is to the High Court that he must turn to originate a claim founded on violation of his constitutional rights, that doubt should be put to rest by Article 23 of the Constitution which is titled, "Authority of courts to uphold and enforce the Bill of Rights"...***
>
> ***...***
>
> ***Under that provision, just like under Art 156(3), the jurisdiction to redress violations of constitutional rights is vested in the first***

instance in the High Court. (See In the Matter of the Interim Independent Electoral Commission, SC Const. App. No. 2 of 2011 and IEBC v. Maina Kiai & 5 Others, CA No 105 of 2017). The Environment and Land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of constitutional rights in matters falling under their jurisdiction (See Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR). The only other courts that the Constitution contemplates exercising original jurisdiction in enforcement of constitutional rights, if Parliament so provides, are the subordinate courts. Pursuant to Article 23(2), section 8 of the Magistrates Courts Act, 2015 vests jurisdiction in the magistrate court to hear and determine applications for enforcement of constitutional rights, but limited only to claims on freedom from torture and cruel, inhuman or degrading treatment or punishment, and freedom from slavery or servitude. If it were ever the intention of the Constitution to vest original jurisdiction in enforcement of constitutional rights in the Court of Appeal, Article 23 would have provided so."

[116] Consequently, contrary to the Appellants' assertion that Article 20 of the Constitution allows virtually everyone to interpret the Bill of Rights, to determine whether there has been a violation thereof, and to grant redress, the Article does not, relate to the upholding and enforcement of the Bill of Rights, which is emphatically provided for by Articles 22, 23 and 165 as being vested in the High Court, with a rider that in appropriate cases, in accordance with legislation, Parliament may vest jurisdiction to uphold and enforce the Bill of Rights on subordinate courts. We find that at the time of the Appellants' cause of action before the Magistrate court such legislation was not in place.

[117] In the absence of legislation enacted by Parliament to give subordinate courts original jurisdiction to hear and determine matters of denial, violation and infringement of right or fundamental freedom in the Bill of Rights, subordinate courts and tribunals, including, the Magistrate's Court do not have jurisdiction to hear and determine matters arising from allegations of violation of the Bill of Rights. This position was also affirmed by the High Court, *Mumbi J,* in **Royal Media Services Ltd v Attorney General & 6 others [2015] eKLR** where the learned judge proceeded to issue a prohibition against a tribunal that was hearing and determining issues of violation of fundamental rights.

[118] While that was the law then, the **Magistrates Court Act No.26 of 2015** has since been enacted to give effect *to Articles 23(2) and 169(1)(a) & (2) of the Constitution; to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes*. Section 8 of the said Act vests jurisdiction in the magistrate court to hear and determine applications for enforcement of constitutional rights, but *limited only* to claims on freedom from torture and cruel, inhuman or degrading treatment or punishment, and freedom from slavery or servitude as guaranteed in Article 25(a) and (b) of the Constitution. The jurisdiction of the Magistrates' court does not also extend to determination of claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights. The section 8 provides:

> ***"Claims relating to violation of human rights***
> ***8(1) Subject to Article 165(3)(b) of the Constitution and pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.***

(2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25(a) and (b) of the Constitution.

(3) Nothing in this Act may be construed as conferring jurisdiction on a magistrate's Court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.

(4) The Chief Justice shall make rules for the better exercise of jurisdiction of the magistrate's courts under this section."

[119] It consequently follows that the position in which the Appellants sought to clarify regarding the jurisdiction of the Magistrate's Courts in dealing with the enforcement of the Bill of Rights has since been addressed by section 8 of the Magistrates' Court Act. However, that legislation was not in force when the Appellants were first before the Magistrate's Court and the Magistrate's Court at that time rightly applied the applicable law. Parliament has granted to the Magistrates Courts power to consider applications on alleged violations of the Bill of Rights but has limited that power to only two rights under Article 25(a) and (b): *freedom from torture and cruel, inhuman or degrading treatment or punishment; and freedom from slavery or servitude*. This limitation is constitutional as Parliament does not bar a person from bringing a case alleging violation of his right but only limits the forum where that cause can be done. This was captured by the High Court of Australia in the case of ***Plaintiff S157 of 2002 v. The Commonwealth of Australia*** [2003] HCA 2 211 CLR 476; 77 ALJR 454; 195 ALR 24 (which decision was cited by this Court in ***Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*** [2014] eKLR) thus:

> ***"The Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution. However, in relation to the second aspect of that function, the powers given to Parliament by the Constitution to make laws with respect to certain topics, and subject to certain limitations, enable Parliament to determine the content of the law to be enforced by the Court"***

[120] We therefore find and hold that there is now a legislation that provides on how Magistrates courts may determine allegations of infringement of fundamental rights. Though limited, the same is constitutional as an aggrieved person, while he might not on all allegations approach the Magistrate courts, still has recourse to the High Court, which is the court constitutionally empowered to address allegations of violations of the Bill of Rights.

VII. DETERMINATION

[121] The upshot is that having carefully considered the appeal before us, we have no hesitation in stating that while the Appellants might have valid grievances and/or allegations as regards their arrest and what happened at the police station, the same does not warrant the nipping of their prosecution by way of a judicial fiat. As we have stated above, such claims may be legitimately pursued and addressed outside the criminal justice system for the criminal justice system is not meant for addressing constitutional petitions and/or allegations of its breach thereof. In ***John Harun Mwau vs Peter Gastrow & 3 Others*** (2014) eKLR it was stated thus:

> ***"Courts will not normally consider a constitutional question unless the existence of a remedy depend on it; if a remedy is available to an applicant under some other legislative provision***

or some of the basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights.
It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all."

[122] Consequently, without downplaying the Appellants' allegations of infringement, we find that they have recourse under Article 22 against the specific violations they may have undergone in the manner of their arrest, detention and arraignment. They may seek damages or other reliefs available to them. We do not think that such violations in themselves should warrant the vitiating of the trial processes. There exist constitutional safeguards that extend to the right to fair trial and the attendant mechanisms to protect the Appellants. We are persuaded by the holding in ***Kuria & 3 Others vs. Attorney General*** [2002] 2 KLR 69 where it was stated that:

"The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas 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."

[123] Consequently, we are not persuaded, just like the High Court and the Court of Appeal, that this is an instance where this Court should intervene in order to quash the proceedings before the trial Court. The criminal proceedings pending before the trial Court should be allowed to continue expeditiously given the amount of time it has taken. While the delay in that matter is regrettable, this is an

example where the trial court is completely at no fault for it was the Appellants who contested the court's jurisdiction all the way, hence the cause of the delay.

[124] The upshot is that this appeal is for disallowing, which we hereby do with no order as to costs.

[125] In the circumstances**,** we make the following orders:

(a) The Petition of Appeal dated 6th November 2017 is hereby disallowed.

(b) Each party shall bear its costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **18th** Day of **October, 2019**

.....	.....
D.K. MARAGA	**M.K. IBRAHIM**
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	**.....**
J.B. OJWANG	**S.C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA