PROJECT: Review of bail in the criminal justice system

Distribution: All Stakeholders

30th May 2019
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>LIST OF ACRONYMS</th>
<th>.......................................................................................................................... iii</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHAPTER ONE:</td>
<td>INTRODUCTION AND BACKGROUND .................................................................................. 1</td>
</tr>
<tr>
<td>Introduction</td>
<td>.............................................................................................................................. 1</td>
</tr>
<tr>
<td>Background and context</td>
<td>...................................................................................................................... 1</td>
</tr>
<tr>
<td>Problem statement</td>
<td>........................................................................................................................ 3</td>
</tr>
<tr>
<td>Non-bailable offences in the Act</td>
<td>...................................................................................................................... 5</td>
</tr>
<tr>
<td>Views of victims during bail hearing</td>
<td>....................................................................................................................... 7</td>
</tr>
<tr>
<td>Objectives of the study</td>
<td>......................................................................................................................... 8</td>
</tr>
<tr>
<td>Justification of the study</td>
<td>........................................................................................................................ 8</td>
</tr>
<tr>
<td>CHAPTER TWO:</td>
<td>ISSUES FOR CONSIDERATION DURING THE STUDY .................................................................................. 10</td>
</tr>
<tr>
<td>2.0</td>
<td>Introduction ........................................................................................................ Error! Bookmark not defined.</td>
</tr>
<tr>
<td>2.4</td>
<td>ISSUES FOR CONSIDERATION .................................................................................. 15</td>
</tr>
<tr>
<td>2.4.1</td>
<td>Definition of the term bail ............................................................................... 15</td>
</tr>
<tr>
<td>2.4.2</td>
<td>The right to apply for bail ................................................................................ 17</td>
</tr>
<tr>
<td>2.1</td>
<td>Consistency in bail conditions and decisions ......................................................... 20</td>
</tr>
<tr>
<td>2.2</td>
<td>Exceptional circumstances in bail application ....................................................... 23</td>
</tr>
<tr>
<td>2.3</td>
<td>Relevance of place of abode in granting bail ........................................................ 27</td>
</tr>
<tr>
<td>2.3</td>
<td>Non-bailable offences in the Act ......................................................................... 29</td>
</tr>
<tr>
<td>2.4</td>
<td>Unprecedented increase in the number of capital offence ....................................... 33</td>
</tr>
<tr>
<td>2.4</td>
<td>Information to sureties on their obligations under bail ......................................... 38</td>
</tr>
<tr>
<td>2.5</td>
<td>The rights of a surety ............................................................................................ 41</td>
</tr>
<tr>
<td>2.6</td>
<td>Views of victims during bail application ................................................................ 42</td>
</tr>
<tr>
<td>2.8</td>
<td>Conclusion .............................................................................................................. 47</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>.............................................................................................................................. 48</td>
</tr>
<tr>
<td>ACRONYM</td>
<td>DESCRIPTION</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>CERD</td>
<td>Convention on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>DPP</td>
<td>Director of Public Prosecution</td>
</tr>
<tr>
<td>DPP</td>
<td>Director of Public Prosecutions</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>MCA</td>
<td>Magistrates Courts Act</td>
</tr>
<tr>
<td>NGO</td>
<td>Non Government Organization</td>
</tr>
<tr>
<td>NRC</td>
<td>National Resistance Council</td>
</tr>
<tr>
<td>TIA</td>
<td>Trial on Indictment Act</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>ULRC</td>
<td>Uganda Law Reform Commission</td>
</tr>
</tbody>
</table>
CHAPTER ONE: INTRODUCTION AND BACKGROUND

Introduction

The subject of bail, particularly its practice is increasingly becoming contentious world over including in Uganda. Legal and social debates on the balance between public safety and the right to personal liberty continue to rage on in public and political spaces. For instance, concerns have been raised by several people on the inconsistencies in the exercise of court discretions 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 among others.

Further to the foregoing justifications for reform, other reasons relating to the limitations of the law on bail have been advanced. It is opined that bail applications are not participatory- 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 breaching those conditions.

This study was intended to make recommendations for any 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 capital offences with the view to curbing their increase. In reviewing the Act, the commission considered; the presumption of innocence; the protection of the public, including victims of crime and fairness in decision making, and the desirability of speedy trials concerning a person’s detention.

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 Chaired by Justice Benjamin. J. Odoki¹, to start the process of developing a new Constitution. During consultations by the Constitutional 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. Some suggested that bail was tantamount to an acquittal because the accused persons used the freedom to interfere with the police investigations by making bribes to ensure that they do not face trial. In some cases, those on bail simply

¹ May, 1993.
abscond and evade trial. The majority called for the abolition of bail completely or 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 be walking freely on the streets and sometimes even intimidating or threatening complainants. 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 a question of grant of bail are based. Many people understood that bail is only granted to those who can afford the bond. 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.

The Commission recommended that: there should be sufficient grounds before any person is arrested; provision for grant of bail to accused persons should be maintained in the new constitution, and bail should not be refused without proper justification; and any accused person who has been on remand for a period of sixteen months for capital offences and eight months for other offences, and has been committed for trial should be entitled to automatic release on bail unless the court decided there are substantial grounds for a continued remand.

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) of the constitution, 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 of the constitution was interpreted by the Constitutional Court in *Uganda (DPP) Vs (RTD) Dr. Kiiza Besigye.* 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’.  

---

4 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;
5 Constitutional Petition No. 20 of 2005.
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 position was adapted in the *Foundation for Human Rights Initiatives Vs Attorney General.*

Despite Article 23 (6) (a) of the constitution which gives an accused person an opportunity to apply for bail in conformity to article 28 (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 others deficiencies in the legal framework and its ability to keep criminals away from the society. For example, on 4th October 2017 people were extremely disgruntled and disappointed that the High Court, had granted bail to Kanyamunyu who is alleged to have shot and killed Akena in cold blood at Lugogo mall for denting his car.\(^7\) Recently, there has been an increase in criminality in the country and prompting the President voice his concern about granting bail to persons accused of capital offences like murder, kidnap, and terrorism among others.\(^8\) The president argued that easy access to bail has led to recidivism, impunity and enabled hard core criminals to walk freely on the streets of Uganda and do further damage.

It is the practice in Uganda that Uganda Police Force arrests 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 ODDP. The poor management of these institutions mostly affects the suspects in prisons. Most developed countries investigate before they arrest and this resonates with their legislative framework.

**Problem statement**

a) **Definition of the word bail**

There is no single legislative enactment in Uganda that defines the term “bail”. It is opined that laws that do not contain definitions of specific words for interpretation purposes create uncertainty and ambiguity. As a result, it creates a loophole and interpretations are done without any principles or underlying benchmark, or purpose for the legislation. Additionally, lack of a definition creates situations where prisoners and the communities think that grant of bail is an acquittal.

b) **Perception and interpretation about bail**

\(^6\) Constitutional Petition No. 20 of 2006.
\(^7\) 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/.
Article 23 (6) (a) provides for the right to apply for bail. It provides that, 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. There is a perception however among the litigants and some practitioners that this article of the constitution gives a right to an applicant to be granted bail whereas not. The differing perceptions in interpretation of the article of the constitution has created a negative sentiment among the public who claim that bail is not granted because of corruption in the judiciary whereas not among other issues.

c) Inconsistencies in bail decisions

Several concerns have been raised by the public as to the lack of consistencies 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\(^\text{10}\) where one accused was granted bail and others not.

Inconsistencies are caused by the wide discretion given to the judicial officers the effect of which create a negative image of the judiciary as the main administrator of justice.

This is evidenced by the cases in Magistrate courts where ‘chicken’ thieves have been ordered to pay colossal sums of money to be released on bail and yet in some cases triable by the High court, grave offences like murder, rape and aggravated defilement, judges have ordered accused persons to pay reasonable sums for release on bail. It follows therefore that a ‘chicken’ thief will be denied bail because he has not proved to the satisfaction of court that he has a fixed place of abode, which is common in such cases, and a senior police officer charged with murder released since he owns an impressive home in Muyenga.

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

d) Limited grounds for exceptional circumstances

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 of the Act, exceptional circumstances include, suffering from a grave or serious illness which has been approved by a medical officer of the prison or other institution where the accused is detained as being incapable of adequately treated while in custody or detention, production of a certificate of no objection signed by the Director of Public Prosecutions (DPP), and showing that the accused is either an infant, or of advanced age.

\(^{10}\) (HCT-00- CR-CM- 0369 – 2016) [2017] UGHCCRD 1 (10 January 2017);
It has been opined that 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 take into consideration situations of sole care takers of children or gravely ill person or a breast feeding and pregnant woman as falling under the meaning of this section. It should be noted that women remanded in custody and their children may have considerable social disruption in their lives. Such women rely on 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.

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. Some research links the experience of having a parent taken into custody during childhood with increased risk of antisocial and criminal behaviours.

e) Limiting the jurisdiction of Magistrates Courts to grant bail bail

The Magistrates Court Act, Cap 16 (MCA) is the law governing the procedure applicable in Magistrate Courts. These courts have authority to try criminal matters. The MCA gives powers to the magistrate 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/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/her that are not included under section 75 of the MCA. The above list is restrictive and does not take into consideration the fact that there is case backlog, and that there is no real reason why magistrates should not hear bail applications for capital offences. It is also strange that the court with jurisdiction to hear/try an offence does not have power to grant bail in respect of that offence. Therefore, the exclusion of magistrates from hearing bail application in certain matters they can try renders section 75(2) c of the Magistrates Court Act 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/her for cattle rustling for instance.

---

11 The Complicated Problems of Children with incarcerated Parents, Alysee Elhage
https://ifstudies.org
12 ibid
f) Unprecedented increase in crimes

Crime levels have continued to skyrocket in the country, several security and legal experts are pondering on changing the legal system in Uganda to be able to curb the social problem of granting bail to suspects involved 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 causes of this increase in crime levels 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 rape and robbery involving guns, acid attackers, terrorism and those involved in embezzlement of either public or private funds should be denied bail, 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 because bail was fuelling high levels of crime in the country.

This argument is based on the fact that the law on bail has two conflicting demands, 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. The fundamental rights of an individual must be balanced with greater public interest.

g) Duties and obligations of sureties

In Uganda, it is not clear from the law whether judicial officers are required to explain to the sureties their rights, obligations, effects and consequences of breach of surety undertaking under bail. It is clear from looking at the law relating to bail that it does not mandate judicial officers to explain to sureties their obligations, rights and the consequences of any breach of the undertaking relating to bail. The law does not answer any of the following questions; are sureties aware about their obligations and responsibilities? Does court take it as a responsibility on it to inform sureties of their obligations and consequences of failure to adhere to them? All the above questions in so far as a surety is concern remain unanswered in Uganda. There are no official guidelines for registrars or court officials detailing what information they must impart to a surety.


15 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 sabautoers.
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 it may mean the surety’s home is liable to forfeiture. If the surety is unable to raise the funds that are the subject of the surety, then they face the prospect of a prison sentence. This has been the case in Uganda as well in some cases.

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

There is no simple and consistent information given to prospective sureties about their obligations and rights. Likewise, there are no guidelines for judicial officers to support sureties.

h) Views of victims during bail hearing

In assessing whether or not there is an unacceptable risk in granting an accused person bail in Uganda, some judges sometimes 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 not sought, it is claimed that views of the victims and those of the community is explained to the court by the police or the prosecution. This may be true, however, there is nothing to stop the prosecution from calling victims to give evidence in a bail hearing. There is a need to ensure that the presiding judicial officer has all the information necessary to reach a just decision but at the moment, the hearing of bail applications is one-sided.

The practice in other jurisdictions such as Australia, Scotland among others requires 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. Courts are required in these jurisdictions to consult victims during bail applications on whether accused will endanger victims or interfere with witnesses. If a court is satisfied that a victim is endangered or likely to be interfered with, then the court may refuse to grant bail unless conditions can be imposed that the courts believe will be sufficient to protect the victim or witnesses.

Unfortunately, a practice like the above is not applied in Uganda because there is no requirement of law to do so. Judicial officers that attempt to apply this good practice do so as a matter of prudence and not as a requirement of law.

The use of money in bail application

Several complaints have been raised about the unaffordable cash bail in Uganda. At times, the cash bail imposed on accused persons by judges or magistrates are exorbitant and unaffordable for many poor citizens in conflict with the law. It has
been argued by some commentators that money 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 allows for discrimination based on wealth, causes loss of confidence in the judicial system while allowing for 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 condition can be more effective, more efficient, and fair.

There is a lack of regularised procedures for obtaining the bail cash after the trial is done. This means many people lose this money as they are tossed around from one office to another.

**Objectives of the study**

The overall objective of this study is to examine the effectiveness of the current legal frame work on the law on bail with the view to improving it.

**The specific objectives of the study are as follows:**

- Examine the effectiveness of the current legal framework;
- Ascertain how the law on bail can be improved to facilitate the needs of justice and reduce crime;
- To gather views and analyze perceptions on the law on bail and any possible recommendations for reform; and
- To make proposals and recommendations for reform of the current legal framework of bail with the view to promoting effective administration of and access to justice.

**Justification of the study**

A relaxed and liberal approach to bail for persons suspected of committing capital offences has been advanced as one of the reasons for the growing number of murders, kidnap and other crimes in Uganda today. Therefore, it is necessary to exclude financial discrimination in the law, provide clarity by removing any ambiguous provisions and streamlining the process while adhering to the constitutional mandates.

The law on bail has two conflicting demands, 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. There is a need to balance the fundamental rights of an individual with greater public interest.
CHAPTER TWO: LEGAL FRAMEWORK ON BAIL

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”.16

The rights of pre-trial detainees are provided for in the Constitution of the Republic of Uganda, 1995 and other international instruments which have variously been ratified by Uganda. 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.

In Uganda, bail is a constitutional right guaranteed under Article 23(6).17 Article 23(6)(a) provides;

“Where a person is arrested in respect of a criminal offence (a) 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 case of Uganda (DPP) –vs- Col (Rtd) Dr. Kiiza Besigye18, 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 Constitution further provides that persons shall be released on bail for cases which are tried by the High Court, as well as other subordinate courts, if they have been remanded in custody for 60 days,19 and for cases which are tried only by the High Court if they have been remanded in custody for 180 days.20 In practice, however, there are many cases of persons remaining in detention for long periods before trial.21

The Trial on Indictment Act Cap 23

The relevant provisions of the Trial on Indictment Act (T.I.A) in respect to bail are; section 14, 15, 16, 17, 18, 19, 20, and 21. The criteria for determining the application is laid under section 1422 and 1523 of the Act.

---

18 Constitutional Reference No. 20 of 2005.
19 Constitution of the Republic of Uganda, article 23(6)(b).
20 Constitution of the Republic of Uganda, article 23(6) (c).
22 The High Court may at any stage in the proceedings release the accused person on bail, that is to say, on taking from him or her a recognisance consisting of a bond, with or without sureties, for such
The Magistrates Court Act Cap 16

The Magistrates Court Act, Cap 16 (MCA) is the law governing the procedure applicable in Magistrate Courts. An application for bail can be made orally by an accused or his or her lawyer/advocate in court. Alternatively, it can be made in writing and should be supported by an affidavit.

An affidavit is a sworn statement made by someone, setting forth the reasons as to why court should consider granting their application and could be used against him/her in the courts of law.

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.

Section 75 and 77 of the Magistrates Courts Act of the Magistrates Court in Uganda.

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 authorized by law to exercise judicial power”

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.

23 Notwithstanding section 14, the court may refuse to grant bail to a person accused of an offence specified in subsection (2) if he or she does not prove to the satisfaction of the court—that exceptional circumstances exist justifying his or her release on bail; and that he or she will not abscond when released on bail. Subsection 2 lists offences triable only by the High Court.

25 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.

(1) 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.

(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.

(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.”

26 Cap 16 Laws of Uganda.
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 other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement”.

Uganda ratified the ICCPR on 21st June 1995 and this later came in force for Uganda on 21st September 1995.

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

General Comment No.35 of the UN Human Rights Committee notes that on Article 9 of ICCPR protects individual(s) against arbitrary detention and unlawful detention with the concept of “arbitrariness” to be interpreted as including “elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality”.27

**European Convention on Human Rights**

Similarly, Article 5 of the European Convention on Human Rights which can be persuasive for this review 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 his 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 detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.28

**European Court of Human Rights**

In response to curtail some of the above scenarios from happening, 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 only be imposed only as an exceptional measure. There is a presumption in favour of release.29 The Court has stated that “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

---

27 ICCPR Human Rights Committee, General Comment No. 35, Article 9 (Liberty and Security of Person) Para 12, December 2014.
28 Article 5(4) ECHR.
suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances.”

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

iii. To justify the detention of a person who is presumed innocent, there must be “a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty”. Mandatory detention on remand is incompatible with Article 5(3) of the Convention.

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;

b. the risk that the suspect will interfere with evidence or intimidate witnesses;

c. the risk that the suspect will commit further offences;

d. the risk that the release will cause public disorder; or

e. the need to protect the safety of a person under investigation in exceptional cases.

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

v. The detention decision must be sufficiently reasoned and should not use “stereotyped” forms of words. The arguments for and against pre-trial detention must not be “general and abstract”.

---

30Ambruszkiewicz v Poland.
32Tomasi v France (1992) 15 EHRR 1. See also Neumeister 1 EHRR 91.
34Caballero v UK (2000) 30 EHRR 693.
36Ibid.
37Muller v. France, App 21802/93, 17 March 1997, para 44.
39Ibid, para 108.
40Yagci and Sargin v Turkey, App 16419/90, 16426/90, 8 June 1995, para 52.
41Smirnova v Russia, App 46133/99, 48183/99, 24 July 2003, para 63.
the reasons for pre-trial detention and for dismissing the application for release.42

vi. 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.43

vii. The mere fact of having committed an offence is not a sufficient reason for ordering pre-trial detention, no matter how serious the offence and the strength of the evidence against the suspect.44

viii. The risk of re-offending can only justify pre-trial detention if there is actual evidence of the definite risk of re-offending available.45

ix. In reviewing pre-trial detention the authorities are obliged to consider whether the “accused’s continued detention is indispensable”.46

43 Kalashnikov v Russia 36 EHRR 587.
45 Matznetter v Austria, App 2178/64, 10 November 1969, para 1.
46 Ibid, para 79.
CHAPTER 3: ISSUES FOR CONSIDERATION DURING THE STUDY

This chapter highlights several challenges concerning the legal framework on bail in Uganda that were considered during desk and field research conducted in five districts. These challenges include among others; definition of the word bail, perception about and interpretation of bail, inconsistencies in bail decisions by judicial officers, limited grounds for exceptional circumstances, non-bailable offences in the Act, unprecedented increase in capital offences and conditions for the grant of bail, information to sureties on their obligations under bail, views of victims during bail hearing and the use of money as a condition for the grant of bail. The chapter presents the findings, analyses and raises issues for further discussions.

2.4 Issues for Consideration

2.4.1 Definition of the term bail

There is no single legislative enactment in Uganda that defines the term “bail”.

Black’s Law Dictionary\(^\text{47}\) 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.”

Lumumba P.L.O\(^\text{48}\) defines the term bail,

“... as an agreement between the accused (and his sureties as the case may be) and the court and that the accused will pay certain sum of money fixed by the court should he fail to attend his trial”.

He goes on to justify the importance of defining legal terms by stating that laws that do not contain definitions of specific words create uncertainty and ambiguity. He therefore recommends that it is desirable that important terms or words in all legislation be defined to create clarity in and give the law generally purpose and effect to the mischief it intends to cure.

Legislation in Uganda that is the 1995 Constitution of the Republic of Uganda, the Magistrates Court Act and Trial on Indictment Act all do not define the word bail. This in essence leaves it to the courts to determine what bail is other than looking at the purpose and effect to the mischief it intends to cure.


**Field findings**

The study sought to establish knowledge on the definition of the word bail. Accordingly, over 70% of the respondents consulted had basic understanding of the term bail while the 30% understood what bail is except that did not necessarily know how to define. Further analysis illustrates that the highest percentage of respondents who could define bail were from the legal profession. These responses were from prosecutors, Magistrates, Judges, some prison officers and private practitioners.

During consultations in Lira district, a Prison officer defined the term bail as follows:

> “an opportunity given to an inmate by court officials to be out of prison after presenting credible sureties so as to come from home as he or she attends court.”

A similar view was expressed by a key respondent from Justice Centres who opined that it is a window of opportunity for an accused person to be able to defend him or herself while coming from home.

Another respondent, a State Attorney defined bail as:

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

While another respondent defined bail as the basic right for every prisoner on remand to be granted an opportunity to attend to his or her court case outside jail.

Some respondents who understood what bail is but could not define defined bail as an agreement between courts to avoid imprisonment.

According to a judicial officer, there is a lack of knowledge amongst the people on the law of bail. There are those who think that they must be given bail, once bail is not granted, these categories accuse courts of corruption and where bail is granted, they think it is an acquittal which has led to jumping of bail in many cases.

Similarly, State Attorneys noted that lack of knowledge on the law of bail is evidenced by the fact that people think being granted bail means the case has ended.

**Analysis**

From the above, it can be that respondents interviewed essentially understood the meaning of the term bail. The definitions were centred 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.

---

49 Officer in Charge of Lira Main Prison, Lira District.
50 Center Manager, Justice Centres Uganda Lira Branch (Francis Okulu)
51 Office of the Resident State Attorney, Jinja.
52 Senior social Rehabilitation welfare Officer, Gulu Main Prison.
53 Magistrate Grade One, Chief magistrate court Masaka
54 Office of the resident state attorney Gulu District.
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 into loss of belief in the justice system by many of the victims who see accused people back in the community and also makes people abscond because they do not understand what bail is. This contributes to mob justice as society takes matters into its own hands largely increasing 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 criminal justice system.

**Issue for consultation**

- **Whether there is need to have a specific definition of the term bail in the law to give the law on bail generally the purpose and effect to the mischief it intends to cure.**

**Proposals**

a) It is important to clearly define the word bail to provide clarity in the law relating to bail to giving it generally, the purpose and effect to the mischief it intends to cure.

b) To bridge that gap there is a need for advocacy for both non legal users and refresher courses for judicial officers

**2.4.2 Perception about bail**

Article 28 (3) (a) 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) 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.

However, there are different perceptions among the litigants on this article of the constitution. Some argue that the Constitution read as a whole grants a right to an applicant to be granted bail while others argue that the right is limited to applying for bail.

The Constitutional Court of Uganda has interpreted the above Article in the case of **DPP –vs- Col (Rtd) Dr. Küza Besigye**, 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 …"
```

---

56 ibid.
57 Constitutional Reference No. 20 of 2005.
Mandatory periods; the constitution demands for bail to be granted where mandatory periods have been met. Today there are sophisticated crimes that are difficult to investigate. Even in these circumstances there is need to balance the rights of the individuals with the interests of the state. Sophisticated crimes make it difficult for the Uganda Police Force and the Office of the DDP to carry out investigations and produce the suspects before court. There is equally an issue with the application of mandatory bail by the courts of law.

Field findings

The study further sought to establish knowledge, views and perceptions on Article 23(6) (a) of the constitution. From the findings, the majority of respondents (60%) did knew what this article meant and wanted it to remain as it is, while 40% stated that they this article gives an accused a mandatory right to bail. Among the respondents who were knowledgeable about the actual meaning of this article, there 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 be amended to grant the right to bail rather than the right to apply for bail. Accordingly, 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.”

Arguing in favour of the status quo remaining as it is, 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 the accused, what can be considered is coming up with 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 judges to allow consistency and certainty in decision making on bail.”

---

58 An advocate at Justice Centres Masaka District.
59 Chief Magistrate, Chief Magistrate’s Court Masaka
A similar view was held by a prison officer who argued that it should remain as it is. Amending it will enable people to commit more crimes with impunity. They will always take it for granted that they will be given bail.

This same view was restated by different respondents and some of the reasons for maintaining the law as a right to apply for bail rather than amend included; the need to have public confidence in the judicial system, amending would water down the concept of bail, judges need to exercise their discretion to ensure people return to court for trial and this would help in fighting crime.

A judicial officer suggested that the prosecution should have the burden of proof to show why someone should not be granted bail. This is would make the prosecution more interested in the quick movement of the case.

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

An advocate had a different view. She stated that bail should be a right once one has proved the ground to grant bail. At the moment the law is that court “may” grant bail.

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

**Analysis**

From the findings, it is evident that majority of the respondents propose that the status quo should be maintained. The law should continue to give judicial officers the discretion to judicially deny or grant bail on a case by case basis depending on available proof of the grounds for grant of bail, 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,

---

60 Officer in Charge of Lira Main Prison, Lira District

61 The Centre Manager, Justice Centres Lira, Magistrate Lira District, Chief Magistrate Lira, Advocate from Mifumi Uganda in Masaka, Senior social Rehabilitation Officer Gulu, Advocate from Legal Aid Jinja, Magistrate Masaka District.

62 Judge, Gulu High Court

63 Nansubuga & Co. Advocates, Masaka District.
the difficulties in the applications for bail and the reality of Uganda’s court system as well as prison conditions.

To permit the law to give accused person the right to be granted bail will however be against the purpose and rationale for bail. Whereas there is the general presumption innocence and therefore not to detain an accused, best practices all over the world 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.

**Issues for consultation**

- **Whether Article 23 (6) (a) should be amended to create right to bail rather than the right to apply for bail?**

- **Whether there is a need to have specific guidelines/practice directive or provision of the law that guides discretion of judicial officers be developed to offer guidance on the grant of bail?**

**Proposals**

a) **It is recommended that article 23 (6) (a) should not be amended; the accused persons should have the right to apply for bail and not the right to bail.**

b) **It is further recommended that specific guidelines/practice directive or provisions of the law that guide discretion of judicial officers be developed to offer guidance on the grant of bail.**

2.1 **Disparities and Inconsistencies**

Several concerns have been raised by the public concerning the lack of consistencies in bail decisions. It is said that similar offences being a subject of bail application have produced different decisions. For instance, in Matthew Kanyamunyu –v- Uganda where some accused were granted bail and others not. Some critics have even questioned whether legal practitioners or judicial officers attended the same law schools since there is no consistency on what must be proved for one accused of murder, treason, rape and other offences to be granted bail.

Further, there are cases in Magistrate’s courts where ‘chicken’ thieves have been ordered to pay colossal sums of money to be released on bail and yet in some cases

---


triable by the High court, grave offences like murder, rape and aggravated defilement, judges have ordered accused persons to pay reasonable sums for release on bail. It follows therefore that a ‘chicken’ thief will be denied bail because he has not proved to the satisfaction of court that he has a fixed place of abode, which is common in such cases, and a senior police officer charged with murder released.66

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

The study further 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 reform to create transparency, consistency and clarity in bail justice. The findings indicate that respondents had varied responses as can be seen below.

**Findings**

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 by the courts. The 30% of the respondent were of the view that the inconsistencies in bail decisions arises from discretions given to a magistrate or judge. In many cases, what set apart decisions might be the nature of offence, the safety of the public, sureties presented before court among others. According to a judicial officer in Lira:

“... I have chosen not to entertain bail applications in my court. There is no faith in courts because of 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.”

Further, another judicial official 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 to exercise their discretions judiciously and as a result, there are variations in bail decisions”.

On the other hand, some of respondents were of the view that the lack of any clear guidelines to guide 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.

66 ibid, fn 57.
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, so it’s then down to their lawyers to explain to them exactly what it means after court, but then it would already be too late.”

Analysis

Drawing from the study findings, there is a popular view that when granting bail, a magistrate or a judge should be required by the law to state the reasons for their decision in relation to bail.67 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 paper68 on the review of Bail Act, 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.

In Uganda, several case laws especially those in the High Courts69 on bail applications judges have clearly indicated reasons for their decisions. 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.

Issues for consultation

- Should a provision be introduced into the law requiring bail decisions and the reason for the decision to be recorded in writing at all times for consistency purposes?
- Should this be in-form of a practice directive or specific provisions in the Acts?
- Should judicial discretion be guided by law?

---


69 Dr. Ismael Kalule & 4 ors –vs- Uganda also see FN 101.
Proposals

a) there should be express and specific provisions requiring judges and magistrates to explain or give reasons for their bail decisions

b) specific provisions be considered to require judicial officers to give reasons for bail decisions.

c) Guide the use of discretion by the judicial officers

2.2 Exceptional circumstances in bail application

The Trial on Indictment Act, Cap 23 is the law governing the trial procedure of criminal cases in High Court. The High Court has unlimited power to hear criminal matters and appeals from the lower courts.\textsuperscript{70} The TIA gives the High Court discretion to grant or deny bail and provides for the procedure adopted by court in doing so.

Section 15 of the TIA provides for exceptional circumstances where a detainee may be released on bail by the High Court.\textsuperscript{71} The High Court may grant bail to an accused upon proof of exceptional circumstances that entitle him/her to be granted bail and also showing that he or she will not abscond when released. Exceptional circumstances include:

a) that the accused is suffering from a grave or serious illness which has been approved 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 Director of Public Prosecutions (DPP); and

c) when the accused shows that he or she is either an infant, or of advanced age.

Exceptional circumstances were put in the law to provide for people who have peculiar circumstances that would make it very difficult for them to stay in prison while still innocent. Therefore, it is important to ascertain whether this purpose is still being achieved and the law is still relevant in dealing with the mischief.

Findings

The study also sought to explore the extent to which section 15 of the TIA on exceptional circumstances is still relevant or rather whether it should be enlarged to include other peculiar circumstances such as a sole caretaker, breast feeding or pregnant women, among others. Findings indicate that 95% of the respondents were of the view that section 15 of the TIA be enlarged to make the law responsive to the

\textsuperscript{70} Article 139 of the Constitution of Uganda, 1995
\textsuperscript{71} Trial on Indictment Act, Cap 23.
present socioeconomic circumstances of Uganda. Only 5% were of the view that said section should not be enlarged. Out of the 95% of the respondents who were of the view that section 15 of the TIA be enlarged, the highest number was judicial officers and prosecutors.

During a focus group discussion72 participants argued that expectant and breastfeeding mothers should be helped in trying to obtain bail especially because of the nature of their circumstances and the poor conditions in prisons. Therefore, if they fulfil the conditions of court that would enable them come for trial, they should be given bail.

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 are detained and later found to be innocent. They were of the view that this injustice should not be looked at in respect of an accused only but their families as well. Thus a judicial officer in Gulu stated:

“Today, you find several accused persons as 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?”73

Another judicial officer74 while agreeing with the proposal to enlarge Section 15 stated thus:

“A mother who is heavily pregnant should be considered. For example, I have just 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”75

Several prosecutors76 consulted were in agreement that section 15 of the TIA needs to keenly be looked at because a lot has changed since this provision was enacted. For instance it is argued that women are more likely to be remanded to prison than men

72 Masaka Main Prison, male inmates both on remand and convicts.
73 Resident Judge, Gulu High Court.
74 Magistrate, Chief Magistrate’s Court Lira
75 A legal practitioner, Masaka district.
76 Respondents consulted in the districts of Gulu, Lira, Jinja and Masaka.
for offences that would not lead to a custodial sentence. This often results in serious consequences for children of imprisoned mothers. Remanding pregnant women or breast feeding mothers in custody creates social costs for the relatives and the community in raising the children, as well as the woman’s employment prospects.

For women remanded in custody, and their children, the social disruption can be considerable. They will be 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. A respondent argued that from experience the conditions of prison are not considerable for pregnant women and children furthermore women are known to adhere to conditions of bail more than men do.

The consequences for the children may also be severe. 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. Some research links the experience of having a parent taken into custody during childhood with increased risk of antisocial and criminal behaviours.

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. This research relates to not only children of parents who are serving prison sentences, the issues are the same for 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 finally be heard.”

Other respondents had divergent views on the issue. Out of the 5% respondents that are against enlarging section 15 of the TIA, one from Justice Centres argued that a circumstance of a pregnant woman or a breastfeeding mother should not be treated as exceptional circumstances. The question of exceptional circumstances is better left to


\[\text{ibid Fn 2.}\]

\[\text{Senior Magistrate, Chief magistrate’s Court Jinja.}\]

\[\text{Centre Manager, Justice centres, Lira.}\]
the judicial officers to determine what is exceptional on a case by case basis. This is because what is exceptional to one may not be for another.

A State Attorney\textsuperscript{83} argued that breastfeeding mothers or pregnant women should not fall within exceptional circumstances. She argued that it would be used to abuse the legal process if all other circumstances are not fulfilled. Equally a judicial officer\textsuperscript{84} was of the view that breastfeeding can be done anywhere although the list on exceptional circumstances can be increased as it may not cover all the areas. Alternatively, leave it to the judicial officer to determine other exceptional circumstances.

Respondents argued that the section should be changed from “may consider” instead of “will consider” 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.

\textit{Analysis}

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 special circumstances may expand to include breast feeding mothers, pregnant women, extremely disabled people, single parents, children and children heading families. The reason for this opinion is based on the effect incarceration has on people with special needs, their minors, and the fact that they are still presumed innocent.

Despite the view of the majority there are others who believe that the section on exceptional circumstances should be interpreted strictly. It is argued enlarging the section would water down the rationale for the section.

One thing is for sure, the Uganda’s socioeconomic circumstances have changed since enactment of this provision. The social fabrics that used to allow another person assume responsibility of another are no more; today there are single homes, child headed families and the cost of taking extra responsibilities is very high.

\textsuperscript{83} State Attorney, Office of the Resident State Attorney Lira District.

\textsuperscript{84} Chief magistrate Masaka District.
Issues for consultation

- Whether section 15 of the TIA should be amended with the view to enlarging it to create other exceptional circumstances? (should the TIA section 15 specifically require a person’s status as primary carer to be taken into account when deciding whether to grant bail?)

- Should the Act contain a list of broad matters that decision makers should have regard to in deciding whether there are exceptional circumstances?

- Whether defendants who are expectant or breast feeding mothers should be remanded in custody only after consideration of risks they are likely to present should bail not be granted.

- In the alternative, should the Act still retain section 15 or it has been overtaken by events.

Proposals

a) Section 15 of the TIA should be amended to take into consideration other possible exceptional circumstances for instance, primary carer, expectant or breast feeding mothers, sole caretaker for example in child headed households, extreme disability among others.

b) The term advanced age in the circumstances should be defined.

2.3 Relevance of place of abode in granting bail

The study sought to establish the respondents’ views on whether they thought “fixed place of abode” as a condition for the grant or refusal to grant bail was still relevant.

According to a respondent in Gulu district, ‘a fixed place of abode is 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.85

Preliminary findings indicate that there were varying responses to this issue. Some respondents were of the view that a place of abode was necessary in granting or denying bail while others found it irrelevant. Another respondent observed that “That purpose of this condition is to ensure that the accused person is kept within the jurisdiction of court and when wanted, can report in court as required.”

Meanwhile, another respondent from Jinja86 argued that, “fixed place of abode is still relevant for accused person and should be even for sureties.” He argued that more emphasis should be placed on the place of abode so that in case of absconding, it becomes easy to trace the offender or their sureties. Another State Attorney argued

---

85 Resident State Attorney in Gulu district.
86 State Attorney, Office of the Resident State Attorney Jinja.
that the relevancy of this condition is to ensure that the applicant comes back to court for trial.

Accordingly, about 80% thought that the provision relating to a fixed place of abode is relevant and should be retained by the law. Out of the 80% however, about 50% strongly opined that whereas the relevance of this law is not in question, 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.” The same officer noted that considering the present socioeconomic circumstances of Uganda where over 80% do not own houses but rent, the definition of a fixed place of abode should considering even a rental home as a fixed place of abode. A senior magistrate agreed with this position and stated that; “such a widened meaning should include the place of origin of the accused while another respondent suggested offices and rented homes.”

A judicial officer described 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% the respondents disagreed and argued that with the introduction of the Uganda National Identification Card, place of abode is not as relevant as it used to be. 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.

An advocate argued that 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 contribute to whether a person will come back to court as and when required.

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

In a focus group discussion with inmates, it was the view of most of them that a fixed place of abode should not be limited to the jurisdiction of the court but rather

---

87 Magistrate, Masaka Chief Magistrate’s Court.
88 Senior Magistrate, Chief Magistrate’s Court Jinja.
89 An advocate with the Justice centres Uganda.
90 Judge, Gulu High Court.
91 Senior social rehabilitation officer, Gulu Main Prison.
92 Legal Officer FIDA Uganda.
93 Centre Manager Justice Centres Uganda, Lira District.
94 Magistrate, Chief magistrate’s Court, Lira District.
95 Inmates in Masaka Main prison comprising of those on remand and convicts.
any place where the applicant can show and prove he resides. Limiting the meaning makes it useless.

Analysis

It is evident that the requirement of a place of abode in granting 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 a place of abode means a fixed and permanent place of residence and as such require an applicant to prove the condition on those terms. Others argue that place of abode need not be permanent but known to court and the applicant should prove that he/she can be found as and when required by court. Furthermore, the interpretation and application of the term place of abode is affected by the territorial jurisdiction of the court given the socio-economic changes of our society and the rural-urban migration.

Issues for consultation

- Whether place of abode is still relevant as a condition for grant of bail.
- Whether there is need to define the meaning of a place of abode.

Proposals

a) to avoid uncertainty and ambiguity in interpretation, there is need to clearly define the phrase, fix place of abode to mean an address of service within the jurisdiction of court.

b) That from the research findings, a fix place of abode is still relevant and as such should be kept in the law however with a clear definition of what it means.

The phrase “within the court’s jurisdiction” should be removed.

2.3 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 MCA gives powers to the magistrate 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 the latter cases, the magistrate’s duty is to inform the accused person of his/her right to bail and also advise him or her to apply for bail in the High Court.

The MCA further provides for situations and circumstances when a pre-trial detainee may be granted bail. These are offences where the accused is not being charged of any of the following offences; acts of terrorism, cattle rustling, abuse of office, rape,

---

96 Section 75 (1) of the Magistrates Court Act.
embezzlement, causing financial loss, defilement, offences under the Fire Arm’s Act punishable by at least ten years’ imprisonment or more, offences triable by only 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/her that are not included in the above list. The above list is restrictive and does not take into consideration the fact that there is case backlog, and that there is no longer justification why magistrates should not hear bail applications for capital offences especially those offences they can try under section 75 of the MCA but for which they cannot hear bail application.

**Findings**

The study sought to explore the reasons why magistrates cannot hear bail applications in offences listed as capital offences and the possibility of extending powers of magistrates to entertain bail applications under section 75. Findings indicate that respondents had varied responses as shown herein below.

Over 85% of the respondents consulted were of the view that there are no fundamental reasons, not any legal ones or experience that should prevent a magistrate from entertaining bail application of any nature. Among this category of respondents, there have been reforms and progress in many of these Commonwealth countries where Uganda got 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.

According to a judicial officer in Lira district,

> “My opinion is that 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.”

A State Attorney also opined that;

> “With the exception of alleged corruption in Magistrate Courts, magistrates qualify to hear bail applications for all offences.

A similar view was expressed by different court users who argued that magistrates are qualified lawyers with skills, knowledge and experience to entertain bail applications in all criminal matters.

A judicial officer was of the view that

---

97 Resident Judge, Lira High Court.
98 Office of The State Attorney in Gulu.
99 Registrar High Court Lira and the Chief Magistrate Masaka
“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’s courts can sufficiently test the sufficiency of sureties and whether someone will return for trial. In a perfect system any judicial officer can handle but Uganda’s system is still imperfect. Where guidelines are adopted this can be used so that a perfect system is made and then magistrate courts can handle.”

Similarly, another respondent was in agreement as far as an imperfect system is concern, he stated that:

“There is no fundamental reason why magistrates cannot entertain bail applications relating to capital offences. Magistrates are well qualified lawyers just like High Court Judges. The only reason which may be considered is the fact that there is more alleged corruption in Magistrate Courts. In a perfect system magistrates would preside over applications in all offences but Uganda does not have a perfect system.”

Although a judicial officer in Lira argued that corruption can no longer suffice as a ground to limit magistrates considering there are very many cases of corruption in High Courts as well; there were respondents who differed in opinion and insisted that the law should remain as is. 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.”

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 for example there is only one Chief magistrate who is already covering a very large area and is already over burdened with work.”

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

---

100 Justice Elubu Micheal of Jinja High court
101 Resident Judge, Gulu
102 State attorney Jinja.
103 Officer in charge of prisons Lira main prison, Lira District.
104 Advocate legal aid Jinja.
105 Legal officer FIDA Uganda, State attorney Gulu, Legal personnel Justice centres Jinja.
Analysis

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’s Courts creating an imperfect system. Some people who argue against altering the status quo believe 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/her and cannot hear a bail application.

In a recent Supreme Court\textsuperscript{106} case where the issues of jurisdiction of magistrate to entertain certain bail applications, Justice Esther Kisaakye held as follows:

On cattle rustling cases; “\textit{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) excludes chief magistrates from hearing a bail application with respect to an accused person charged with this offence.”}

She further stated; “\textit{in my analysis of Article 23 (6) of the Constitution, I found that the court with jurisdiction to hear/try an offence, has power to grant bail in respect of that offence. In this case, the court referred to is a Chief Magistrate’s Court which has the jurisdiction to try this offence,}” she added.

The lead judge also held that the exclusion renders section 75(2) c of the Magistrates Court Act (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/her for cattle rustling.

Accordingly, the lead judge held thus: “\textit{given my findings in respect of Section 75 (2) c & 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,}” she ruled.

Following field findings 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.

Issues for consultation

- \textit{Whether section 20 of the M.C.A should be amended to give power to magistrates to handle bail application for non bailable offences?}

\textsuperscript{106} Anthony Wesaka & Juliet Kigongo; Magistrates granted bail powers on serious offences.
• Whether in supporting magistrates in entertaining bail applications in capital offences, special conditions be considered?

a) Proposals It is recommended that Magistrate Courts should be given the jurisdiction by the law to entertain bail applications even in capital offences.

2.4 Restriction of the right to bail in some cases

Crime levels have continued to skyrocket in the country\(^{107}\), several security and legal experts are pondering on changing the legal system in Uganda to be able to curb the social problem of granting bail to suspects involved capital offenses. Among the common capital offences are homicide, rape, terrorism, treason, kidnap and aggravated robbery to mention but a few.\(^{108}\) 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 negligence 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.\(^{109}\) The president of the Republic of Uganda has weighed in on this debate; he argues that suspects of murder, aggravated rape and 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 not less than six months before any form of bail application is entertained in the courts of law.\(^{110}\)

This argument is based on the fact that the law on bail has two conflicting demands, 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.\(^{111}\) 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 prove the necessary grounds sufficiently, 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: -


\(^{109}\) Annual Crime Report, 2018, page 17-18


\(^{111}\) Okello Augustine –vs- Uganda.
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.\textsuperscript{112}

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] and home environment;

c) accused’s compliance with any previous grants of bail;

d) strength of the evidence against the accused; and

e) attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail.\textsuperscript{113}

The restrictions arise out of necessity given the increase in crime rates, the changing nature and face of these 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. But any restrictions adopted should not lose sight of the innocence of the accused, the pressure such restrictions would place on the prisons.

\textit{Findings}

The study further sought to explore the possibility of tightening conditions for the grant of bail in capital offences for instance; an accused should only apply for bail after 60 days with the view to curbing widespread crimes in Uganda. Findings indicate that respondents had varied responses as seen below.

Accordingly, 60\% of the respondents were of the view that whereas this proposal is intended to deter people from committing crimes, the right to personal liberty of an individual must be taken into consideration, the status quo should remain except that other restrictive conditions such as seeking to know the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail, the possibility of accused’s case succeeding, strength of the evidence against the accused among others. In Lira, a respondent stated:

\textsuperscript{112} ibid.
“There should be careful consideration taken in respect of the proposed new law; the new law should not be used to deny capital offenders bail. Whereas the intention to restrict the grant of bail to persons accused of 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 long time when they are innocent.”

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.”

Majority of the respondents consulted 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 further argued that international and regional instruments are all in favour of bail to be granted to an accused person rather than deny it. It was further argued that given Uganda’s political and social environment, such a restriction would keep more innocent people in prison rather than criminals because chances are that it will be abused.

It is argued that the law can 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 investigation are conducted. Other restrictive conditions cited by the respondents include use of house arrest, use of high cash bail for such offences and restriction of movements within or outside the country. An example is the bail application for the case of Uganda v Robert Kyagulanyi and 32 others wherein the Resident Judge Gulu agreed with 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 calmness 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 an application, Dr. Ismael Kalule & 4 ors –vs-Uganda,114 the applicants were indicted for various offences related to terrorism and they filed an application for bail pending trial. Hon. Justice Chigamoy Owiny – Dollo held that,

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

---

multiple counts 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... 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 "

It was opined by many respondents during consultations that whereas it is clear that there is need to consider Article 28(3)(a)\(^{115}\) 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. It was therefore suggested that special conditions for certain capital offences be set with the sole purpose of sending a strong message against rising or increasing offences.

It was noted by some legal practitioners that the judgement of Justice Chigamoy Owiny-Dollo in the case Dr. Ismael Kalule & 4 ors –vs– Uganda is the right approach towards capital offences especially those relating to terrorism, kidnap, murder, aggravated defilement, child sacrifice, aggravated robbery because almost or not all

these offences cause much public anxiety and resentment; the perpetrators target soft targets and their victims are usually people with whom they have no quarrel at all.

**Analysis**

From the findings most of the respondents insist that bail is a constitutional right that cannot be out rightly 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 defence. They further argued that international and regional instruments are all in favour of bail to be granted to an accused person rather than deny it. This notwithstanding, 60% of the respondents recommend more stringent conditions for capital offences; for instance, seeking to know the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail, the possibility of accused’s case succeeding, strength of the evidence against the accused among others.

Despite the strong views above, there are those who believe that Uganda’s reality calls for a tougher approach to crime and this includes 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.

**Issues for consultation**

- **Whether bail should not be granted to persons who are involved in the commission of capital offences such as kidnap, terrorism, aggravated robbery, child sacrifice.**

- **Whether special set of conditions (the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail, the possibility of accused’s case succeeding, strength of the evidence against the accused among others) for bail in capital offences be set with the view to curbing the increasing offences against public safety and security?**

**Proposals.**

1. **Very stringent conditions such as the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail, the possibility of accused’s case succeeding, strength of the evidence against the accused among others should be imposed on accused person for selected capital offences such as kidnap, terrorism, aggravated robbery and child sacrifice.**

2. **Political offences should be excluded from such cases for which bail is restricted.**
2.4 Information to sureties on their obligations under bail

The high profile disappearance of gangland identity, Tony Mokbel, while on bail in March 2006 drew public attention to the role of sureties for 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. Apart from penalties, Mokbel 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 a responsibility it has to inform sureties of their obligations and consequences of failure to adhere to them?

All the above questions in so far as sureties are concerned remain unanswered also here in Uganda.

The term surety can be used variously to refer to;  

a) a person who undertakes to pay a specified amount if the accused fails to abide by the bail conditions.

b) the amount that the 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, it is not clear from the law whether judicial officers are required to explain to the sureties their obligations, effects and consequences of breach. During consultations, respondents were asked whether it was a requirement to inform sureties of their obligations and responsibilities under bail conditions and if doing so was a good practice that needs to be codified by the law.

Findings

The study sought to establish the extent to which the law relating to bail mandates 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

---

116Rv Mokbel and Mokbel [2006] VSC 158 (Mokbel). Gillard J rejected the surety’s application for relief against forfeiture in Mpkbel 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.

explain sureties’ obligations to them. Accordingly, it is at the discretion of each judicial officer to deem it fit to do so.

According to one of the respondents:

“Sureties are never informed of their obligations as sureties, they in fact do not even know that they have any specific obligations, many at that time are looking at their person, the accused being released. 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\(^{118}\) agreed with the above position and argued that lawyers many times ignore giving the necessary information and courts only test by asking whether the sureties know their duties/obligations without necessarily giving sureties the necessary information.

A State Attorney at the office of the Resident State Attorney Gulu District pointed out that court explains to the sureties but never sufficiently for the common person.

On the contrary, 30% of the respondents among whom was the Resident Judge Lira High Court were of the view that this was a matter of practice and sureties are informed regarding their obligations during the application for bail. Another respondent claimed that they are informed by court but the majority of sureties do not know the gravity of the offence if the offender absconds. In most cases, they take things for the sake of making money purposes.\(^{119}\) Equally, in a focus group discussion male prisoners in Masaka Main Prison re-echoed that court informs the sureties of their obligations especially when it is going to give bail.

According to one respondent in Masaka, it is desirable that the law specifically mandates court to have the responsibility to give sureties information about their obligations. Where it cannot be a legislative provision, there should be guidelines on what information should be imparted onto sureties.

According to a legal practitioner in Masaka,

“the grant of bail does not set accused person free, but rather release him/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 accused person attend court to answer the charges against them, this is an important role that cannot be left with practice, the law must expressly provide that a magistrate or a judge has the responsibility to inform a surety of their role and responsibility when they stand sureties”

\(^{118}\) Center Manager Justice Centers in Lira.
\(^{119}\) Officer in Charge Lira Prisons.
A respondent argued that guidelines would help in knowing which information should be imparted. Similarly, other respondents were of the view that guidelines would be ideal and should contain the obligations/roles of the sureties, and the implications (including financial) in case the accused absconds.

Further, a prosecutor in Lira was of the view that this aspect relating to bail application is the most ignored one, often times nowadays, you find professional sureties, they stand sureties in all criminal matters. Therefore, developing proper regulations and guidelines that ensures certainty, transparency and consistency would help avoid this kind of practice. In any case, if a surety knows that they will forfeit specified amount of money or property, they will only stand surety when it is really necessary.

**Analysis**

It was clear from the responses that there was no legal requirement for judges and magistrates to inform sureties of their obligations under bail conditions. To some judicial officers, they explained to sureties sometimes but not all the time since it was not a mandate of the law. What is not clear however is whether it should be a specific provision of the law requiring judges and magistrates to explain sureties’ obligations under the undertaking or a comprehensive guideline be developed to achieve the same objective. It is important to note that guidelines do not have the same force of law like legislative provisions; it is therefore desirable to think towards amendment of the law to take is into consideration.

Responses from respondents highlighted a problem of “professional sureties” who present a challenge to court that relies on them to ensure that the accused returns to court yet this person doesn’t know the person and cannot sufficiently control them to ensure that they return to court for trial. It was argued that this is further aggravated by the lack of information systems in the courts so as to help the judicial officers ascertain the substantiality of the surety.

**Proposals**

a) It is recommended that the law on bail be amended to require judges and magistrates to explain bail conditions to accused and sureties including the consequences of breach of those conditions by sureties.

b) The law should clearly define who a substantive surety is.

c) 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.

---

120 Legal Volunteer, Justice Centres Uganda Jinja Branch.
121 A senior magistrate at Jinja High Court, State Attorney Lira District, Advocate at Justice Centres. Masaka, an Advocate in Masaka, Magistrate Grade One Masaka High Court, Advocate from Mifumi (u) Ltd, Masaka District.
2.5 The rights of a surety

A surety undertaking is needed when it has been decided that it is necessary to ensure that the accused complies with his/her bail obligations. The intention of the condition is to have the surety accept the responsibility to ensure that the accused appears in court when required.

Where a surety reasonably believes that:

a) the accused is not likely to appear in court; or

b) a bail condition is being, has been or is likely to be broken;

he or she should notify the prosecutor or a police officer in writing and that person may have the accused brought before the court. However, the surety’s obligations continue until the accused is brought before the court.122

In cases of urgency where the surety reasonably believes that the accused is not likely to appear in court or that he has broken any bail conditions, he has the power to arrest the accused. The surety must hand him over as soon as is practicable to a police officer who is required to take the accused before the court.

Once the accused has been so taken before the court the surety undertaking will not be continued in force without the surety’s consent. 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 it may mean the surety’s home is liable to forfeiture. If the surety is unable to raise the funds that are the subject of the surety, then they face the prospect of a prison sentence.123

In other 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.124

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. The guidelines would most likely be in the form of a practice direction to judicial officers.

Analysis

There are no official guidelines for registrars or court officials detailing what information they must impart to a surety. From our consultations it appears that the respondents believe that it may be helpful to establish guidelines for judicial officers.

---

124Bail Act 1980 (Qld) s 21(8).
concerning what should be explained to sureties including the surety’s rights to be relieved of the undertaking as surety.

Issues for consultation

- Whether an express provision in the law should be considered to mandate judicial officers to explain obligations of sureties relating to bail.

- Should courts consider protecting sureties by taking into consideration a greater and complete financial position of a surety in order to protect a surety’s family?

Proposals

a) There is need to have an express provision in the law requiring judicial officers to explain to sureties their obligations relating to bail.

b) When taking into account the financial position of a surety, the court should bear in mind the effect of the consequences on the all family.

c) Regulation of what properties can be used as security in bail, for instance, can you present a land title of a family house as security without the consent of your spouse?

2.6 Views of victims during bail application

The practice in other jurisdictions such as Australia, Scotland among others requires 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.125 If a court is satisfied that a victim is endangered or 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.126

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

126 A judge during consultation conducted in Gulu district.
Other than the safety of the community, courts also put into consideration the safety of the accused person as well.

**Findings**

The study also sought to establish the extent to which the courts value or consider the views of victims during bail application. Findings indicate that 80% of the respondents were of the view that views of the victims have not been taken into consideration during bail hearings and that they only hear from other people that an accused has been released which is very disappointing. However, 20% were of the view that courts consider views of the victims through the police and prosecution. Out of the 80% of the respondents who were of the view that views of victims are not considered in bail hearing, the highest number was among private practitioners and inmates.

According to a judge in Gulu:

> “The practice to seek the views of victims, their family or the community in Uganda is not a requirement of law; nevertheless, it is a very good practice which is already being done in other countries. Some proactive judges actually try to do this. In order to make sure that it becomes a practice in Uganda, the law should expressly provide for it or at the least, a Practice Directive.”

A prosecutor in the same district stated that:

> “once there is an expressed 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.”

On the contrary, there were respondents who argued that the victim’s views are not taken into consideration. It was argued that this is because the victims are not in court especially in the High Court where the procedure is by written motion while in international criminal law and sometimes in Uganda’s legal framework; the views can be made by the State Attorney through affidavits, focus is usually on the accused and the sureties especially as to their obligations rather than the victim.

A different perspective was that this depended on the presiding judicial officer. Some consider the views of the victims because some of the accused persons are dangerous to the victims so if released on bail, they will immediately cause harm to the victim.

---

127 A judge during consultation conducted in Lira district.
128 The same view was held by the Chief Magistrate Masaka.
129 Advocate at Justice Centres Masaka District, FGD with prisoners in Jinja Remand Prison, State Attorney Jinja, Mifumi (U) ltd.
130 Justice Elubu Micheal of Jinja High Court.
131 Centre Manager, Justice Centres, Lira District.
while some interfere with witnesses. This was buttressed by the Magistrate Masaka who stated that: “it depends on the area the victim comes from. Victims from rural areas do not follow up on their cases while those in urban areas follow up and are present in court for their views to be heard.” Analysis

There were mixed reactions as to whether judicial officers take into consideration the views of the victims. While some respondents believed judicial officers consider the views, others disagreed. Despite the disagreements, most of the respondents agreed that it should be a requirement for judicial officers to take into consideration the views of the victims if they are in court. It follows therefore that there is need to amend the law and introduce as a requirement, requiring judges and magistrates to consider victims’ views as a matter of procedure.

Issue for consultation

- Whether specific section in the law or a Practice Directive should be considered to make it mandatory to seek the victims’ views where there is perceived or actual fear that an accused might commit another crime or interfere with witnesses?

Proposals

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

2.7 Use of money as a condition in bail application

The Monitoring Committee of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) has also urged 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 straitened economic circumstances, so as to prevent the requirement from leading to discrimination against such persons”.

According to a report authored by Harvard Law school, 2019; 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 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. To avoid likely discrimination as envisaged by the

---

132 State Attorney, Office of the Resident State Attorney-Gulu District.
133 Committee on the Elimination of Racial Discrimination, General Recommendation XXXI, para 26.
Monitoring Committee\textsuperscript{136} other conditions of release can be more effective, more efficient, and fair.

Rather than eliminate money bail, some jurisdictions have attempted to forbid judges from imposing unaffordable bail. But so long as money bail remains a possible condition of release, some judges may continue to illegally detain people on unaffordable bonds.

In \textit{Charles Onyango Obbo \& Andrew Mwenda v Uganda} (1997)\textsuperscript{137} 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 2,000,000/-, was a failure by the lower court to judiciously exercise its discretion according to Bossa J.

\textit{While court should take into account the accused’s ability to pay, while 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.}

Respondents revealed that monetary bail while useful in some cases is detrimental in others because it seems to exclude bail to only the rich people. They also argued that judicial officers demand that are impossible to meet by the applicant thereby ruling them out. There are no guidelines to guide court discretion to determine how the amounts are reached by the judicial officers making it very uncertain and prone to abuse.

Some respondents argued that monetary bail should be excluded from magistrate’s courts although the high court should be allowed to use it given the nature of offences and it’s a useful tool for judges to ensure such high end criminals return to court.

Monetary bail mostly keeps the poor in prison. By May 2019, Uganda Prisons Service had an average population of 58,587 prisoners with nearly a half of them at 28,412 on remand.\textsuperscript{138} It is a notorious fact that the prisons in Uganda are not many and in fact are taking in double the numbers that they were meant to keep. With such a growing number, bail as a tool of justice would be helpful in ensuing that innocent people are not kept in jail while relieving the Uganda Prison Service of the problem of numbers.

\textbf{Issue for consultation}

\textit{Whether money should continue to be used as one of the conditions for bail to be granted?}

\textsuperscript{136}The Monitoring Committee of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).
\textsuperscript{137} Charles Onyango Obbo \& Andrew Mwenda v Uganda (1997) 5 KALR 25

\textsuperscript{138} Uganda Prisons Service in a meeting with the ULRC.
Proposals

It is recommended that money as one of the conditions for granting bail should be removed to avoid discrimination basing on economic capacity.

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

Recovery of money paid as security during bail applications.

Respondents noted that applicants for bail had issues related with recovery of money deposited as security when granting bail. The law is that at final disposal of the matter, any money deposited by the applicants or their sureties should be returned to them. However, findings show that this money is not easily accessed.

According to a respondent, the cost of recovering this money is so high that it becomes useless for the common person to try to get it. This money is paid to government and received from Uganda Revenue Authority in Kampala making it cumbersome for people in other districts to collect it. A judicial officer argued that this system is not conducive to the users of court and suggested that it should be left at the courts for easy administration and return to the rightful owners.

Analysis

It is evident from the respondents that there are issues arising from monetary bail. These are as regards the uncertainty surrounding it and affordability at the point of applying for bail. The other difficulty arises at the point of reclaiming it, a process termed as cumbersome and cost inefficient.

Issues

- Whether the requirement to deposit a guarantee or financial security in order to obtain release pending trial can be applied in a manner appropriate to the situation of persons in vulnerable groups, who are often in straitened economic circumstances, so as to prevent the requirement from leading to discrimination against such persons?

- Should judges adopt an individualized approach, taking into account the economic circumstances of the accused and only attach such conditions as are strictly necessary to ensure that accused returns to court for trial.

- Whether an accused person should be informed by the court why each bail condition is necessary and proportionate, as well as the consequences of the breach of any conditions.

- How should bail money be efficiently/effectively managed?

---

139 Centre Manager, Justice Centres Uganda Lira District.
140 Chief magistrate, Chief Magistrate Court Masaka.
proposals

Provide for clear regulations to guide on how money meant for bail should be returned to the suspect.

Advocacy to sensitize the public that this money may be returned and on how to get back money paid for bail

2.8 Conclusion

As Constitutional requirement, consideration in an application for the grant of bail must be guided by legislative provisions that operationalize the article of the constitution on the right to personal liberty. These provisions must be interpreted as protecting rights other than taking them away. Remanding a person is a judicial function and as such the court should summon its judicial mind to bear the matter before depriving the applicant of an application for bail of their liberty.¹⁴¹ The decision rendered by Court must be fair to both the state, public safety and the accused person; well within the constitutional guarantees.

¹⁴¹ Uganda (DPP) –vs- Col (Rtd) Dr. Kiiza Besigye (Supra).
BIBLIOGRAPHY

LEGISLATION

Bail Act 1980 (Qld) s 21(8).


Reports of the Uganda constitutional commission, 1993 at page 181.

Trial on Indictment Act, Cap 23.

CASE LAW

Ambruszkiewicz v Poland.


Caballero v UK (2000) 30 EHRR 693.

Foundation for Human Rights Initiatives Vs Attorney General Constitution Petition No20 of 2006


Kalashnikov v Russia 36 EHRR 587.

Kanyamunyu and Ors vs Uganda.

Matznetter v Austria, App 2178/64, 10 November 1969, para 1.


Muller v. France, App 21802/93, 17 March 1997, para 44.

Okello Augustine –vs- Uganda.


Tomasi v France (1992) 15 EHRR 1. See also Neumeister v EHRR 91.


Uganda (DPP) VS (RTD) Dr. Kizza Besigye constitution petition No. 20 of 2005.

Yagci and Sargin v Turkey, App 16419/90, 16426/90, 8 June 1995, para 52.

**ONLINE MATERIALS**


http://www.prisonreformtrust.org.uk/Portals/0/Documents/Remand%20Briefing%20FINAL.pdf


**ARTICLES AND REPORTS**


Consultation Paper, Published by the Victorian Law Reform Commission, 2006.

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

