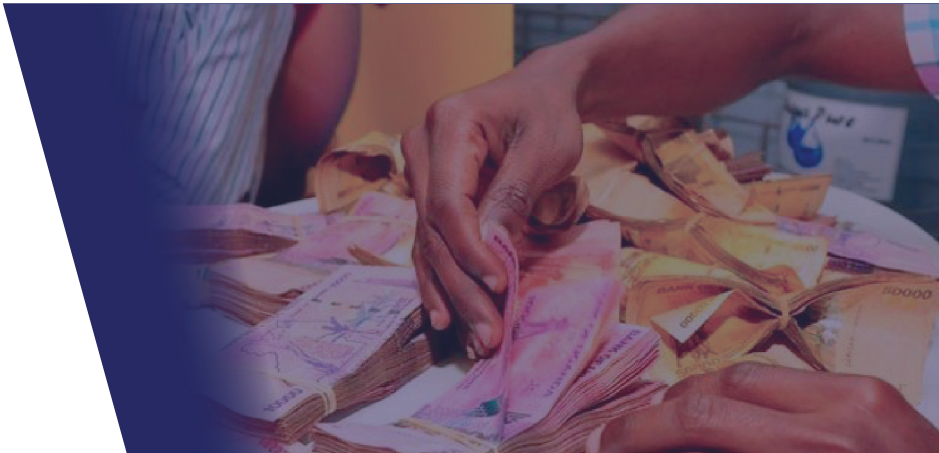
UGANDA
LAW REFORM
COMMISSION
- Modernising the Law -

REVIEW OF BAIL IN THE CRIMINAL JUSTICE SYSTEM

STUDY REPORT
NOVEMBER 2020



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Vision

"Laws that facilitate transformation and development of Uganda"

Mission Statement

"To reform and update the laws in line with the social, cultural and economic needs and values of the people of Uganda."

Core values of the Commission

Professionalism

Accountability

Integrity

Result oriented

Slogan

"Law reform for transformation and sustainable development"

FOREWORD

This study was undertaken by the Uganda Law Reform Commission, with support from the Justice Law and Order Sector, to review bail in Uganda's Criminal Justice System for purposes of bringing it in line with the practice in other common law jurisdictions.

The study examined the factors which affect the decision to grant bail or not and the procedures which should be followed in making and reviewing that decision. The study also sought to address the challenges associated with bail practice in Uganda.

Several recommendations were proposed and it is our hope that they will inform the need for reform in this area of the law.

The Uganda Law Reform Commission is grateful for the support offered by various institutions particularly the Justice Law and Order Sector. Special thanks go to the institutions that provided professional knowledge and support during the study and to all those who contributed in one way or another to the development of this report.

Dr. Pamela Tibihikirra-Kalyegira
Chairperson

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EXECUTIVE SUMMARY

This report presents the findings of the study on the review of bail in the criminal justice system and is intended to make recommendations for procedural, administrative and legislative changes necessary to provide clarity where the law is ambiguous, create consistency and transparency where interpretations are not clear and provide more stringent conditions for capital offences with the view to stopping rapid increase in crime in Uganda.

The study was undertaken by the Uganda Law Reform Commission with support from Justice Law and Order Sector (JLOS). It sought to address the challenges associated with the laws relating to bail, particularly, issues that require regulations to facilitate effective and reliable administration of justice in the criminal justice system. Furthermore, the study sought to devise solutions to the following:—

(a) definition of words like bail, a fixed place of abode, advanced age and substantial sureties;
(b) disparities in decisions relating to the grant of bail by judicial officers;
(c) limited considerations for exceptional circumstances;
(d) lack of specific provisions on information to sureties;
(e) jurisdiction of magistrates under section 75 of the Magistrates Courts Act, (MCA) Cap. 16;
(f) elimination of the use of money in bail application;
(g) mandatory bail; and
(h) Bail pending appeal considerations.

The study utilised library research; direct interviews with key players in the criminal justice system including judicial officers and prosecutors, police officers, the community, legal practitioners and inmates. A workshop was also held with judicial officers to validate the findings and recommendations of the study.

LIST OF ACRONYMS

CERD	Convention on the Elimination of All Forms of Racial Discrimination
CPCA	Criminal Procedure Code Act, Cap. 116
DPP	Director of Public Prosecutions
ECHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
JLOS	Justice Law and Order Sector
MCA	Magistrates Courts Act, Cap. 16
NGO	Non-Governmental Organisation
NRC	National Resistance Council
TIA	Trial on Indictments Act, Cap. 23
UK	United Kingdom
UN	United Nations
UNHR	Universal Declaration on Human Rights
ULRC	Uganda Law Reform Commission

SUMMARY OF KEY FINDINGS

1) Definitions of words in the laws relating to bail

The study established that it is necessary to define important words in the law relating to bail to avoid uncertainty and ambiguity that creates gaps in the law. In particular, it was recommended that the following words be defined:—

(a) bail;
(b) advanced age;
(c) substantial sureties; and
(d) fixed place of abode.

2) Inconsistencies in decisions relating to bail

The study established that there are disparities associated with court decisions on bail applications. These disparities can be discerned from the amount associated with cash bail, restrictive conditions such as restricting movement of the accused person, and refusal to grant bail in one case and grant of bail in another with a similar set of conditions.

The study findings indicate that disparities can be resolved through the use of specific provisions in the law to guide the exercise of discretion by judicial officers, issuance of a Practice Directive or use of guidelines.

Study findings further indicate that the disparities in judicial decisions arise from injudicious exercise of judicial discretion by judicial officers.

Summary of key recommendations

1. Definition of the term bail

The word bail may be defined as stipulated in the case below;

> **Lawrence Luzinda-V-Uganda [1986] HCB 33**, the definition of bail was given by Justice Okello thus; "bail is an agreement between the court, the accused and sureties on the other hand that the accused will attend his trial when summoned to do so".

There is a need for advocacy for both non legal users of the law and refresher courses for judicial officers with a view to removing negative perception about bail.

2. Inconsistencies in decisions relating to bail

(i) The law should be amended to include express and specific provisions requiring judges and magistrates to explain or give reasons for their bail decisions.

(ii) The use of discretion by judicial officers should be guided by either a specific provision of the law or a Practice Directive.

3. Exceptional circumstances in bail application

Section 15 of the Trial on Indictment Act, (TIA) Cap. 15 should be amended to take into consideration other possible exceptional circumstances, for instance, primary carer/care takers, expectant or breast-feeding mothers, sole caretaker, extreme disability, among others.

4. Relevance of place of abode in grant of bail

To avoid uncertainty and ambiguity in interpretation, there is need to clearly define the phrase 'a fixed place of abode' to mean an address of service.

5. Non-bailable offences in the Magistrates Court Act

It is recommended that Magistrates and Registrars should be given jurisdiction by law to entertain bail applications even in capital offences provided for under section 75 of the MCA.

6. Restriction of the right to bail in some cases

For selected capital offences such as kidnap, terrorism, aggravated robbery and child sacrifice very stringent considerations such as:—

(a) the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail;
(b) the possibility of accused's case succeeding; and
(c) strength of evidence against the accused should be imposed on accused person.

7. Information to sureties on their obligations under bail

The study recommends as follows:

(i) That the law on bail is amended to require judicial officers to explain bail conditions to the accused and sureties, including the consequences of breach of those conditions by sureties.
(ii) The use of information systems to enable judicial officers to know who has stood surety before, who failed in their duty as surety and who is barred from standing as a surety.
(iii) When taking into account the financial position of a surety, the court should bear in mind the effect of the consequences on the family of the accused.
(iv) Regulation of the kind of properties that can be used as security in bail, for instance, whether the accused can present a land title of a family house as security without the consent of their spouse.

8. The view of victims during bail application

It is desirable and necessary that the views of victims are considered as a matter of law at a bail hearing especially in hearings involving capital offences.

9. Use of money as a condition in bail application

The financial position of the accused should be put into consideration by a judicial officer and any money imposed should not be intended to fail the applicant, but rather ensure their return for trial.

10. Recovery of money paid as security during bail applications

(i) Clear regulations should be provided to give guidance on how money meant for bail should be returned to the suspect.

(ii) Advocacy should be undertaken to sensitise the public that money may be returned and how to claim it.

CHAPTER ONE: INTRODUCTION AND BACKGROUND

1.1 Introduction

The subject of bail, particularly its practice, is largely contentious. Legal and social debates on the balance between public safety and the right to personal liberty continue to rage in the public and political spaces. Concerns have been raised on the inconsistencies in the exercise of court discretion while considering conditions for bail, the increasing crimes that are capital in nature and the need to curb them using more stringent conditions for the grant of bail. The exorbitant fines and unaffordable cash bail imposed on applicants for bail by courts are argued to be discriminatory because only the rich can afford.

Furthermore, it is opined that bail applications are not participatory. The victims' views are ignored. Magistrates and judges are not required by law to inform sureties of their obligations and rights as sureties and the consequences of breach of those conditions.

This study was intended to make recommendations for procedural, substantive, administrative and legislative changes necessary to provide clarity where the law is ambiguous, create consistency and transparency where interpretations are not clear or fair and provide more stringent conditions for bail in capital offences with the view to curbing their increase. In reviewing the law on bail, the Commission considered the presumption of innocence, the protection of the public, including victims of crime, fairness in decisions of courts and the desirability of speedy trial of persons in detention.

1.2 Background and context

On 21 December, 1988 the National Resistance Council (NRC) enacted Statute No. 5 of 1988 which established the Uganda Constitutional Review Commission (hereinafter Commission) Chaired by Justice Benjamin. J. Odoki, to start the process

of developing a new Constitution. During consultations by the Commission, the people complained about the abuse of bail provisions by courts. The report states "…the average citizen finds it hard to understand how people charged with both serious and minor crimes can be walking freely on the streets and sometimes even intimidating and threatening the complainants."[1]

Some suggested that bail was tantamount to an acquittal because the accused persons used the freedom to interfere with the police investigations by giving bribes to ensure that they do not face trial. In some cases, those on bail simply abscond and evade trial.[2] The majority called for the complete abolition of bail or imposition of severe restrictions on its application.

The Commission noted that this was due to the failure by members of the public to comprehend how someone who has been charged with serious or minor crimes can walk freely on the streets. The Commission did not entirely agree with the submissions of the majority of the people. The objections were interpreted as a failure to understand the principles upon which bail and grant of bail are based. Many people understood that bail is only granted to those who can afford the bond.[3]

The Commission argued that the underlying principle is that the liberty of a person should not be taken away unless there are good grounds for doing so. However, in the circumstances of Uganda, where the police lack adequate investigative resources, the tendency has always been to arrest suspects before investigations have been carried out. This has resulted in long periods of remand in custody while investigations are conducted with some suspects being released without trial due to lack of sufficient evidence against them. The Commission concluded that such suspects would suffer grave injustice if not released on bail.[4]

1 The Uganda Constitutional Review Commission.
2 Report of the Uganda Constitutional Review Commission, 1993 at Page 180.
3 ibid.
4 Report of the Uganda Constitutional Review Commission (fn), page 181.

The Commission recommended that:

(a) there should be sufficient grounds before any person is arrested;
(b) provision for grant of bail to accused persons should be maintained in the new constitution;
(c) bail should not be refused without proper justification; and
(d) any accused person who has been on remand for a period of sixteen months for a capital offence or eight months for other offences, and has been committed for trial should be entitled to automatic release on bail unless the court decides that there are substantial grounds for a continued remand.[5]

Over the years, the law on bail in Uganda has undergone substantive transformation. The Constitution of the Republic of Uganda 1995 introduced Article 23(6) (a) which provides that where a person is arrested in respect of a criminal offence, such a person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable.

This article was interpreted by the Constitutional Court in **Uganda (DPP) Vs (RTD) Dr. Kiiza Besigye**[6]. The court held that,

Under Article 23(6) (a), every accused person is entitled to apply for bail. The word "entitled" creates a 'right' to apply for bail and not a right to be granted bail. The word 'may' creates discretion for the court to grant or not to grant bail. The context in which the word 'may' is used does not suggest otherwise.

While under Article 23(6)(b) & (c), the court has no discretion to refuse to grant bail to such a person, the context of Article 23(6) (a) confers upon the courts discretion whether to grant or not to grant bail. Therefore, bail is not an automatic right. On the other hand, according to Article 23(6) (b) & (c) bail for someone who has completed this statutory period is mandatory. A similar

5 ibid.
6 Constitutional Petition No. 20 of 2005.

position was taken in the case of **Foundation for Human Rights Initiatives Vs Attorney General.**[7]

Despite Article 23(6)(a) of the Constitution which gives an accused person an opportunity to apply for bail in conformity with article 28(3)(a) on the presumption of innocence, there has been a growing concern over the past years about several aspects of the law on bail. The concerns relate to, among other things, deficiencies in the legal framework and its ability to keep criminals away from society. For example, on the 4th of October, 2017, relatives of the deceased were extremely disgruntled and disappointed that the High Court,[8] had granted bail to Mathew Kanyamunyu a suspect in the murder of Akena.[9]

An increase in criminality in the country, prompted the President to voice concern over grant of bail to persons accused of capital offences like murder, kidnap, and terrorism.[10] The president argued that easy access to bail leads to recidivism, impunity and enables hard core criminals to walk freely on the streets and do further damage.

It is a practice in Uganda that the Uganda Police Force arrests suspects and then investigates. It is equally a notorious fact that the Uganda Police Force lacks the necessary financial and human resource to investigate in a timely manner. These issues have created a lot of back log as they affect the work of the Director of Public Prosecutions (DDP). The poor management of back log mostly affects the suspects in prisons by increasing the number of people incarcerated. Most developed countries carry out investigations before they arrest and this resonates with their legislative framework.

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7 Constitutional Petition No. 20 of 2006.

8 Kanyamunyu & 2 Ors V Ug, (HCT-00- CR-CM- 0369 – 2016) [2017] UGHCCRD 1 (10 January 2017); https:// ulii.org/ug/judgment/hc-criminal-division/2017/1/. https://www.newvision.co.ug/new_vision/news/1463013/akena-relatives-tears-kanyamunyu-released-bail.

9 ibid.

10 Yudaya Nangonzi; Bail to suspected killers must stop, Museveni tells courts, the Observer News Paper, June 14, 2018, see https://observer.ug/news/headlines/57942-bail-to-suspected-killers-must-stop-museveni-tells-courts.html, accessed August 15th, 2019.

1.3 Problem statement

There is no single legislative enactment in Uganda that defines the term "bail". Laws that do not contain definitions of specific words create uncertainty and ambiguity, which results in interpretations that are without any principles or underlying benchmark or purpose for the legislation. Additionally, lack of a definition of bail creates situations where prisoners and the communities perceive grant of bail as an acquittal.

Furthermore, concern has been raised by the public as to the lack of consistency in bail decisions. It is said that similar offences being a subject of bail application have produced different decisions. For instance, in **Matthew Kanyamunyu & 2 Ors -v- Uganda**[11] where one accused was granted bail while other accused persons in similar circumstances were not.

Inconsistencies are caused by the wide discretion given to judicial officers, the effect of which is a negative image of the Judiciary as the main administrator of justice. This is evidenced by the cases in Magistrate courts where misdemeanors have been ordered to pay colossal sums of money to be released on bail and yet for felonies triable by the High Court, like murder, rape and aggravated defilement, judges have ordered accused persons to pay reasonable sums for release on bail. It is not clear why in some minor cases bail is very colossal yet in graver offences it is affordable. It is probable that such discretion is exercised injudiciously.

Section 15 (3) of the Trial on Indictment Act, (TIA) Cap. 15 provides for exceptional circumstances when a detainee may be released on bail by the High Court. According to the above section, exceptional circumstances include; grave or serious illness which has been certified by a medical officer of the prison or other institution where the accused is detained as being incapable of being adequately treated while in custody or detention, production of a certificate of no objection signed by

11 (HCT-00- CR-CM- 0369 – 2016) [2017] UGHCCRD 1 (10 January 2017).

the DPP and showing that the accused is either an infant, or of advanced age.

Section 15 above is narrow as it does not take into consideration other situations that may be considered exceptional circumstances. For instance, the section does not consider situations of sole care takers; breast feeding mothers, grave disability and pregnant women as falling within the meaning of this section.

Research suggests that children with parents in prison are likely to experience a range of psycho-social problems including fear and anxiety, separation anxiety, shame, depression and even post-traumatic stress disorder.[12] Some research links the experience of having a parent taken into custody during childhood with increased risk of antisocial and criminal behaviours.[13]

The Magistrates Courts Act (MCA) is the law governing the procedure applicable in Magistrate Courts. These courts have authority to try criminal matters. The MCA empowers magistrates to grant bail to accused persons who have committed offences which are triable and bailable by them. However, there are offences which can be tried by magistrates for which they cannot grant bail and also cases which are neither triable nor bailable by them. In these cases, the magistrate's duty is to inform the accused person of his or her right to bail and also advise him or her to apply for bail in the High Court.

It is important to note that a magistrate has power to grant bail for any other offences triable by him or her that are not included under section 75 of the MCA. The Provision under section 75 is restrictive and does not take into consideration the fact that there is case backlog, and provides no reason why magistrates should not hear bail applications for capital offences. It is also incomprehensible that the court with jurisdiction to hear or try

12 Victorian Law Reform Commission, Review of the Bail Act Consultation Paper, Published by the Victorian Law Reform Commission, 10 October 2005 page 141, para 8.

13 ibid.

an offence does not have power to grant bail in respect of that offence.

As Crime levels have continued to skyrocket in the country, some security and legal experts are advocating for a change in the legal system in Uganda in order to curb the social problem of granting bail to suspects involved in capital offenses. Among the common capital offences nowadays are homicide, rape, terrorism, treason, kidnap and aggravated robbery to mention but a few. One of the reasons for increase in crime level is attributed to the liberal nature of granting bail which equally affects public confidence in the judicial system thus the suggested restrictions which would deter future crimes.

The President of the Republic of Uganda has weighed in on this debate. He argues that suspects of murder, aggravated[14] rape and robbery involving guns, acid attacks, terrorism and those involved in embezzlement of either public or private funds[15] should be denied bail and special considerations for bail be developed to allow them be kept in jail for a period not less than six months before any form of bail application is entertained in the courts of law.[16]

It is not clear from the reading of the laws of Uganda whether judicial officers are required to explain to sureties their rights, obligations, effects and consequences of breach of bail undertaking. As a matter of practice they do not do so. There are no official guidelines for judicial officers detailing what information they must provide to a surety.

The repercussions for a surety if an accused breaches his or her conditions of bail can be very serious. In some instances, it may result in large amounts of money being forfeited; in others

14 https:www.monitor.co.ug/News/National/Chief-Justice-M7-Bail-Constitutional-Matter-/688334-4616382gy vommz/index.html. Accessed on 1/07/2019 at 8.48am. In reaction to the murder of Ibrahim Abiriga former Member of Parliament of Arua.

15 www.state house.go.ug/media/news/2013/11/22 “deny-bail-crime-suspects”-president Museveni 2013/

16 https://Ugandaradionetwork.com/story/museveni-insists-no-bail-law-is-urgently-needed. In retaliation to the walk to work group on the basis that they were economic saboteurs.

it may mean the surety's home is liable to forfeiture. If the surety is unable to raise the funds subject of the surety, then they face the prospect of a prison sentence.

In Australia, sureties are protected from losing their property. For instance, a person cannot be accepted as a surety if it appears to the court that it would be particularly ruinous or injurious to the person or the person's family if the undertaking were forfeited[17].

In assessing whether or not there is an unacceptable risk in granting an accused person bail in Uganda, some judges consider a number of factors, including the attitude or opinion of the victim to the grant of bail. In practice, however, the views of the victim are rarely sought.

Several complaints have been raised about the unaffordable cash bail in Uganda. At times, the cash bail imposed on accused persons by judicial officers is exorbitant and unaffordable for many poor citizens in conflict with the law. It has been argued by some commentators that cash bail is an ineffective tool for protecting the public or ensuring that people show up in court. After a judge has set a bail amount, a defendant can pay that amount as a condition to get out of jail. This means that a defendant's release depends upon his or her ability to pay. It can be said therefore that wealthy defendants are likely to walk free while poor defendants languish in jail. Monetary bail promotes discrimination based on wealth, causes loss of confidence in the judicial system while providing an environment that enables increase in criminal activity, especially for those who can afford to pay the sums. To avoid likely discrimination, other conditions of release other than cash bail could be more effective, more efficient, and fair.

1.4 Objectives of the study

The overall objective of this study was to examine the effectiveness of the current legal frame work on bail in Uganda.

17 Victorian Law Reform Commission, (fn 12) page 96, para 2.

The specific objectives of the study were:

(a) to provide clear definitions of important words or phrases to create clarity in the law;
(b) to examine causes for inconsistencies in court decisions on bail matters;
(c) to explore the possibility of expanding section 15 of the Trial on Indictments Act on exceptional circumstances for grant of bail;
(d) to gather views on the effects of the use of money in bail;
(e) to examine the possibility of empowering Magistrates to hear bail applications concerning certain crimes listed under section 75 (2) of the Magistrates Court Act;
(f) to explore the possibility of restricting bail in certain offences such as terrorism and kidnap;
(g) to consider the grounds for the grant of bail pending appeal; and
(h) to make proposals for reform of the law on bail in Uganda.

1.5 Scope of the review

The review focused on the following areas: definition of bail and other terms; possibility of enlarging the application of section 15 of the TIA; considerations or grounds for bail pending appeal; possibility of enlarging jurisdiction of magistrates on several matters relating to bail; furnishing sureties with information about bail undertakings on bail matters; reasons for the existing inconsistencies in bail decisions by judicial officers; the use of money in bail application; mandatory bail and victims' views in bail applications.

CHAPTER TWO: LEGAL FRAMEWORK ON BAIL IN UGANDA

2.0 Introduction

In describing bail, Makame, J. (as he then was) stated "The liberty of the individual must be guarded, protected and promoted but the interest of the society, to which the individual is component, must be taken into account if a society is to move forward and flourish instead of staggering and breaking apart ".[18]

This chapter examines the legal framework on bail in Uganda. It is aimed at highlighting the impact of the existing regulatory framework on bail in the criminal justice system in Uganda. It seeks to address issues of the existing pieces of legislation including gaps and ambiguities. The chapter draws out legal issues and gaps for streamlining. It also considers other relevant issues for effective administration of bail application in Uganda.

The rights of pre-trial detainees are provided for in the Constitution of the Republic of Uganda, 1995 and other international instruments. These include the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The African Charter on Human and Peoples Rights, among others.

The legal framework on bail in Uganda is contained in the Constitution of the Republic of Uganda 1995, the Trial on Indictments Act, Cap. 23, the Magistrates Courts Act, Cap. 16, Criminal Procedure Code Act, Cap.116, Children Act, Cap. 59 and international instruments.

18 Said Gurhl Shabel and three others v. Republic (1976) LRT No. 4.

2.1 International and Regional Legal Framework on bail

2.1.1 Universal Declaration of Human Rights

Article 3 of the Universal Declaration on Human Rights[19] (UDHR) provides that everyone has the right to life, liberty and the security of person. Article 9 prohibits arbitrary detention. The purpose of the Universal Declaration is to recognise that 'the inherent dignity of all members of the human family is the foundation of freedom, justice and peace in the world'.[20] It declares that human rights are universal – to be enjoyed by all people, no matter who they are or where they live. This instrument promotes human rights in cases relating to arrests by encouraging the protection and observance of the right to personal liberty through the prohibition of arbitrary detention. Deviation from the provisions of the Declaration amounts to violation of commitment to the protection of human rights under the UDHR.

Uganda is a signatory to UDHR and as such has obligation under international law to respect, observe and promote all declarations pertaining to human rights therein.

2.1.2 International Covenant on Civil and Political Rights

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power" and that person shall be entitled to trial within a reasonable time or to release. Significantly, in relation to pre-trial detention, the ICCPR expressly provides that "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any

19 UN General Assembly, "Universal Declaration of Human Rights," 217 (III) A (Paris, 1948), http://www.un.org/en/universal-declaration-human-rights/ (accessed September 6, 2019).

20 The Preamble to the Universal Declaration of Human Rights 1948 at page 1.

other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

Uganda ratified the ICCPR on 21st June 1995 and it gained the force of law in Uganda on 21st September 1995. Therefore, continuous detention without release or trial is not only a violation of Uganda's Constitution but also a violation of Article 9 of the ICCPR. Uganda is bound by Article 9 to protect and observe human rights including the right to personal liberty.

2.1.3 General Comment No. 35 of the UN Human Rights Committee

General Comment No. 35 of the UN Human Rights Committee notes that Article 9 of ICCPR protects individual(s) against arbitrary unlawful detention. The concept of arbitrariness is interpreted as including elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[21]

The legal framework on bail in Uganda is clogged with uncertainties and ambiguities. The fact that decisions are inconsistent even for similar matters, important terms not defined and the lack of uniformity even in similar matters in cash bail, make the law unjust and unpredictable.

2.1.4 European Convention on Human Rights

Similarly, Article 5 of the European Convention on Human Rights provides that no one shall be deprived of his liberty save in specified cases and in accordance with a procedure prescribed by law, including where the accused is brought before a court where there is a "reasonable suspicion" he committed an offence or "when it is reasonably considered necessary to prevent him committing an offence or fleeing after having done so". Anyone deprived of liberty under the exceptions set out in Article 5 "shall be entitled to take proceedings by which the lawfulness of his

21 ICCPR Human Rights Committee, General Comment No. 35, Article 9 (Liberty and Security of Person) Para 12, December 2014.

detention shall be decided speedily by a court and his release ordered if the detention is not lawful".[22]

The exceptions under Article 5 above can be adopted by Uganda in particular in bail pending appeal. The law is silent as to the consideration for release on bail. The court exercises its discretion which may be unfair at times. Where release is reasonable in the circumstance, it is important that such release is done in accordance with established set of rules and guidelines to avoid unnecessary violation of rights.

2.1.5 European Court of Human Rights

The European Court of Human Rights (ECHR) has developed general principles on the implementation of Article 5. These include and state that

(i) Pre-trial detention should be imposed only as an exceptional measure. There is a presumption in favour of release.[23] The Court has stated thus;

"detention of an individual is such a serious measure that it is only justified where other less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances."[24]

(ii) The state bears the burden of proof to demonstrate that a less intrusive alternative to detention would not serve the respective purpose.[25] The authorities must consider measures to counteract any risks, such as requiring a financial security to be lodged or court supervision.[26]

(iii) To justify the detention of a person who is presumed innocent, there must be "a genuine requirement of

22 Article 5(4) ECHR.
23 Michalko v. Slovakia, App 35377/05, 21 December 2010, Para 145.
24 Ambruszkiewicz v Poland.
25 Ilijkov v Bulgaria, App 33977/96, 26 July 2001, Para 85.
26 Tomasi v France (1992) 15 EHRR 1. See also Neumeister1 EHRR 91.

public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty".[27] Mandatory detention on remand is incompatible with Article 5(3) of the Convention.[28]

(iv) ECHR case law recognizes that there are lawful grounds for ordering pre-trial detention, namely:

(a) the risk that the suspect will fail to appear for trial;[29]

(b) the risk that the suspect will interfere with evidence or intimidate witnesses;[30]

(c) the risk that the suspect will commit further offences;[31]

(d) the risk that release of the suspect will cause public disorder; or[32]

(e) the need to protect the safety of a person under investigation in exceptional cases.[33]

According to the ECHR, an individual should only be detained if one of these grounds applies and a condition of bail could not mitigate the risk in question.

(i) The detention decision is sufficiently reasoned and does not use "stereotyped"[34] forms of words. The arguments for and against pre-trial detention must not be "general and abstract".[35] The court must engage with the reasons for pre-trial detention and for dismissing the application for release.[36]

(ii) The authorities must exercise *"special diligence"* throughout detention on remand. It is not enough for them to have demonstrated that one of the risks set out above exists and cannot be reduced by any bail condition. They must then act expeditiously from the day the accused is placed in custody until the day the charge is determined.[37]

27 Ilijkov v Bulgaria (2001).
28 Caballero v UK (2000) 30 EHRR 693.
29 Smirnova v Russia, App 46133/99, 48183/99, 24 July 2003, para 59.
30 ibid.
31 Muller v. France, App 21802/93, 17 March 1997, para 44.
32 I.A. v. France, App 28213/95, 23 September 1988, para 104.
33 Ibid, para 108.
34 Yagci and Sargin v Turkey, App 16419/90, 16426/90, 8 June 1995, para 52.
35 Smirnova v Russia, App 46133/99, 48183/99, 24 July 2003, para 63.
36 Buzadj v. Moldova, App 23755/07, 16 December 2014, para 3.
37 Kalashnikov v Russia 36 EHRR 587.

(iii) The mere fact of having committed an offence is not sufficient reason for ordering pre-trial detention, no matter how serious the offence and the strength of the evidence against the suspect.[38]

(iv) The risk of re-offending can only justify pre-trial detention if there is actual evidence of the definite risk of re-offending available.[39]

(v) In reviewing pre-trial detention the authorities are obliged to consider whether the "accused's continued detention is indispensable"[40]

2.2 National Legal Framework

2.2.1 The Constitution of the Republic of Uganda

In Uganda, application for bail is a constitutional right guaranteed under Article 23(6).[41] Article 23(6) (a) provides thus;

"Where a person is arrested in respect of a criminal offence, the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable"

The Constitutional Court of Uganda has interpreted the above Article in the case of **Uganda (DPP) –vs- Col (Rtd) Dr Kiiza Besigye** [42], the Court held that;

"Under Article 23(6) (a), the accused is entitled to apply for bail. The word "entitled" creates a 'right' to apply and not a right to be granted bail ..."

The Constitution further provides that a person shall be released on bail for cases which are triable by the High Court, as well as other subordinate courts, if they have been remanded in custody for 60 days,[43] and for cases which are triable only by

38 Tomasi v France, App 12850/87, 27 August 1992, para 102.
39 Matznetter v Austria, App 2178/64, 10 November 1969, para 1. 35
40 Matznetter v Austria, App 2178/64, 10 November 1969, para 1. 35
41 The Constitution of the Republic of Uganda (1995).
42 Constitutional Reference No. 20 of 2005.
43 Constitution of the Republic of Uganda, article 23(6) (b).

the High Court if they have been remanded in custody for 180 days.[44] In practice, however, there are many cases of people remaining in detention for long periods before trial,[45] besides, the Constitution seems to create uncertainty by giving with one hand ("shall be released on bail") and taking away with another hand ("on such conditions as court considers reasonable"), thus creating uncertainty. The uncertainty is exploited by judicial officers to refuse the granting of mandatory bail. There is need to streamline the application of this Article.

2.2.2 The Trial on Indictments Act, Cap. 23

The relevant provisions of the TIA in respect to bail are; section 14, 15, 16, 17, 18, 19, 20, and 21. The criteria for determining the application is laid out under sections 14, and 15 of the Act. It has been argued that section 15 on exceptional circumstances is narrow and does not take into consideration the changing prevailing socio-economic circumstances of Uganda, in particular situations of extreme disability, sole care takers and pregnant women.

2.2.3 The Magistrates Court Act, Cap. 16

The MCA is the law governing the procedure applicable to Magistrate Courts. An application for bail can be made orally by an accused or his or her advocate in court. Alternatively, it can be made in writing and should be supported by an affidavit.

The relevant provisions in respect to bail are;

Section 75, 76, 77, 78, 79, 80, 81, 82, 83, and 84. The criteria for determining the application is laid under section 75, 77 and 15 of the Act.

44 Constitution of the Republic of Uganda, article 23(6) (c).

45 Uganda Human Rights Commission 2011 Annual Report 2010. Kampala: Uganda Human Rights Commission. p.11.

Section 75[46] and 77[47] of the Magistrates Courts Act[48] governs the grant of bail in Magistrates Courts in Uganda. Section 75 of the Act prohibits magistrates from entertaining bail applications on matters listed thereunder. It is not clear however whether there are any legitimate reasons why magistrates should not entertain such bail application. Extending jurisdiction of magistrates under this section would be beneficial in so far as it would promote decongestion of prisons and reduce case backlog.

2.2.4 The Criminal Procedure Code Act, Cap 116

For an accused person found guilty after trial, or who has pleaded guilty before a trial Judge, and sentenced to a term of imprisonment, and who has lodged an appeal against conviction or sentence, the prospects of being granted bail pending appeal are limited and will be granted only if the applicant establishes 'exceptional circumstances'.[49]

Bail pending appeal is a legal process under sections 132(4) of the Trial on Indictments Act and 40(2) of the Criminal Procedure

46 A magistrate's court before which a person appears or is brought charged with any offence other than the offences specified in subsection (2) may, at any stage in the proceedings, release the person on bail, on taking from him or her a recognisance consisting of a bond with or without sureties, for such an amount as is reasonable in the circumstances of the case to appear before the court, on such a date and at such a time as is named in the bond.

47 Where any person appears before a magistrate's court charged with an offence for which bail may be granted, the court shall inform the person of his or her right to apply for bail.

(1) When an application for bail is made, the court shall have regard to the following matters in deciding whether bail should be granted or refused—
(a) the nature of the accusation;
(b) the gravity of the offence charged and the severity of the punishment which conviction might entail;
(c) the antecedents of the applicant so far as they are known;
(d) whether the applicant has a fixed abode within the area of the court's jurisdiction; and
(e) whether the applicant is likely to interfere with any of the witnesses for the prosecution or any of the evidence to be tendered in support of the charge.

(3) Where bail is not granted under section 75, the court shall—
(a) record the reasons why bail was not granted; and
(b) inform the applicant of his or her right to apply for bail to the High Court or to a chief magistrate, as the circumstances may require.

48 Cap 16 Laws of Uganda.

49 Edney, Richard, Bail Pending Appeal in Serious Criminal Cases: The New Victorian Law (Volume 3 Issue 3 Sandstone Academic Press (2007) page 1.

Code Act where the appellate court has a mandate to grant a convict bail so long as the penalty being appealed is not a death sentence.

This concept differs from pre-trial bail, because during pre-trial, a bail applicant has not yet been declared guilty. Whilst for bail pending appeal, court must be satisfied that the applicant shall be in compliance with bail conditions and be available to attend trial or appeal.[50]

The theoretical basis for the concept of bail is that the applicant is the only person capable of preparing his or her own defense and is believed to be innocent until proven guilty. However, upon conviction, the presumption of innocence ceases.

The law on bail pending appeal in Uganda does not provide for grounds upon which the court can base its discretion to grant or not to grant bail on appeal. As a result, courts have tried to fill the gap in the law by laying down considerations for bail pending appeal.

In the case of **Arvind Patel vs Uganda**[51] court laid down the legal framework for deciding whether or not an applicant is entitled to bail pending appeal. In particular, the court observed that it must scrutinise the character of the applicant; ask whether he or she is a first offender; ask whether the offence in question occasioned personal violence; measure the absence of frivolity and the reasonable possibility of success; and estimate the time the determination of the appeal is likely to take. In conclusion, the court held that a combination of at least two of these criteria may suffice to serve as grounds for granting bail pending appeal.

50 Igamu Joanita -v- Uganda Criminal Application Number 0107 of 2013. 142 Arvind Patel vs Uganda S.C.C. Application No.? of 2003.

51 Arvind Patel v Uganda ((Criminal Appeal No. 36 of 2002)) [2003] UGSC 35 (26 October 2003)

In the case of **Jamwa**[52] , the applicant argued and based his grounds on those considerations laid down in the **Arvind Patel** case[53] above as follows:

(a) that he was a first time offender who had complied with his previous bail conditions;
(b) that his offence did not cause any personal violence;
(c) that he had presented substantial sureties;
(d) that his appeal had a high likelihood to succeed; and
(e) that the appeal was likely to delay.

Court was persuaded by the applicant's arguments

The above considerations are however not found in any legislation in Uganda. The Trial on Indictments Act and of the Criminal Procedure Code Act are silent. As a result, litigants have to solely rely on case law and court discretion. To avoid uncertainties likely to be created by exercise of discretion, the considerations laid down in the above court decisions should be codified.

Conclusion

There are major gaps, uncertainties, inconsistencies in bail decisions and ambiguity in Uganda's bail related laws in so far as supporting the rights to personal liberty in Uganda is concerned.

To avert this situation, the laws relating to bail especially the MCA and TIA should be reviewed to enable the people maximally benefit from the right to personal liberty as enshrined in the Constitution of the Republic of Uganda especially by improving consistencies in decisions relating to bail and removing the gaps in the law.

52 Chandi Jamwa v Uganda (Miscellaneous Application No. 09 OF 2018) [2018] UGSC 18 (15 May 2018).
53 ibid.

CHAPTER THREE: METHODOLOGY

3.0 Introduction

This chapter provides details of the various methods that were used to conduct this study.

3.1 Study design

The study applied qualitative and quantitative methods of data collection. This approach was intended to solicit facts, views, perceptions and opinions from stakeholders at all levels of implementation as a strategy to fill the gaps in existing laws relating to bail. Besides primary data collection, a review of relevant documents was undertaken to supplement the raw data collected.

3.2 Study area

Consultations were undertaken in five districts of Masaka, Jinja, Lira, Gulu and Kampala. The selection of the districts for the consultations was based on a number of factors including; availability of key stakeholders, composition in terms of rural/ urban dimensions, accessibility to legal representation and geographical coverage.

3.3 Population and sample selection

The study was undertaken in selected areas representing most regions of Uganda. Respondents were purposively identified for consultation. They included prisons officers, police officers, private legal practitioners, judicial officers (judges, registrars and magistrates,), prosecutors, representatives from Law Development Centre, Justice Centres Uganda and Civil Society Organizations such as the Public Defenders Association of Uganda. Other key stakeholders interviewed included officials

from the Ministry of Justice and Constitutional Affairs and the Uganda Human Rights Commission.

A total of two hundred (200) respondents were consulted.

3.4 Methods of data collection

Data collection methods included literature review, key informant interviews, focus group discussions and consultative workshops.

3.4.1 Literature review

Literature reviewed included source documents, reports, publications to generate information for the study. Some of the documents were reviewed during site visits to key actor institutions. This information was used to generate evidence based conclusions and specific recommendations.

Some of the documents reviewed included reports and studies on bail by other law reform commissions, relevant writings from researchers, case law and academic articles. In particular, the following were reviewed:

i) National laws and policies;
ii) International human rights instruments;
iii) Reports on bail from other law reform commissions;
iv) Case law;
v) Publications on bail; and
vi) Academic writings.

3.4.2 Key informant interviews (KIs)

Key informant interviews were conducted to help explore further and gain a deeper understanding by verifying earlier information, correcting earlier misinterpretations, filling gaps and soliciting personal views. Respondents for the key informant interviews were purposively selected based on their knowledge and experience on the subject of bail. A total of fifty (50) persons were interviewed using this method, 10 in each of the districts.

3.4.3 Focus group discussions (FGDs)

A focus group discussion is a forum at which a group of carefully identified members congregate to raise and share issues that merit attention in matters that affect them. It is different from the other consultation fora in the sense that it draws together a smaller population of the community at one sitting to gather new information that depicts the general perspective on a topical issue.

Focus group discussions were used to explore peoples' views, perceptions and concerns on the law relating to bail and to explore the possibility of making the law more effective.

A total of 5 focus group discussions were held and drew together prison inmates from all the districts in which consultations were conducted. A total of seventy-five (75) members participated in these discussions.

3.4.4 Technical working group meetings

A technical working group was constituted of selected key stakeholders from relevant institutions involved in the implementation of the law on bail. They provided technical expertise and shared their knowledge with the Commission team. Their contributions enriched the Commission's proposals for reform of the law on bail. In addition, their participation created a sense of ownership of the proposals provided/gathered from other stakeholders.

3.4.5 Workshops

Two workshops were held in Kampala. Participants at the workshops included judicial officers, private legal practitioners, police officers from the Justice Law and Order Secretariat and representatives of civil society organisations (CSO). The objectives of the workshops were twofold:

(i) to disseminate the findings and recommendations of the study; and

(ii) to gather more views and build consensus on recommendations of the study.

Comments from the participants of the workshop were used to enrich and strengthen the recommendations of the Commission as contained in the draft study report.

3.5 Research Procedure

A study instrument in form of a question guide based on the issues was prepared and pre-tested for validity and reliability. This was followed by preliminary visits to the different districts to prepare grounds for consultations. Preliminary visits involved securing permission from relevant district authorities and identification of focal persons whose key role was to guide the Commission in identifying various respondents as well as making any other prior arrangements necessary to ease the field consultations.

3.6 Challenges

Conflicting timeframe

Some planned meetings with the intended respondents, especially the private legal practitioners did not take place because they were attending to their clients thus the consultations could not take place.

Logistical constraints

The team was faced with logistical constraints including limited time and financial resources.

CHAPTER FOUR: FINDINGS AND ANALYSIS

4.0 Introduction

This chapter presents the findings of the study. The chapter constitutes the core of the report and provides an anchor for legal and policy recommendations. The findings are views gathered from field respondents, technical working group meetings, workshops, literature review, as well as comparative analysis of legislation and practice in other jurisdictions.

4.1.1 Definition of bail

Bail refers to an agreement between court and an accused person to enable the accused get a temporary release from custody so that he or she can prepare for his or her case.[54] Several views were expressed to the effect that it is necessary to specifically define bail in the statute book[55].

Black's Law Dictionary[56] defines bail as, *"to obtain the release of (oneself or another) by providing security for a future appearance in court ..." 'A security such as cash, a bond, or property required by a court for the release of a criminal defendant who must appear in court at a future time."*

Another clear definition is from a legal scholar, Lumumba P.L.O who defines bail as, *".... an agreement between the accused (and his sureties as the case may be) and the court and that the accused will pay a certain sum of money fixed by the court should he fail to attend his trial"*.[57]

Lumumba asserts that laws which do not contain definition of specific terms create uncertainties and ambiguities. He

54 Luzinda-V-Uganda [1986] HCB 33,
55 70% responses from key informants' interview conducted on the 19th of March, 2019 in Lira district.
56 Black's Law Dictionary (9th Edition, West, June 2009.
57 P.L.O, Lumumba, Criminal Procedure in Kenya (Law Africa Publishing (K) Ltd 2008).

recommends that important terms in all legislation be defined to create clarity and give the laws purpose and effect to the mischief they intend to cure.

Legislation in Uganda, including the Constitution of the Republic of Uganda does not define the word bail. This leaves it to the courts to determine what bail is.

On the other hand, 30% of the respondents did not see the need to define the term bail. In their opinion, the term is known and also defined by case law and dictionaries, thus there is no need to define it in specific legislation. While the findings show that there is consensus that bail is an agreement between court and an accused person, there is concern that this definition is not a legal description within the strictest meaning of the term. According to study respondents, the definition of bail must embrace all tenets of bail, including it being conditional on certain terms. The essential characteristics of bail are stipulated in the case of **Lawrence Luzinda V Uganda**[58] , where Justice Okello defined bail as an agreement between the court, the accused and sureties that the accused will attend his trial when summoned to do so.

During consultations in Lira district, a prison officer defined bail as: *"an opportunity given to an inmate by court officials to be out of prison after presenting credible sureties so as to come from home to attend court."* [59]

A key respondent from Justice Centre Uganda[60] defined bail as a window of opportunity for an accused person to be able to prepare to defend him or herself while coming from home. Another respondent, a State Attorney[61] defined bail as:

58 See note 54.

59 Interview with the Officer in Charge of Lira Main Prison, held on 18th of March 2019 in Lira district.

60 Francis Okulu, Justice Center Manager, Justice Centers Uganda, held on the 18thof March, 2019 at Lira Branch.

61 Interview with the Office of the Resident State Attorney, held on the 3rd of April 2019 at Jinja district.

"a temporary release of a suspect from custody on such terms as court may impose upon satisfying court that he or she will attend the trial."

While another respondent[62] defined bail as the basic right of every prisoner on remand to be granted an opportunity to attend his or her case while outside jail.

Some respondents defined bail as an agreement between a court and an accused to avoid imprisonment.

According to a judicial officer[63], there is a general lack of knowledge among the people on the law relating to bail. There are those who think that they must be given bail; once bail is not granted, these categories of people accuse the courts of corruption and where bail is granted, they think it is an acquittal. This misconception has led to people jumping bail.

Similarly, several state attorneys[64] note that limited knowledge of the law on bail is evidenced by the fact that people think being granted bail means the case has ended.

From the above discussion, the respondents interviewed essentially understand the meaning of the term bail. The definitions were centered around four main aspects namely: bail is a human right, it is a temporary release from prison, a contract between the applicant/ accused and court, and a mandatory return to court for trial. The findings further highlight the need for a definition of the term bail because it would provide clarity and prevent uncertainty in the law.

However, there are misconceptions among some of the members of the public that bail is a final release and also that it is mandatory. Such misconceptions have resulted in loss of belief in the justice system by victims who see accused persons

62 Interview with the Senior Social Rehabilitation Welfare Officer, held on the 20th of March, 2019 at Gulu Main Prison.

63 Interview with the Magistrate Grade One, Chief magistrate Court, held on the 6th of March, 2019 in Masaka, district.

64 Interview with the Office of the Resident State Attorney, held on the 20th of March, 2019 in Gulu district.

released on bail. This contributes to mob justice as society takes matters into its own hands leading to increase in crime. It is important that the law clearly defines bail so that members of the public can understand the concept and purpose of bail in the criminal justice system.

4.1.2 Perceptions about bail

Article 28(3) (a)[65] provides that every person who is charged with a criminal offence shall be presumed to be innocent until proven guilty or until that person has pleaded guilty. From this presumption of innocence arises the right to apply for bail under Article 23(6) (a)[66] which provides that where a person is arrested in respect of a criminal offence, the person is entitled to apply to court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable.

There are different perceptions on this article of the Constitution. Some argue that the Constitution, read as a whole, gives an applicant the right to be granted bail while others argue that the right is limited to application for bail.

The Constitutional Court has interpreted Article 23 (6) (a) in the case of

DPP -vs- Col (Rtd) Dr. Kiiza Besigye,[67] in which the court held that,

"under Article 23(6) (a), the accused is entitled to apply for bail. The word "entitled" creates a 'right' to apply and not right to be granted bail ..."

The study sought to establish knowledge, views and perceptions about Article 23(6) (a) of the Constitution. From the findings, 60% of the respondents knew what this article meant and wanted it to remain as it is, while 40% stated that this article gives an accused a mandatory right to bail. Among the respondents who were knowledgeable about the actual meaning of this article,

65 The Constitution of the Republic of Uganda 1995.
66 ibid.
67 Constitutional Reference No. 20 of 2005.

were those whose views were technical in nature and those who made general remarks based on their experiences or practice.

Among the respondents who understood the meaning of Article 23(6) (a) of the Constitution, some were of the view that Article 23(6) (a) of the Constitution should be amended to grant the right to bail rather than the right to apply for bail. A respondent from Masaka district stated: "it is important that this article be amended to give the right to bail rather than the right to apply. The reason is that at the point of applying for bail, the accused has not yet been proven guilty and as such, still innocent." Article 28(3) of the Constitution provides for the presumption of innocence. In effect, leaving the discretion for the grant of bail to judges or magistrates has the implication of presumption of guilt."[68]

While in a focus group discussion with inmates from Jinja main prison, 30% of the respondents were of the view that grant of bail should be left to the discretion of court. 70% of the same group said that bail should be as of right because of the presumption of innocence, the long stay on remand, rampant corruption among the judicial officers and other court officials, very long and unending investigations, and expensive litigation.

An advocate[69] had a different view. She stated that bail should be a right once a person has satisfied the grounds for the grant of bail. At the moment the law is that court "may" grant bail.

A judicial officer in Masaka stated thus: "making bail a right will make no sense considering that bail is intended to balance the rights of the society and that of personal liberty. What can be considered are specific guidelines to be used by magistrates and judges to ensure that the grant of bail is consistent and reasons are given for all decisions on bail. Top on the list should be a practice directive to guide the discretion of Magistrates and

68 Interview with an advocate at Justice Centres, held on the 6th of March, 2019 in Masaka district.

69 Interview with Nansubuga & Co. Advocates, held on the 6th of March 2019 in Masaka District.

Judges to allow for consistency and certainty in decision making on bail."[70]

A similar view was held by a prison officer who argued that the article should remain as it is because amending it will enable people to commit more crimes with impunity. They will always take it for granted that they will be given bail.[71]

This same view was restated by different respondents.[72] Some of the reasons for maintaining the law as a right to apply for bail rather than have it amended as a right to be granted bail included;

(a) the need to have public confidence in the judicial system;
(b) amending this article would water down the concept of bail;
(c) Judges need to exercise their discretion to ensure people return to court for trial; and
(d) to ease fighting crime.

A judicial officer suggested that the prosecution should have the burden of proof to show why someone should not be granted bail; otherwise, the law is good as is and should not be amended.[73]

Generally, 60% of all the respondents stated that the article of the Constitution should remain as it is. The 40% who wanted change based their argument on perceived corruption in the judiciary and the presumption of innocence. Respondents who argued for the status to remain suggested that whereas judicial officers should continue to exercise discretion, to avoid misuse of judicial discretion, there should be guidelines to avoid arbitrary use of discretion.

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70 Interview with the Chief Magistrate, Chief Magistrate's Court Masaka, held on the 7th of March 2019 in Masaka district.

71 Interview with the Officer in Charge of Lira Main Prison, Lira District held on the 19thof March. 2019.

72 The Centre Manager, Justice Centres Lira, Magistrate Lira district, Chief Magistrate Lira, Advocate from Mifumi Uganda in Masaka, Senior Social Rehabilitation Officer Gulu, Magistrate Masaka district; (Interview held with different officers from the 18th to the 22nd of March, 2019).

73 An interview with the High Court Judge, Gulu High Court, held on the 20th of March, 2019 in Gulu district.

From the study findings, it is evident that majority of respondents want the status quo to be maintained. The law should continue to give judicial officers the discretion to deny or grant bail, on a case by case basis, taking into consideration the prevailing social needs, rights of the victim, public safety and the applicant.

However, there are arguments that bail should be a right once applied for. This position is based on the presumption of innocence guaranteed under the Constitution. Nonetheless, to give an accused person the right to be granted bail by law would be against the purpose and rationale for bail. Whereas there is the general presumption of innocence, best practices the world over encourage a balance of public security and safety and the right to personal liberty of an individual. It is therefore recommended that the law continues to maintain this balance.

4.2 Disparities and inconsistencies

Concern has been raised by the public over the lack of consistency in bail decisions.[74] It is said that similar offences being a subject of bail application have produced different decisions. For instance, in **Matthew Kanyamunyu -v- Uganda**[75] where co-accused persons were granted bail and Matthew Kanyamunyu denied bail. Some critics have questioned whether legal practitioners or judicial officers have the same principles or guidelines on which they base their decisions while considering applications for bail.

Further, there are cases in Magistrate courts where accused persons charged with misdemeanors have been ordered to pay large sums of money to be released on bail and yet those charged with felonies like murder, rape and aggravated defilement, have been ordered to pay reasonable sums for release on bail. It follows therefore that a 'chicken' thief will be denied bail because

74 Isaac Walukagga; "why there is inconsistency in granting bail" April 10, 2017, or https://www. observer.ug/viewpoint/52214-why-there-is-inconsistency-in-granting-bail.html accessed 28th May 2019.

75 Kanyamunyu&2 ors V Ug, (HCT-00-CR-CM-0369 – 2016) [2017] UGHCCRD 1 (10 January 2017); Derrick Kiyonga, Judgejustifies decision to deny Kanyamunyu bail, March 31, 2017 or https://observer. ug/news/headlines/52059-judge-justifies-decision-to-deny-kanyamunyu-bail, accessed 28th May 2019. https://ulii.org/ug/judgment/hc-criminal-division/2017/1/.

he or she has not proven to the satisfaction of court that he or she has a fixed place of abode, which is common in such cases, and a senior police officer charged with murder released.[76]

It is not clear why in some minor cases bail is very exorbitant yet in graver offences it at times comes on the cheap. It is probable that in such cases discretion is exercised injudiciously.

This study sought to establish the reasons and circumstances which lead to inconsistencies in bail decisions in an attempt to explore the possibility of curbing the problems through legislative reforms to create transparency, consistency and clarity in bail justice. The study respondents had varied responses as can be seen below.

Over 70% of the respondents attributed the inconsistencies in decisions relating to bail to corruption and failure of the investigating officers to furnish judicial officers with the right evidence to be relied on. 30% of the respondents were of the view that the inconsistencies in bail decisions arise from the discretion given to judicial officers. In many cases, what set apart decisions might be the nature of offence, the safety of the public or sureties presented before court.

> *"… I have chosen not to entertain bail applications in my court. There is no faith in the courts because of perceived corruption associated with bail. The public strongly believe, and rightly so, that clerks, lawyers and judicial officers are corrupt. You find a magistrate in a similar offence granting bail in one and the other demanding exorbitant cash bail that the accused and all his family cannot afford. This same magistrate the next day will do totally the opposite."*[77]

Another judicial officer stated; *"there is failure to appreciate the proper exercise of discretion and powers given to a Judge or Magistrate. Some judicial officers simply misapply the law, fail*

76 ibid.

77 A judicial officer at interview held on the 19th of March, 2019 in Lira district.

to exercise their discretion judiciously and as a result, there are variations in bail decisions".[78]

On the other hand, some of respondents were of the view that the lack of clear guidelines to inform the exercise of discretion is the cause of the inconsistencies in decisions relating to bail. According to this category of respondents, most judicial officers do not take time to explain the reason for their decisions; this could cure the mischief surrounding inconsistencies in bail decisions.

A prosecutor in Gulu stated as follows: *"Some judicial officers have problems, and you can see why; they don't really understand why they should give reasons for their decision relating to bail hearing. In my opinion, this could be because the law does not require them to do so. It is then down to the lawyers of the accused to explain to them exactly what it means after court, but then it would already be too late."* [79]

It can be observed from the study findings that there is a popular view that when granting bail, a judicial officer should be required by the law to state the reasons for their decision in relation to bail.[80] This is because most of the inconsistencies are created by the wide discretion granted to judicial officers. This discretion should be guided to ensure consistency and keep public faith in the judicial system.

According to Victoria Law Reform Commission Consultation Paper on the Review of the Bail Act[81], it is recommended that in order to achieve consistencies in bail decisions, all decisions must be in writing and reason for the decision should be given as a matter of transparency and consistency in decision making.

78 A respondent at a workshop for judicial officers held at Royal Suites Hotel, Bugolobi on the 27th of August, 2019.

79 Resident State Attorney (fn 63).

80 http://www.iprt.ie/files/IPRT_Position_Paper_11_on_Bail_and_Remand_sml.pdf Accessed 15th May 2019. IPRT, Irish Penal Reform Trust, IPRT Position Paper 11, Bail Remand, November, 2015, Pg 8. Also see views of several respondents from legal practices in the districts of Gulu, Lira, Masaka and Kampala,

81 Victorian Law Reform Commission: Review of the Bail Act; Consultation Paper, 2006.

In bail applications heard by the High Court in Uganda, judges usually give reasons for their decisions.[82] It is however important to require all judicial officers to give reasons for their decisions on bail hearings. This is intended to enable consistency in bail decisions.

4.3 Exceptional circumstances in bail application

The Trial on Indictments Act, Cap 23 is the law governing the trial of criminal cases in the High Court. The High Court has unlimited power to hear criminal matters and appeals from lower courts.[83] The TIA gives the High Court discretion to grant or deny bail and provides the procedure to be adopted by court in doing so.

Section 15 of the TIA provides for exceptional circumstances when a detainee may be released on bail by the High Court. The High Court may grant bail to an accused upon proof of exceptional circumstances that entitle him or her to be granted bail and that he or she will not abscond when released on bail. Section 15 of the TIA describes exceptional circumstances to mean any of the following:—

(a) that the accused is suffering from a grave or serious illness which has been certified by a medical officer of the prison or other institution where the accused is detained as being incapable of being adequately treated while in custody or detention;
(b) when the accused produces a certificate of no objection signed by the DPP; and
(c) when the accused demonstrates that he or she is either an infant, or of advanced age.

Exceptional circumstances were placed in the law to provide for people who have special circumstances that would make it very difficult for them to stay in prison during trial.

Therefore, it is important to ascertain whether this purpose is still being achieved and if the law is still relevant in dealing with the

82 Dr. Ismael Kalule & 4 ors -vs- Uganda also see fn 101.
83 Article 139 of the Constitution of Uganda, 1995.

mischief. The study sought to explore the extent to which section 15 of the TIA on exceptional circumstances is still relevant, and to explore the possibility of introducing other special circumstances such as a sole caretaker, breast feeding mothers and pregnant women. 95% of the respondents were of the view that section 15 of the TIA should be enlarged to make the law responsive to the present socioeconomic circumstances of Uganda. Only 5% were of the view that the said section should not be enlarged. Out of the 95% respondents who were in support of increment of special circumstance under section 15, the highest number was judicial officers and prosecutors.

During a focus group discussion[84] participants proposed that expectant and breastfeeding mothers should be helped to obtain bail because of the nature of their circumstances and the poor conditions in prisons. The participants argued that courts should be considerate to the plight of expectant and breastfeeding mothers.

According to judicial officers in Gulu and Lira districts, the rationale for the exceptional circumstances is that greater injustice would be caused to an accused if they were detained and later found to be innocent. As such, this injustice should not be looked at in respect of an accused only but their families as well. A judicial officer in Gulu stated: "Today, you find several accused persons are single parents; this was not the case at the time this section was considered. The same accused is the bread winner, sole protector, a breast-feeding mother and or pregnant. Should such applicant be denied bail because their circumstances do not satisfy section 15 of the Act?"[85]

Another judicial officer[86] while agreeing with the above view to widen the application of section 15 stated thus: *"A mother who is heavily pregnant should be considered. For example, I have just*

84 Interview at Masaka main prison, with male inmates both on remand and on conviction, held on the 7th of March, 2019 in Masaka district.

85 Resident Judge Gulu High Court 'see fn 73'.

86 Interview with a Magistrate, Chief Magistrate's Court Lira, held on the 19th of March, 2019 in Lira district.

released a lady who is 8 months pregnant and the pregnancy was a big consideration in granting her bail."

Another respondent argued; *"I see no good reason why a pregnant mother or one breast feeding a little baby or a person with extreme disability should be detained just because her circumstances do not fall within the meaning of section 15 yet a bail applicant is still innocent until proven guilty".* [87]

Several prosecutors[88] consulted were in agreement that section 15 of the TIA needs to be keenly looked at because a lot has changed since this provision was enacted. Due to the nature of their businesses, women are more likely to be remanded to prison than men for offences that should not lead to a custodial sentence.[89] The respondents cited examples of several women who are arrested for roadside vending in cities and towns among other petty offences. This often results in serious consequences for children of the imprisoned mothers. Remanding a pregnant woman or breast feeding mother bears social costs for the relatives and the community, including raising the children, as well as diminishing the woman's employment prospects.

For women remanded in custody, and their children, the social disruption can be considerable. They are reliant upon other family members, partners or even older children to care for dependent children for an indefinite period. There may be severe psychological implications for women in such circumstances; anxiety associated with concern for children may lead to depression and self-harm.[90]

87 Interview with a legal practitioner, held on 7th of March, 2019 in Masaka district.

88 Respondents consulted in the districts of Gulu, Lira, and Masaka,on the 20th of March, 18th of March and 7th March, 2019 respectively.

89 Prison Reform Trust (2011) Innocent until Proven Guilty: Tackling the Overuse of Custodial Remand available at http://www. prisonreformtrust.org.uk/Portals/0/Documents/Remand%20Briefing%20FINAL.pdf

90 Stuart Ross, Remand Patterns in Victoria and South Australia (2004) 15, 42, also see Review of the Bail Act Consultation Paper, Published by the Victorian Law Reform Commission, 2006. https://www.lawreform.vic. gov.au/sites/default/files/Bail_Consultation_Paper_Final.pdf accessed 16 May 2019.

A respondent argued that, from experience, the conditions of prison are not suitable for pregnant women and children.[91] The law needs to be favourable to women since they adhere to the conditions of bail better than men.[92]

The consequences for the children may also be severe. Research suggests that children with parents in prison are likely to experience a range of psychosocial problems including fear and anxiety, separation anxiety, shame, depression and even post-traumatic stress disorder.[93] Some research links the experience of having a parent taken into custody during childhood with increased risk of antisocial and criminal behaviours.[94]

According to a judicial officer in Jinja, "extended families, particularly grandmothers, can have considerable difficulty caring for children and may experience practical and economic problems".[95]

This research relates not only to children of parents who are serving prison sentences, but also to people on remand, with the added factors of uncertainty about the length of time on remand, whether bail will be granted and when the case will be finally heard.

Five percent of the respondents who do not want any change to section 15 of the TIA are of the view that the said section should be maintained. The reason given for the position is that the question of exceptional circumstances is better left to judicial officers to determine on a case-by-case basis as what is exceptional to one may not be for another.[96]

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91 A respondent interviewed in Gulu Prison on the 20th of March, 2019 in Gulu district.

92 ibid.

93 Review of the Bail Act. Consultation Paper, Published by the Victorian Law Reform Commission, 2006. https:// www.lawreform.vic.gov.au/sites/default/files/Bail_Consultation_Paper_Final.pdf accessed 16 May 2019.

94 ibid fn 2.

95 An interview with a Senior Magistrate, Chief magistrate's Court Jinja, conducted on the 5th of April, 2019 in Jinja district.

96 Interviews with the office of the DPP and Centre Manager, Justice centres, conducted in Lira district on the 19th of March, 2019.,

*A State Attorney[98] argued that breastfeeding mothers or pregnant women should not fall within the ambit of exceptional circumstances. She argued that it would be used to abuse the legal process if all other circumstances are not fulfilled. Respondents argued that the section 15 which provides that "may take into account" should be changed to "will take into account" so as to restrict the use of the exceptional circumstances. It will be difficult to have an exhaustive list of all exceptional circumstances. Furthermore, the exceptional circumstances in the TIA should be transferred to the MCA to provide for the same. Other respondents argued that the social construct of the accused should be considered in the use of discretion so as to take into consideration what could amount to exceptional or very difficult circumstances.

Respondents also noted that advanced age is not defined and this creates ambiguity. With increased crime, it is important to have clarity and to have a restricted approach to the use of exceptional circumstances.

From the findings, it is evident that majority of the respondents feel that there is need for the law to put into consideration other special circumstances when hearing bail applications. These include breast feeding mothers, pregnant women, extreme disability and child headed families. The reason for enlarging this section is based on the effects incarceration has on people with special needs, their children and families and the fact that at this stage an accused is still presumed innocent.

One thing is certain, Uganda's socioeconomic circumstances have changed since enactment of this provision. The social fabric that used to allow someone to assume responsibility for another person has been weakened. Today, there are single parent-headed homes, child headed families and the cost of taking up extra responsibilities is very high. Therefore, it is the right time to revisit the section on exceptional circumstances with

* Please see section 15(4) TIA

98 State Attorney, Office of the Resident State Attorney Lira district, interview conducted on the 19th of March, 2019.

the intention of amending it to make it responsive to the present socioeconomic circumstances.

4.4 Relevance of place of abode in granting bail

The study sought to establish whether "a fixed place of abode" as one of the considerations for the grant or refusal to grant bail is still relevant.

According to a respondent in Gulu district, the requirement that an applicant has 'a fixed place of abode is still relevant.' He argued that this is only one of the many considerations and that if one satisfies all the other conditions then he or she will be granted bail.[99]

Another respondent observed that "the purpose for this condition is to ensure that the accused person is kept within the jurisdiction of court and when wanted, can report as required. "[100]

Meanwhile, another respondent from Jinja[101] argued that, "a fixed place of abode is still relevant for consideration of an application of an accused person and should be a requirement even for sureties." He argued that more emphasis should be placed on a fixed place of abode so that in case of absconding, it is easy to trace the offender or their sureties.

Approximately 80% of the respondents believe that the provision relating to a fixed place of abode is relevant and should be retained in the law. Out of the 80%, about 50% strongly opined there is need to clearly define what a fixed place of abode means and what it includes.

According to a judicial officer in Masaka district "any challenges relating to interpretation should be cured by defining the parameter."[102] The same officer noted that considering the present

99 Resident State Attorney Gulu (fn 64).

100 A State Attorney, Lira district, at an interview held in Lira district on the 19th of March, 2019.

101 State Attorney, Office of the Resident State Attorney at an interview held in Jinja district on the 5th of April, 2019

102 A Magistrate at Masaka Chief Magistrate's Court, at an interview held in Masaka district on the 6th of March, 2019

socioeconomic circumstances of Uganda where over 80% of people in homes do not own houses but rent, the definition of a fixed place of abode should consider rental properties as fixed places of abode. A senior magistrate[103] agreed with this position noting that; "such a wider definition should include the place of origin of the accused while another respondent[104] suggested including offices and rented homes."

A judicial officer[105] described a fixed place of abode as a place that need not be permanent but known to court. He further suggested that if there is an intended change in location, the applicant should be required to notify court of that change.

About 20% of the respondents disagreed and argued that with the introduction of the Uganda National Identification Card, a fixed place of abode is not as relevant as it used to be.[106] Another respondent observed that this consideration is not helpful at the moment because of the movement of people in the modern era as well as the cross-border nature of crimes.[107]

An advocate[108] argued that a fixed place of abode is becoming an irrelevant consideration given the socio-economic changes of our society, the rural-urban migration and it does not directly guarantee that an accused will come back to court.

A judicial officer[109] was of the view that the concept of a fixed place of abode is problematic and should be looked at vis-a-vis other conditions but court should use its discretion to grant or deny bail.

103 Senior Magistrate, Chief Magistrate's Court Jinja, at an interview held in Jinja district on the 5th of April, 2019

104 An advocate with the Justice centres Uganda, at an interview held in Masaka district on the 6th of March, 2019

105 Resident Judge Gulu (fn 73).

106 Senior Social Rehabilitation Officer, Gulu Main Prison, (fn)

107 Legal Officer FIDA Uganda, at an interview held in Gulu district on the 20th of March, 2019

108 Centre Manager Justice Centres Uganda, at an interview held in Lira district on the 19th of March, 2019

109 Magistrate, Chief Magistrate's Court, at an interview held in Lira district on the 19th of March, 2019

In a focus group discussion with inmates,[110] it was the prevailing view that a fixed place of abode should not be limited to the jurisdiction of court but rather any place where the applicant can show and prove he or she resides.

It is evident that the requirement of a fixed place of abode as one of the considerations for grant of bail is still relevant in as far as it guarantees that someone returns to court for trial. However, there are variations in interpretation and application. Some people believe that a fixed place of abode means a fixed and permanent place of residence and as such require an applicant to prove this condition. Others argue that a fixed place of abode need not be permanent but known to court and the applicant should prove that he or she can be found as and when required by court. Furthermore, the interpretation and application of the term fixed place of abode is affected by the territorial jurisdiction of the court given the socio-economic changes of our society and rural-urban migration.

In order to create clarity and certainty in the law, it is recommended that the phrase "a fixed place of abode" is clearly defined to take into consideration, address of service for the purpose of ensuring that an accused returns to court.

4.5 Non-bailable offences in the Magistrates Court Act

The Magistrates Court Act, Cap. 16 is the law governing the procedure applicable in Magistrate Courts. The Act empowers a magistrate to grant bail to an accused person who has committed an offence which is triable and bailable by the Magistrate Court. However, there are offences which can be tried by a magistrate but are not bailable in a magistrates court and also cases which are neither triable nor bailable by that court. In the latter case, a magistrate's duty is to inform the accused person of his or her right to bail and advise him or her to apply to the High Court.

110 Inmates in Masaka Main prison comprising of those on remand and convicts, at an interview held in Masaka district on the 7th of March, 2019

The Act provides for situations and circumstances when a pre-trial detainee may be granted bail.[111] These are offences where the accused is not being charged with acts of terrorism, cattle rustling, abuse of office, rape, embezzlement, causing financial loss, defilement, offences under the Fire Arm's Act punishable by at least ten years' imprisonment or more, offences triable only by the High Court, corruption, bribery and any other offences for which the Magistrate Courts have no jurisdiction to grant bail.

It is important to note that a magistrate has power to grant bail for any other offences triable by him or her that are not included in the above list. It is not clear why magistrates do not have jurisdiction to entertain bail applications under this section. In the absence of any justification, the above list is only restrictive and does not take into consideration the fact that there is case backlog in most of our courts. It should be noted that magistrates have the jurisdiction to try certain offences under section 75 of the Act but cannot hear bail applications related to these offences.

This study sought to explore:

(a) why magistrates cannot entertain bail applications in offences listed as capital offences; and
(b) the possibility of extending powers of magistrates to entertain bail applications under section 75.

Over eighty five percent (85%) of the study respondents believe there are no fundamental reasons, whether legal or borne out of experience that should prevent magistrates from entertaining a bail application of any nature. This belief is largely drawn from their understanding of the law on bail and their experience. One respondent noted that, "there have been reforms and progress in many Commonwealth countries from which Uganda derived its laws. Accordingly, in countries like UK, Scotland, Australia, bail hearings have been demystified to the extent that police officers are mandated by law to also grant bail. "[112]

111 Section 75(1) of the Magistrates Court Act.

112 A respondent in Lira district, at an interview held in Lira district on the 19th of March, 2019.

A judicial officer in Lira district observed as follows, "in my opinion, there are more benefits in accepting magistrates to entertain bail applications than not. In Lira, I have almost stopped considering bail applications, I have devised means to conduct trials instead. But this is also unfair; an accused should not be kept in detention for long."[113]

The Registrar of the High Court in Lira opined that magistrates are qualified lawyers with skills, knowledge and experience to entertain bail applications in all criminal matters.

Another judicial officer[114] was of the view that; "the court hearing the matter should be the one handling the bail application. Uganda's current circumstances must be put into consideration to decide whether Magistrate Courts can sufficiently test the sufficiency of sureties and whether someone will return for trial."

Another respondent in agreeing with the previous view added that as far as an imperfect system is concerned "there is no fundamental reason why magistrates cannot entertain bail applications relating to capital offences. They are well qualified lawyers just like High Court judges. The only reason which may be considered is the alleged higher prevalence of corruption in Magistrate Courts.[115]

Although a judicial officer in Lira argued that corruption can no longer suffice as a ground to limit magistrates' jurisdiction to entertain bail application considering there are very many cases of corruption in High Court as well, a state Attorney stated: *"no, this would be abused because some magistrates are unethical. If the judicial system is fixed as a whole the challenges of case backlog won't be a problem"*[116]

While another respondent opined that; *"in my opinion let it remain as it is, in the case of this area (Lira), there is limited personnel.*

113 Resident Judge, Lira High Court, at an interview held in Lira district on the 18th of March, 2019.

114 Justice Elubu Michael of Jinja High court, at an interview held in Jinja district on the 5th of April, 2019.

115 Resident Judge Gulu (fn 73)

116 State Attorney Jinja, at an interview held in Jinja district on the 5th of April, 2019.

For example, there is only one Chief Magistrate who is already covering a very large area and is already overburdened with work."[117]

Other respondents were of the view that magistrates should not handle bail applications for capital offences because that will require the entire law on jurisdiction to be amended, [118]and since capital offences are grave in nature, they should remain for judges in the High Court.[119] While another respondent argued that Magistrate Courts should be excluded from cases with a death penalty.

From the findings, it is generally accepted that Magistrates can entertain bail applications for all matters within their jurisdiction and those outside their jurisdiction. Despite this general belief, there are fears of corruption in Magistrate Courts creating an imperfect system. Some people who argue against altering the status quo, believe that Magistrates would only handle such cases in a perfect system that is not blighted with corruption and other influences such as politics. However, it remains debatable as to why a Magistrate can entertain the case before him or her but cannot hear a bail application relating to the same.

In the Supreme Court case of *Foundation for Human Rights Initiatives Vs Attorney General*[120] the issues of jurisdiction of magistrates to entertain certain bail applications was considered. Kisaakye, J held that under section 266 of the Penal Code Act, cattle rustling is punishable by a sentence of imprisonment for life. This puts the offence of cattle rustling under the jurisdiction of the Chief Magistrate's Court. However, Section 75(2)(c)

117 Officer-in-charge of prisons, Lira main prison, at an interview held in Lira district on the 19th of March, 2019.

118 Advocate, Legal aid Jinja, at an interview held in Jinja district on the 5th of April, 2019.

119 Legal officer FIDA Uganda, State Attorney Gulu, Legal personnel Justice Centres Jinja, at an interview held in Gulu and Jinja districts on the 19th of March and 5th of April, 2019 respectively.

120 CONSTITUTIONAL APPEAL NO. 03 OF 2009 [2018] UGSC 46 (26 October 2018), also see an article by Anthony Wesaka& Juliet Kigongo; Magistrates granted bail powers on serious offences. https://www.monitor.co.ug/News/National/Magistrates-granted-bail-powers-serious-offences/688334-4828258-view-printVersionjcbblf/index.html. Accessed on 29th of May 2019.

excludes chief magistrates from hearing a bail application with respect to an accused person charged with this offence."

Considering Article 23(6) of the Constitution, the judge found that the court with jurisdiction to hear or try an offence, has power to grant bail in respect of that offence. In this case, the court referred to was the Chief Magistrate's Court which has the jurisdiction to try this offence. The court further held that the exclusion of magistrates from entertaining bail applications for capital offences renders section 75(2)(c) of the MCA inconsistent with Article 23(6) of the Constitution because it denies an accused person the right to apply for bail before a court that has jurisdiction to try him or her for cattle rustling.

Accordingly, it was held thus: "given my findings in respect of section 75(2)(c) and (d) of the MCA and bearing in mind Article 274 of the Constitution, it follows that since a Chief Magistrate has power to try the offence of cattle rustling and importation and exportation of firearms or ammunition without a licence, she or he has power to consider bail applications in respect of these offences," court ruled.

In line with field findings, the position in other jurisdictions and the above Supreme Court decision, it can be said that Magistrate Courts can entertain all bail applications. It would therefore be desirable to amend the law to give jurisdiction to Magistrate Courts to entertain bail applications particularly in all matters where Magistrate Courts have jurisdiction to try any given offence.

Commonwealth countries which had bail laws similar to those of Uganda have since changed their positions. In United Kingdom, Scotland, and Australia, police officers are mandated by law to grant bail in certain offences. It is therefore possible for Uganda's laws on bail to change not only because of the Supreme Court case above but because there is need for reform.

4.6 Restriction of the right to bail in some cases

As crime levels have continued to skyrocket in the country[121] , security and legal experts are pondering change in Uganda's legal system in order to curb the problems associated with grant of bail to suspects involved in the commission of capital offenses including homicide, rape, terrorism, treason, kidnap and aggravated robbery to mention but a few.[122] Police reports show an increase in crime and reveal that a total of 8,826 post mortem examinations were carried out in 2018 throughout the country where 3,343 were for murder cases, 1,068 for sudden death, 661 for murder by mob action, 196 for murder by shooting, 169 for suspected murder cases, 29 for cases of poisoning, 23 for rash and negligent acts causing death, 17 for manslaughter, 13 for infanticide, 37 for murder and aggravated robbery cases, 09 for cases of death as a result of abortion, 06 for cases of ritual murders, 01 for case of death by bomb blast, 01 for mudslide and 10 for unknown causes.[123]

The high crime rate has attracted the attention of the President of the Republic of Uganda who weighed in on this debate. He argues that suspects of murder, aggravated rape, robbery involving guns, acid attackers and terrorism should be denied bail, special considerations for bail be developed or they should be kept in jail for a period of not less than six months before any form of bail application is entertained by the court of law.[124]

Bail has two conflicting demands of fundamental rights of an individual (accused) and the greater public interest. There should be peace and safety of the public and their property. The courts of law and all organs of government have a duty to ensure that national and international security is preserved.[125]

121 Uganda in the grip of violent crime wave, https://www.dw.com/en/uganda-in-the-grip-of-violent-crimewave/a-44227640, accessed 29th May 2019.

122 APCOF Policy Paper, in conjunction with Uganda Human Rights Commission, 4th November 2012, Page 6.

123 Annual Crime Report, 2018, page 17-18, Uganda Police Force.

124 https://jocom.mak.ac.ug/news/puzzle-granting-court-bail-capital-offenders-remains-enigma, accessed,13th of May, 2019.

125 Okello Augustine –vs- Uganda. (CRIMINAL MISC APPLICATION No. 006 Of 2012) [2012] UGHC 119 (3 July 2012)

The fundamental rights of an individual must be balanced with greater public interest.

The general criteria even in capital offences is that accused persons are innocent until proven guilty and once they satisfy the necessary grounds for the grant, they may be released on bail unless the prosecution satisfies the court that there is an unacceptable risk that, if they are released on bail, they would:

(a) fail to appear in court in compliance with bail;
(b) commit an offence while on bail;
(c) endanger the safety or welfare of members of the public; and
(d) interfere with witnesses or otherwise obstruct the course of justice.[126]

In assessing whether there is an unacceptable risk, courts must look at all relevant considerations, including the:

(a) nature and seriousness of the offence;
(b) accused's 'character, antecedents [any prior convictions] ;
(c) a fixed abode within the area of the court's jurisdiction
(d) accused's compliance with any previous grants of bail;
(e) strength of the evidence against the accused; and
(f) attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail.[127]

With the exception of considerations in (e) and (f) above, section 77(2)[128](e) of the MCA adds to the assessment another

126 ibid.

127 IPRT Position Paper 11, Bail and Remand, Irish Penal Reform Trust; November 2015. http://www.iprt.ie/files/ IPRT_Position_Paper_11_on_Bail_and_Remand_sml.pdt accessed 30th May 2019.

128 Section 77 provides thus:

(2) When an application for bail is made, the court shall have regard to the following matters in deciding whether bail should be granted or refused—
(a) the nature of the accusation;
(b) the gravity of the offence charged and the severity of the punishment which conviction might entail;
(c) the antecedents of the applicant so far as they are known;
(d) whether the applicant has a fixed abode within the area of the court's jurisdiction; and
(e) whether the applicant is likely to interfere with any of the witnesses for the prosecution or any of the evidence to be tendered in support of the charge.

criteria; 'whether the applicant is likely to interfere with any of the witnesses for the prosecution or any of the evidence to be tendered in support of the charge'. While considering capital offences, additional restrictions for example; strength of the evidence against the accused; and attitude, if expressed to the court, of the alleged victim of the offence to section 77(2) of the MCA would tightened the grant of bail in capital offences.

Restrictions arise out of necessity given the increase in crime rates, the changing nature and face of crimes e.g. transactional and transnational crimes, use of internet and advanced technology which all require the judicial system to provide timely and effective solutions. Any restrictions adopted however should not lose sight of the presumed innocence of the accused and the constraints on accommodation, such restrictions would place on the prisons.

The study sought to explore the possibility of further restricting the conditions for grant of bail in capital offences in some circumstances. In Lira, a respondent stated; *"there should be careful consideration taken in respect of the proposal being fronted; it should not in any way be used to deny capital offenders bail. Whereas the intention to restrict the grant of bail to persons accused of certain grave/capital offences sounds good, the new law should not be used or drafted in such a way that some people will use it to frame others to have them arrested and suffer incarceration for a long time when they are innocent."*[129]

Another respondent opined that, *"offences relating to terrorism, kidnap, murder and rape should not attract bail or at least the consideration for bail should be different taking into account special circumstances, such as the possibility of conviction resulting from the offence, interference with evidence or safety of the society."* [130]

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129 A statement by a respondent at a taskforce meeting held in Royal Suites at Bugolobi on the 15th of August, 2019.

130 A statement by a participant at the taskforce meeting held in Royal Suites, Bugolobi on 15th of August, 2019.

Majority of the respondents were of the view that bail is a constitutional right that cannot be denied except within the confines of the law. This is based on the presumption of innocence and the fact that bail is meant to ensure that the accused returns to court for trial. They argue that various international and regional instruments to which Uganda is a party enjoin Uganda to respect and observe them, in particular that the right to personal liberty shall be respected. Furthermore, given Uganda's political and social environment, such a restriction would keep more innocent people in prison rather than criminals because chances are that such provisions of the law will be abused.

The law could consider providing more restrictive conditions to persons who are involved in the commission of capital offences for instance through delaying the grant of bail as thorough investigations are conducted. Other restrictive conditions cited by the respondents include use of house arrest and restriction of movements within or outside the country. An example is the bail application in the case of *Uganda v Robert Kyagulanyi and 32 others*[131] wherein the resident judge of Gulu agreed with the prosecution and decided to restrict the Arua Member of Parliament Kassiano Wadri from going to Arua for three months to allow police investigate without interference and for restoration of calm in the area.

It is important to note that the High Court has already taken a stricter approach in dealing with terrorism related cases. In a bail application by *Dr. Ismael Kalule & 4 ors –vs-Uganda,*[132] where the applicants were indicted for various offences related to terrorism and filed an application for bail pending trial. Owiny – Dollo held that,

"In the instant case before me, except for A4 who has been charged on one count only, namely the lesser offence of being an accessory to the offence of terrorism after the fact, the applicants and others have been charged in multiple counts

131 Uganda v Hon. Robert Kyagulanyi Sentamu and 32 Others Criminal Miscellaneous application No. 052 of 2018.

132 Crim. Misc. Applications No. 57, 58, 59, & 60 of 2010.

with various offences; to wit, 76 of murder, 10 of attempted murder, and 3 of terrorism …By any account, the allegation of murder of 76 persons in the manner alleged in the indictments amounts to mass homicide. It is certainly a very grave allegation. These are further aggravated by the allegations of multiple acts of terrorism. Both offences attract a possible death sentence. The Court must certainly never lose sight of the constitutional provision of presumption of innocence whatever the nature of the offence charged.

Nonetheless, the gravity of these offences and the severity of the sentence that may result from any conviction make it incumbent on the applicants to present correspondingly strong grounds and justification for seeking to be admitted to bail.… I must also state here that the very volatile nature of the Eastern African region with its porous borders would present any Court with additional difficulty in the exercise of its discretion; and this is so, in the absence of cogent and persuasive assurance that the applicant will actually appear and face trial… Added to this is the public anger, the blasts which claimed several lives and wounded others, and for which the applicants have been indicted, evoked; inclusive of persons to whom the victims were not known at all.

Nevertheless, I have taken judicial notice of the fact that terrorism has become a global phenomenon that has caused much public anxiety and resentment; the more so because the perpetrators target soft targets and their victims are usually people with whom they have no quarrel at all. In the circumstance, the need for a full trial while the liberty of the accused is curtailed is imperative…… In the result, and for the reasons I have set out herein above, I find myself unable to admit any of the applicants to bail …"

According to the study respondents, whereas it is important to consider Article 28(3)(a)[133] on the presumption of innocence, it is equally important to consider the corresponding interest, safety and public security, especially when looking at the offences relating to murder, kidnap and terrorism. Respondents proposed that special

133 The Constitution of Uganda 1995.

conditions should be set out for certain capital offences with the sole purpose of sending a strong message against rising or increasing occurrence.

It was noted by some legal practitioners in that the judgement of Owiny-Dollo in the case of *Dr. Ismael Kalule & 4 ors –vs-Uganda*[134] is the right approach towards consideration of bail in capital offences, especially those relating to terrorism, kidnap, murder, aggravated defilement, child sacrifice and aggravated robbery. This is because most of these offences cause public anxiety and resentment, the perpetrators choose soft targets and their victims are usually people with whom they have no quarrel at all.

From the findings most of the respondents insist that bail is a constitutional right that cannot be outrightly denied except within the confines of the law. This is based on the presumption of innocence, the fear that outright denial of bail will be abused for political reasons or impunity and the fact that bail is meant to ensure that the accused is the best person to prepare for his or her defense. Respondents also pointed out that international and regional instruments are all in favour of granting rather than denying bail to an accused person.

The majority of study respondents recommend that more stringent conditions for capital offences be taken into account during bail application. These may include:

(a) seeking to know the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail;
(b) the possibility of the prosecution case succeeding; and
(c) strength of the evidence against the accused.

Despite the strong views above, there are those who believe that Uganda's reality calls for a tougher approach to crime. This involves curtailing some rights for the good of the society which might include outright denial of bail for some offences like kidnap, terrorism, aggravated robbery, child sacrifice, among others. It

134 ibid. fn.131.

is therefore imperative to create a balance between protecting and observing the rights to personal liberty and public interest and security.

4.7 Information on obligations of sureties

The high-profile disappearance of gangland identity, Tony Mokbel, while on bail in March 2006 drew public attention to the role of sureties in bail. In response to Mokbel's failure to appear at his drug-trafficking trial, the court ordered his sister-in-law to forfeit a $1m surety or face two years in jail.[135] Apart from penalties, Mokbel's case raises other questions as regards sureties such as;

(a) is a proposed surety suitable?
(b) what is the surety's financial position?
(c) are sureties aware about their obligations and responsibilities?
(d) does court take it as its responsibility to inform sureties of their obligations and consequences of failure to adhere to them?

All the above questions in relation to sureties remain unanswered in Uganda.

The term surety can be used variously to refer to;[136]

(a) a person who undertakes to pay a specified amount if the accused fails to abide by the bail conditions.
(b) the amount that a person making the undertaking has undertaken to pay if the accused breaches the bail conditions.
(c) the bail condition requiring a person to enter into such an undertaking before the accused is released on bail.

In Uganda the term surety literally refers to a person not money or condition, In Uganda, judicial officers are not required to explain to sureties their obligations or effects and consequences of breach of bail conditions by an accused. During consultations, respondents were asked whether it was a requirement to inform

135 R v Mokbel and Mokbel [2006] VSC 158 (Mokbel). Gillard J rejected the surety's application for relief against forfeiture in Mokbel v DPP (Vic) and DPP (Cth) [2006] VSC 487. On 15th March 2007, Mokbel was arrested and remanded in custody for failure to pay $1m.

136 Victoria Law Reform Commission, Review of Bail Act: Consultation Paper (2005) 161-62.

sureties of their obligations and responsibilities under bail conditions and if doing so is a good practice that needs to be codified in the law.

The study sought to establish the extent to which the law relating to bail obliges judicial officers to explain and give information relating to a surety's undertaking on behalf of a bail applicant. Findings indicate that judicial officers do not explain to sureties their obligations, the effect and consequences of breach. About 75% of the respondents observed that it is not the requirement of the law that judicial officers should explain to sureties their obligations. Accordingly, it is at the discretion of each judicial officer to do as they deem fit.

According to a respondent[137], *"sureties are never informed of their obligations as sureties. They in fact do not know that they have any specific obligations. At that time they are focused on the release of their person, the accused. Informing sureties is a very good practice that the law should expressly state; it should not be left to practice because some judicial officers are strict, and can only follow what the law says".*

Another respondent [138]stated that lawyers often ignore to give necessary information regarding obligations of a surety to their client only some do pose a few questions to sureties and ask them whether they know their duties or obligations without necessarily giving them the required information.

A State Attorney in Gulu District pointed out that courts sometimes explain to the sureties their duties but never sufficiently for the lay person.

Thirty percent (30%) of the study respondents were of the view that explanations to sureties was a matter of practice and sureties are informed of their obligations during the application for bail. One respondent stated that sureties are informed by

137 Officer in Charge of Lira Prisons, at an interview held in Lira district on the 19th of March, 2019.

138 Center Manager, Justice Centers in Lira, at an interview held in Lira district on the 18th of March, 2019.

court but the majority of sureties do not know the gravity of the offence if the offender absconds. In most cases, sureties accept this responsibility because they want to make money from the accused. They stand as professional sureties.

Equally, in a focus group discussion, male prisoners in Masaka Main Prison observed that court informs the sureties of their obligations especially when it is going to give bail; only that it is not always clear and court does so cursory.

According to a respondent in Masaka[139], it is desirable that the law mandates court to give sureties information about their obligations. In the absence of a legislative provision, there should be guidelines on the information that should be given to sureties so that they have a clear understanding of their obligations.

According to a legal practitioner in Masaka, *"the grant of bail does not set an accused person free, but rather releases him or her from custody of the law into the custody of bail guarantors. In the absence of a formal police force, bail guarantors perform a supervisory role to ensure that an accused person attends court to answer the charges against them. This is an important role that cannot be left to practice, the law must expressly provide that a Magistrate or a Judge has the responsibility to inform a surety of their role and responsibility."*[140]

A respondent stated that guidelines would help to inform concerned parties about the information to be imparted to the relevant persons.[141] The guidelines should contain the obligations or roles of sureties, and the implications (including financial) in case the accused absconds.

The study found that today people are using "professional sureties" in bail applications. Use of guidelines which spell out the roles and obligations of sureties would ensure certainty,

139 A respondent at an interview held in Masaka district on the 6th of March, 2019.
140 Judicial officers workshop.
141 Legal Volunteer, Justice Centres Uganda, Jinja at an interview held in Jinja district on the 4h of April, 2019.

transparency and consistency and deter the use of "professional sureties."

In some jurisdictions, sureties are protected from losing their properties. For instance, a person cannot be accepted as a surety if it appears to the judge that it would be particularly ruinous or injurious to the person or the person's family if the undertaking were forfeited.[142]

Given the consequences that flow from potential forfeiture, it is important that simple and consistent information is given to prospective sureties about their obligations and rights.

4.8 Views of victims during bail hearing

Some jurisdictions such as Australia and Scotland require that bail should be refused if there is found to be an 'unacceptable risk' that the accused would endanger the safety or welfare of members of the public, interfere with witnesses or otherwise obstruct the course of justice.[143] If a court is satisfied that a victim is endangered or witness likely to be interfered with, then the court should refuse to grant bail unless conditions can be imposed that the court believes will be sufficient to protect the victim or witnesses.

In assessing whether or not there is an unacceptable risk, the court is required to consider a number of factors, including the attitude of the victim to the grant of bail. In practice, the views of the victim will usually be explained to the court by the police or the prosecution, although there is nothing to stop the prosecution from calling a victim to give evidence in a bail hearing.[144]

In Uganda, as a condition for the grant of bail to an accused person, court takes into consideration the security and safety of the community from which an accused comes.[145] Other than the

142 Bail Act 1980 (Qld) s 21(8) (Australia).
143 Bail consultation Paper, Victorian Law Reform Commission Report.
144 Resident Judge Gulu High Court (fn 72).
145 Resident Judge (fn 11 refers to a respondent in Lira).

safety of the community, courts also take into consideration the safety of the accused person.

The study sought to establish the extent to which the views of victims are considered during a bail application hearing. Findings indicate that 80% of the respondents believe that the views of victims have not been taken into consideration during bail hearings. Twenty percent of respondents believe that courts consider the views of victims through the police and prosecution.

A judge in Gulu district[146] stated that the law in Uganda does not require judicial officers to seek the views of victims during bail hearings, even though some pro-active judicial officers do. The judge recommends that to make the procedure a requirement, a provision should be made in the law or by use of a Practice Directive.

A prosecutor in the same district[147] stated that; *"once there is an express provision requiring court to seek victims' views, the condition relating to safety of the community would not be relevant anymore because investigations and the community or a victim would be in the best position to inform court whether an accused is a threat to the victim, witnesses, or would be in danger."*

Some respondents stated that whereas it may appear as if the views of victims are not sought during bail hearings, views are in fact presented by State Attorneys through affidavits.[148]

The study found consensus that judicial officers should receive and consider the views of victims during bail hearings. The views should be considered as a matter of procedure. However, victim views received should not on their own be used so as to deny an accused bail.

146 Resident Judge (fn 73).
147 A State Prosecutor at an interview held in Gulu district on the 22nd of March, 2019.
148 Resident Judge (fn 112).

4.9 Use of money as a condition in bail applications

In Uganda, the law relating to bail requires an accused person to fulfill several conditions before being granted bail.[149] These include:

(a) taking a personal cognisance from him or her;
(b) admitting at least two substantial sureties who must know or have a close relationship with the accused person and are duly recommended by the local authorities where they live; and
(c) are bonded in a sum of money determined by Court.

This is intended to ensure that the accused person shall return to court whenever he or she is called upon to do so.

On many occasions the cash bond cannot be raised by the accused especially when they are indigent. Therefore, whereas there is a need by courts to balance the interest of justice, many times these monetary conditions are restrictive to the right to bail for the poor persons.

The Monitoring Committee of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) urges State Parties to ensure that "the requirement to deposit a guarantee or financial security in order to obtain release pending trial is applied in a manner appropriate to the situation of persons in vulnerable groups, who are often in difficult economic circumstances, so as to prevent the requirement from leading to discrimination against such persons".[150]

According to a Harvard Law School, report on bail reform 2019[151]; monetary bail is an ineffective tool for protecting the public or ensuring that people show up in court. After a Judge has set a bail amount, a defendant can pay that amount as a condition to

149 Section 14 of the TIA and 78 (b) of the MCA provide that a person may be required by any court or officer to execute a bond for such amount that may be reasonable in the circumstance.

150 Committee on the Elimination of Racial Discrimination, General Recommendation XXXI, para 26.

151 Bail Reform; A Guide for States and Local Policymakers, criminal Justice policy programme, Harvard Law School, February 2019

get out of jail.[152] This means that a defendant's release depends upon his or her ability to pay. It can be said therefore, that wealthy defendants are likely to walk free while poor defendants languish in jail. To avoid likely discrimination as envisaged by the Monitoring Committee[153] other conditions of release can be more effective, more efficient, and fair.

Rather than eliminate money as a condition for the grant of bail, some jurisdictions[154] have attempted to forbid judges from imposing unaffordable bail.

In **Charles Onyango Obbo & Andrew Mwenda v Uganda (1997)[155]** the High Court was empowered to interfere with the discretion of the lower court while granting bail under s. 75(4) (a) MCA where it is shown that the discretion was not exercised judiciously. The imposition of a condition that each accused should pay two million shillings (2,000,000/-), was a failure by the lower court to judiciously exercise its discretion.

According to Bossa J., *"while court should take into account the accused's ability to pay, in exercising its discretion to grant bail on certain conditions, the court should not impose such tough conditions that bail looks like a punishment to the accused".*[156]

There are no guidelines to aid judicial officers on the use of money in bail applications, in particular to give direction on how much money to impose on accused persons in respect of particular offences. The absence of guidelines has led to inconsistencies in bail decisions, hence raising issues of legitimacy concerning the exercise of judicial discretion.

152 ibid.

153 Sonya Tafoya; Public Policy Institute of California: Pretrial Detention and Jail Capacity in California 5 (2015) (citations omitted), http://www.ppic.org/content/pubs/report/R_715STR.pdf, accessed on September 8th 2019

154 Tennessee, Texas, California (California passed legislation in August to get rid of money bail, joining the wave of states and local jurisdictions that have undertaken some form of bail reform over the past few years.), New York

155 Charles Onyango Obbo& Andrew Mwenda v Uganda (1997)5KALR 25.

156 ibid.

By May 2019, the Uganda Prisons Service had an average population of 58,587 prisoners with nearly a half of them (28,412) on remand.[157]

Bail can be used as a tool of justice to keep only people who must be on remand in jail. This would address the challenge of congestion in prison by prisoners on remand and thus decongest prisons.

5.0 Recovery of money paid as security for bail

In practice, the recovery of money paid as security for bail is very difficult. At the final disposal of a matter, any money deposited by the applicants or their sureties should be returned to them. However, findings indicate that this money is not easy to access.

Respondents noted that applicants for bail had challenges with recovery of money deposited as security.

According to a respondent, the recovery of money paid as security for bail is centralized.[158] One can only recover it from Uganda Revenue Authority headquarters in Kampala thus making the cost of recovering of this money paid as security very high. It becomes cumbersome for the ordinary person to try to collect it, particularly those that hail from other districts outside Kampala. As a result, many persons entitled to bail refunds give up.

A judicial officer[159] argued that this system is not conducive to court users and suggested that bail money should be left at the courts for easy administration and return to the rightful owners.

5.1 Bail pending appeal

Bail pending appeal is a legal process under sections 132(4) of the Trial on Indictments Act and 40(2) of the Criminal Procedure Code Act where the appellate court has a mandate to grant a

157 A Prison's officer at a meeting held on the 19th of March 2019 in Lira district.
158 Centre Manager, Justice Centres Uganda Lira, an interview conducted on the 19th of March, 2019 in Lira district.
159 Chief Magistrate (fn 69).

convict bail so long as the penalty being appealed is not a death sentence.

Bail pending appeal differs from pre-trial bail. For pre-trial bail, an applicant has not yet been sentenced to a term of imprisonment and as such is presumed to be innocent until proven guilty. While for bail pending appeal, court has sentenced an applicant to a term of imprisonment and he or she can only be granted bail in exceptional circumstances.[160]

The theoretical basis for bail is that the applicant is the only person capable of preparing his or her own defense and is believed to be innocent until proven guilty. However, upon conviction, the presumption of innocence ceases.

The court in *Arvind Patel vs Uganda*[161] laid down the legal framework for deciding whether or not an applicant is entitled to bail pending appeal. In particular, the court observed that it must scrutinise the character of the applicant; ask whether he or she is a first offender; ask whether the offence in question occasioned personal violence; measure the absence of frivolity and the reasonable possibility of success of the appeal; and estimate the time the determination of the appeal is likely to take. The court held that a combination of at least two of these criteria may suffice to serve as grounds for granting bail pending appeal.

In the case of *Jamwa*,[162] the applicant argued and based his grounds on the considerations laid down in the *Arvind Patel* case[163] as follows:

(a) that he was a first time offender who had complied with his previous bail conditions;
(b) that his offence did not cause any personal violence;
(c) that he had presented substantial sureties;
(d) that his appeal had a high likelihood to succeed; and
(e) that the appeal was likely to delay.

160 Igamu Joanita -v- Uganda Criminal Application Number 0107 of 2013.
161 Arvind Patel vs Uganda S.C.C. Application N0. of 2003.
162 Chandi Jamwa v Uganda (Miscellaneous Application No. 09 of 2018) [2018] UGSC 18 (15 May 2018).
163 ibid.

The respondents observed that the principles laid down in the case of Arvind Patel should be codified to form part of Uganda's legal framework on consideration of bail pending appeal. This position was further supported by participants at a workshop of judges and magistrates [164].

5.2 Mandatory bail

Article 28 (3) (a) of the Constitution of the Republic of Uganda provides that every person who is charged with a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.

Persons accused of criminal offences have a right to apply for bail.[165] However, the grant of bail is discretionary to the court.[166] The overriding principles[167] for granting a prisoner bail are first, the presumption of innocence; which is that an accused person is presumed innocent, except where he or she has pleaded guilty to the charge, or the prosecution has established beyond reasonable doubt that such person perpetrated or participated in the offence charged.

The second principle is the need to afford an accused person adequate opportunity to prepare for his or her defence which obviously may not be properly done when on remand.

The foregoing legal provisions have the effect of rendering mandatory bail where a person is accused of a crime and is held in detention and not brought before court for a continuous period exceeding 180 days for capital offences and 60 days for minor offences, without committal for trial. In the case of *Sentongo v Uganda*[168], court opined that while section 14(1) of the TIA permits the grant of bail by the High Court with or without

164 A workshop with judicial officers held at Royal Suites Bugolobi on the 27th of August, 2019.

165 Article 23(6) (a) and 28(3) of the Constitution of the Republic of Uganda.

166 Uganda v Kiiza Besigye (Const. Ref No. 20 of 2005).

167 These principles were confirmed in Dr. Ismail Kalule & 3 Others V Uganda (Criminal Miscellaneous Applications 57, 58, 59, & 60 of 2010) [2011] UGHC 184 (27 January 2011).

168 (Cr. Misc. Applic. No. 13 of 2013) [2013] UGHCCRD 4 (25 February 2013).

sureties, section 17 of the same Act is quite instructive on the need, not only for sureties but for substantial or sufficient sureties. Even where the grant of bail is mandatory, as is in this case, in exercise of its discretion on the terms of such grant, the court is required to evaluate the substantiality of the sureties presented and may decline to immediately grant bail until more substantial sureties are presented. Indeed, an applicant otherwise entitled to mandatory grant of bail is, nonetheless, required to meet the terms of such bail set by the courts.

Therefore, the position of courts in Uganda as presented in the above case and others such as *Uganda vs Kiiza Besigye*[169] and *Godi H. Akbar vs Uganda*[170] is that bail in such circumstances of Article 23(6) (c) is mandatory and the only discretion courts have is with regard to the terms thereof.

There have however been other considerations that courts have used to deny mandatory bail such as the threat to the general public and committal to the High Court for trial. In the matter of bail application by *Tigawalana Bakali*[171] it was noted that a magistrate may refuse to grant bail to an accused person even if he or she has completed the mandatory days on remand if the accused person is committed or referred to High Court for trial or if the magistrate thinks that the release of the accused person is a threat to the public.

Furthermore, courts have also construed the provision of the 1995 Constitution of Uganda to the effect that mandatory bail or any bail for that matter once granted does not lapse upon committal of an accused to the High Court for trial. It was held in *Hon Sam Kuteesa and two others -v- Attorney General*,[172] that section 168 (4) of the Magistrate Courts Act must be construed as if the legislature enacted it under the authority of the 1995 Constitution. The court said, “the automatic cancellation of

169 Constitutional Reference No. 20 of 2005.
170 Miscellaneous Application No. 20 of 2009.
171 Tigawalana Bakali Ikoba (Criminal. Case No.161 of 2003)) [2003] UGHC 89 (12 August 2003).
172 Hon Sam Kuteesa & 2 Others Vs Attorney General (Constitutional Reference No. 54 O f 2011) [2012] UGCC 02 (4 April 2012)

bail, without any right to be heard, based on the mere fact that one is being committed to the High Court for trial, contained in section 168 (4) of the Magistrates Courts Act, is not part of the expressly stipulated circumstances of derogation from the right to protection of liberty in the Constitution. Automatic lapse of bail by the court committing an accused to the High Court for trial has the unconstitutional effect of condemning that person unheard on whether or not he or she should continue to enjoy the right to liberty, restored to him or her when he or she was first granted the bail. It is therefore inconsistent and in contravention of Article 28 (1) of the Constitution."

In the case of *Asea Dante*[173] J. Mubiru held that section 168 (4)of the MCA(in free) rescinds the constitutionally guaranteed power of the court to grant bail, through the court's exercise of its discretion. It acts counter to the fundamental right of an accused person to apply for and receive the discretionary consideration of the court before which such accused person is brought, to maintain the bail already granted, or to grant bail. Its purpose and effect, if construed in accordance with the 1995 Constitution, results in its being contrary to Articles 23(6) (a) and 28(1) of the constitution.

Therefore, pursuant to Article 274 of the constitution, section 168(4) of the Magistrate's Courts Act must be construed in such a way as to provide that:

(a) bail granted, by a court of competent jurisdiction, to a person arrested in connection with a criminal case does not automatically lapse by reason only of the fact of that person being committed to the High Court for trial.

(b) subject to being competently seized of jurisdiction under the law, the court committing an accused person to the High Court for trial, has power derived from Article 23(6) (a) of the Constitution to maintain bail already granted or to grant bail to an accused person, or to cancel bail for

173 Asea Dante Alias Goro V Uganda, Miscellaneous Criminal Application No. 0029 of 2016.

sufficient reason, after hearing the parties concerned on the matter.

The court in the *Asea Dante* case concluded that bail should be maintained by the court committing an accused person except where that court, for sufficient reason, considers that bail ought to be cancelled. Sufficient cause does not include the mere fact of committal.

Whereas the law provides for mandatory bail, courts have often denied bail to persons who have been detained in prison for 60 days and 180 days respectively. The courts have argued that they still retain discretion and not all accused persons can be allowed to roam free pending their court appearance. In the *Dr Kiiza Besigye case*[174] , it was stated that while considering bail, the court needs to balance the constitutional rights of the applicant and the needs of society to be protected from lawlessness, among other considerations. This clearly shows that public interest is a valid consideration in a bail application. This case illustrates the consideration of public interest in grant of bail or refusal of grant of mandatory bail.

174 Uganda (DPP) v. Col. Rtd Dr. Kiiza Besigye, Constitutional Reference No. 20 of 2005.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

This chapter sets out the recommendations of the study. These recommendations are drawn from the findings of the study.

5.1 Definition of the word bail in the law

The lack of definition of the term bail in the law creates uncertainty and ambiguity for interpretation purposes which may occasion injustice to litigants.

Recommendation

Bail should be defined in the law as the conditional release of a defendant with a promise to appear in court when required, or as an agreement between the court, the accused and sureties on the other hand that the accused will attend his or her trial when summoned to do so.

5.2 Knowledge and perception about bail in Uganda

It is evident that the majority of the intended beneficiaries of bail have limited knowledge about bail. This consequently affects acceptability and implementation of the law on bail. For effective administration of justice to be achieved, there is need for public education and sensitisation to remove negative perceptions about bail and reduce the knowledge gap.

Recommendation

Public education and sensitisation on bail should be conducted.

5.3 Disparities and inconsistencies

The study found that disparities in decisions concerning bail are largely due to corruption in the judiciary and the misguided use of discretion by judicial officers. In order to achieve minimum

standards in bail decisions, certain rules or guidelines for operation of bail must be put in place.

Recommendations

1 **There should be guidelines requiring judges and magistrates to give reasons for bail decisions.**

2 **A practice directive should be issued by the Chief Justice to guide court discretion with the view to achieving a minimum standard and reducing disparities in bail decisions.**

5.4 Exceptional circumstances in bail application

Section 15 of the TIA provides for exceptional circumstances when a detainee may be released on bail by the High Court. According to the above section, exceptional circumstances include grave or serious illness incapable of being adequately treated while a defendant is in custody, production of a certificate of no objection signed by the DPP, and infancy, or advanced age.

The findings indicate that section 15 is narrow; it does not take into consideration other situations that may be considered exceptional circumstances such as sole care takers of children or extreme disability.

Recommendations

1. **Section 15 of the TIA should be amended to accommodate other exceptional circumstances like, primary caretaker, expectant or breast-feeding mother, sole caretaker and extreme disability.**

2. **The term advanced age under section 15 needs to be defined to mean any age from 65 years and above.**

5.5 Relevance of place of abode in consideration of bail application

Section 77(2)(4) of the Magistrates Courts Act provides that when an application for bail is made, the court shall have regard to, among other things, whether the accused has a fixed place of abode. The phrase 'a fixed place of abode' is not defined by law, as such, it has been interpreted differently by courts. Some judicial officers have preferred this phrase to mean a personal residential home despite the fact that the majority of accused persons do not have personal residential homes; they live in rentals.

The problems associated with the lack of definition of the phrase 'a fixed place of abode' can be cured by providing a definition in the law."

Recommendation

A fixed place of abode can be defined as the place where a person dwells. It may include, one's home which shall include his or her personal home or a rental.

5.6 Non-bailable offences in the Magistrates Court Act

The MCA empowers magistrates to grant bail to accused persons who have committed offences which are triable and bailable by them. However, there are offences for which they cannot grant bail. The study found that restriction of jurisdiction of Magistrates in entertaining bail application is not justifiable.

Recommendations

a) **Magistrate Courts and registrars should be given the jurisdiction by the law to entertain bail applications even in capital offences.**

b) **Chief magistrates should be granted power to entertain bail applications in all matters under section 75 of the MCA.**

5.7 Denial of bail for certain offences

As a result of increased crime rate in the country, there is a general view that suspects of murder, aggravated rape robbery involving guns, acid attackers and terrorism should be denied bail. The view is that special considerations for bail should be developed to allow them be kept in jail for a period of at list six months before any form of bail application is entertained in the courts of law. The study findings however indicate there is no correlation between grant of bail and crime level in the country.

Recommendation

Very stringent conditions including bail amounts should be imposed on accused persons for selected capital offences such as kidnap, terrorism, aggravated robbery and child sacrifice.

5.8 Courts obligations to sureties

The present legal framework does not require judicial officers to explain to sureties their rights, obligations, effects and consequences of breach of surety undertakings under bail. As a result, sureties are bound by bail undertakings and several sureties have either ended up in jail or lost properties and money due to an accused person's abandonment.

Recommendations

1 **The law on bail should be amended to require judicial officers to explain to potential sureties, their rights, obligations and consequences of breach of bail conditions.**

2 **There should be use of information systems to enable judicial officers to know who has stood as a surety before, who failed in their duty and who is barred from standing as a surety.**

3 **When taking into account the financial position of a surety, the court should bear in mind the effect of the consequences on the entire family.**

4 **The law should spell out the kind of properties which can be forfeited as security for the purposes of bail.**

5.9 Views of victims

In assessing whether or not there is an unacceptable risk in granting an accused person bail, some judges consider the attitude of the victim to the grant of bail. In practice however, the views of the victim are not sought. The purpose of considering views of victims is to enable courts to understand both the offence and the perpetrator better.

Recommendation

It is desirable and necessary that the views of victims are considered as a matter of law at a bail hearing especially hearings involving capital offences.

6.0 Use of money as a condition in bail application

Complaints have been raised about the affordability of cash bail in Uganda.

Recommendations

a) **the financial position of the accused should be taken into consideration by the judicial officer during bail hearing; and**

b) **Money imposed should not be so restrictive as to deny the right to bail for poor persons but rather ensure their return for trial.**

6.1 Recovery of money paid as security for bail

There are no clear guidelines to guide people on how to recover money paid as security for bail. This has brought about confusion and lack of clarity as to how one can recover the money.

Recommendations

Clear practice directives should be prepared by the Chief Justice to guide how bail money should be returned to the suspect or sureties.

The Judicial Service Commission should carryout sensitisation of the public on bail and related matters.

6.2 Bail pending appeal

Bail pending appeal is an important aspect of the right to personal liberty as enshrined under the Constitution of the Republic of Uganda. It is unfortunate however that there are no provisions in any law in Uganda that clearly provide for grounds for consideration during the hearing.

A combination of at least two of these criteria may suffice to serve as a ground for granting bail pending appeal.

Recommendation

The law on bail pending appeal should be amended to codify grounds considered by the Supreme Court case of Arvind Patel vs Uganda[175] these include:—

(a) that the accused was a first time offender who had complied with his previous bail conditions;
(b) that the accused's offence did not cause any personal violence;
(c) that accused had presented substantial sureties;
(d) that the accused's appeal had a high likelihood of success; and
(e) that the appeal is likely to delay.

6.3 Mandatory bail

Under the Children Act, bail is automatic to children and where court is of the view that bail cannot be granted to a juvenile, court must give reasons. This is a good practice that should be adopted by the Magistrate and High courts in matters of mandatory bail. Likewise, bail should not lapse on committal to the High Court; courts must retain bail on committal except where there are reasonable grounds to think otherwise.

Recommendations

a) It is recommended that where mandatory bail cannot be granted as stipulated by the law, the presiding judicial officer must give reasons for the decision not to grant bail

b) The Magistrates Courts Act under section 168(4) should be amended to mandate magistrates to give reasons why bail should lapse on committal to the High court.

175 SCC Application No. of 2003.

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