ANALYSIS OF THE IMPORTANCE AND DANGERS OF THE RIGHT TO BAIL IN UGANDA'S CRIMINAL JUSTICE SYSTEM

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Approval

This is to certify that this dissertation has been done under my supervision and submitted to the school of law for examination with my approval.

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Sign:  **.....**

Date:2nd/02/2016**.....**

Dedication

I dedicate this dissertation to my dad Buyinza Daniel, my mother Buyinza Scovia and to the Almighty God for the courage strength and wisdom that you have all endured in me.

Acknowledgement

First and foremost am grateful to my parents especially my father Mr. Buyinza Daniel and my mother Mrs. Buyinza Scovia for the overwhelming courage and support both morally and financially without which this course wouldn't have been possible.

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God Bless You All!

List of cases

Attorney General Vs Joseph Tumushabe Supre Court Constitutional Petition No. 6 of 2004

Foundation for Human Rights Initiatives v Attorney General Constitutional Petition No. 6 of 2008

S. Ruparelia Vs Uganda Civil Appeal No 16 of 2001

Uganda (D.P.P) Vs Col. (Rtd) Dr. Kizza Besigye Constitutional Petition No. 20 of 2005

Onyango Obbo & Andrew Mwenda Vs Uganda Constitutional Petition No. 2 of 2004

Arvind Patel v Uganda Supreme Court Criminal Appeal No. 1 of 2003

Democratic Republic of the Congo (DRC) v. Burundi, Rwanda and Uganda

Arvind Patel v Uganda Supreme Court Criminal Appeal No. 1 of 2003

Charles Onyango Obbo and Andrew Mwenda v Uganda **HCMA 145/97**

Joseph Tushabe vs Attorney General , Constitutional Petition N0.6 /2004

Uganda v George Nduga (1978) High Court Buullrtin 221

Teddy Sseezi Cheeye Versus Uganda (Miscellaneous Criminal Appeal No.37 of 2009

List of statutes

The Constitution of Uganda 1995

Magistrates Court Act Cap 16

The Trial on Indictments Act Cap 23

The Police Act Cap 303

The Uganda Peoples Defence Forces Act of 2005

List of Acronyms

UHRC	Uganda Human Rights Commission
IG	Inspectorate of Government
CSO	Civil Society Organization
NGO	Non Governmental Organization
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights

Abstract

This research is about the importance and dangers to the implementation of the right to bail in Kampala, Uganda. The study was carried out in Makindye Division and it focused on the meaning and relevance of the admission of bail to the various accused personnel's in the country. The literature discusses the legal basis on the right to bail of an individual, the interpretation and application of bail, and the judicial provision and process on the grant of bail. The study also analyzed the legal framework concerning the right to bail such as the Constitution, The Penal Code Act, interalia among other statutes with reference to past cases. Findings from various entities were also sought majorly from the IGP's office, the different police posts in the region, the Human Rights Organizations in Uganda, among others. Conclusions and recommendations were made concerning the research findings and the recommendations to the parties involved were also put.

CHAPTER ONE: INTRODUCTION

1.0 Introduction

This chapter presents the introduction of the study; it contains the background of the study, the statement of the problem, the research purpose, objectives and research questions, the scope and significance of the study.

1.1 Background of the study

Pre-trial Detention is the stage in the criminal justice system when a person accused of committing an offence is arrested and detained as he/she awaits trial and the decision of court. It is the duty of the State to bring the accused person to justice without delay. This is in accordance with the Constitutional right to a fair, speedy and impartial trial provided for under the Constitutional framework[1]. Inspite of these constitutional provisions the rights of pre-trial detainees are often overlooked. This is due to a number of factors including lack of awareness of the rights of detainees and the laws that provide for protection of those rights.

This leads to overstay in detention contrary to Article 23 (4) resulting into overcrowding in prisons and its related problems. In a concerted effort to remedy the situation, the Justice, Law and Order Sector, Local Non-Governmental Organizations, Development Partners as well as individual Human Rights Defenders have devised various means to improve the conditions of pre-trial detainees in addition to improving access to justice. One such step was undertaken by the Foundation for Human Rights Initiative in 2006 with support of the Legal Aid Basket Fund. FHRI undertook a project entitled 'Enhancing Access to Justice for Pre-trial Detainees through Creation of Awareness and Enforcement of their Constitutional Right to Bail'.

1Article 28 of the 1995 Constitution of Uganda

The main objective of the projectwas to create awareness among the public on the problem and its effect on the judicial system in the country. This activity entails public education and publication of a Handbook on rights of pre-trial

Bail is a constitutional right of an accused person where he /she is "...released from prison, his /her giving of sufficient security for his /her appearance in court or on accepting certain specified conditions of court[2]". Well as the accused has the right to apply for bail, the grant is discretionary. The effect of bail is merely to release the accused from physical custody while he remains under the jurisdiction of the law and is bound to appear at the appointed pale and time to answer the charges against him[3]. The granting of bail is premised on the presumption of innocence until proven guilty as provided for under Article 28 (3)(a) of the constitution of Uganda.

As justice Twinomujuni stated; "*The idea is that a person presumed to be innocent and who is entitled to a speedy trial should not be kept behind bars for unnecessary long before trial*[4] " I opine that this is conclusively the essence of granting bail. Section 75 (1) of The Magistrate's Court Act Cap 16 empowers the Magistrates Courts to hear and grant bail applications of cases within their jurisdictions. It also specifies cases that a Magistrates court cannot hear as bail applications. One has to apply to the Chief Magistrates and High Court for bail respectively.

1.2 Statement of the problem

In Uganda, the accused person's right to bail stems from Article 23(6) of the Constitution of Uganda 1995 which provides that every person accused of a criminal offence has a right to apply to a competent court for bail. Thus bail is one of the fundamental rights of an accused person. The most important basis for the right to apply for bail can be found in the presumption of innocence contained in Article 28(3)(a) of the Constitution.

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2 Osborn's concise law Dictionary page 36

3 Foundation for Human Rights Initiative Vs Attorney General Constitutional petition No.20 of 2006 at p.g 28

4 Joseph Tushabe vs Attorney General , Constitutional Petition N0.6 /2004

In **Uganda vs. Dr. Kizza Besigye,** the Constitutional Court made it clear that since the accused is presumed innocent until proven guilty, he or she should be given an opportunity to prepare his case.

The other is the right to liberty which is guaranteed under Article 23 of the Constitution. It is stated here that everyone has a right to liberty and this liberty can only be denied in exceptional circumstances including where one is suspected of committing a criminal offence. The position is that the granting/denying of bail is an exercise of judicial discretion. Therefore, the power to grant bail is discretionary exercised by judicial officers whose role is to apply the law to the prevailing circumstances in a given case.

Initially it was wrongly-held that bail is an automatic right but this has since been corrected. In Uganda vs. Kizza Besigye, the Constitutional Court authoritatively declared that the grant of bail is a discretion which court exercises in accordance with the law.

Similarly in Florence Byabazaire vs. Uganda Justice Akiiki Kiiza reiterated that the accused person has no automatic right to bail but rather the accused has the right to apply for bail and Article 23(6) confers discretion on Court to decide whether to grant bail or not grant it. This research therefore investigates the importance and implications of the right to bail in Uganda.

1.3 Purpose of the study

The purpose of this study is to investigate the importance to bail and the challenge associated with bail in Uganda.

1.4 Objectives of the study

I. To investigate the legal provisions related to the provision of bail in Uganda

the judicial courts.

III. To investigate the effectiveness of the institutional bodies associated with the provision of bail in Uganda.

1.5 Research questions

I. What are the legal provisions related to the provision of bail in Uganda?

II. What is the effectiveness of the legal interpretation of bail in Uganda by the judicial courts?

III. What is the effectiveness of the institutional bodies associated with the provision of bail in Uganda?

1.6 Scope of the study

The study was carried out in Uganda, the researcher interviewed and observed the situation in the area in order to attain information about the bailment in the country through observation of various cases, bailees treatment and the court's decisions on bailment in Uganda.

The research covered a time period of three months and in this period the researcher managed to observe while writing the research and consulting on the various opinions of the concerned parties in the field. After the time period, the researcher managed to conclude and recommend to the concerned parties.

1.7 Significance of the study

The researcher hopes that the results of the research will help people convicted and those hoping for bail in Uganda, and also help on enlighten the public on the rules and regulations pertaining the right to bail in the country.

It is also hoped that the researcher findings will aid the Human rights commission to decide whether to investigate, at its own initiative or on a complaint made by any person or group of persons concerning the right to bail in the country.

1.8 Research methodology

In order to achieve the objectives of the study successfully, the researcher used secondary data from various books in the library and interviews were utilized to acquire more information relevant to the study. The interviews contained short and clear questions that sought to establish the various requirements and challenges to the provision of bail in Uganda.

1.9 Literature Review

Despite its existence and recognition at international, regional and national level, there is no single agreed definition of what constitutes the right to fair trial. Ouguergouz[5] discusses that the concept of the right to a fair trial is inevitably bound up with the concept of justice. He notes that there appears to be no definition of the right to a fair trial either in the international instruments which recognise it or in the case-law of the international bodies protecting these instruments. However, the notion of the right to a fair trial can be understood in two distinct levels; the conceptual or structural level whose ingredients include independent, impartial, open and accessible judiciary and the technical sense, which is defined by reference to a number of procedural safeguards or requirements such as the right to be informed of a charge, right to counsel, right to a speedy trial. These two concepts, though district, complement each other.

Halstead takes the view that is it possible to have a fair trial despite flaws in the procedure.6 He notes that there are circumstances where a conviction can be upheld even though some principles of the right to a fair trial have been violated. This view has created a gap since these principles are aimed at ensuring that no party is disadvantaged by having a right violated. Any violation is likely give an advantage in favour of the violator. This will more often than not, affect the fairness of trial. Kameri - Mbote and Akech pointed out that some courts have taken the view that any violation

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5Ouguergouz F, _ The African Chrater on Human and People's Rights; A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa' (2002) Martinus Nijhoff Publishers, the Hague

6Halstead P, *Unlock ing human rights* (Hodder education 2009).

of the right to fair trial, even at the pre trial stage, is fundamental and affects the validity of the entire proceedings.[7] This entitles an accused to be acquitted. Halsends' perspective seeks to promote substantive justice by considering the effect of the right or its violation on the entire trial. However, he fails to consider how violation of some rights impact an accused person's ability to effectively defend himself and may, on its own render the entire trial unfair.

Kameri - Mbote and Akech's view that any violation is fundamental and entitles an accused to an acquittal is too much focused on formal justice at the expense of substantive justice. This is because it is important to analyse the nature of a violation, its impact a trial and the overall effect before determining the appropriate remedy. They also fail to take into account the various remedies that may address a violation, such as damages, enforcement of the right (for example the right to counsel), instead of an acquittal, especially where the violation does not affect the fairness of a trial.

Chadambuka,[8] analyses co-relation between the seriousness of an offence with which an accused is charged *vis a vis* the right to a fair trial within a reasonable time. She argues that where there is an inordinate delay in trial, the court should be more willing to find a violation of the right to trial within a reasonable time in cases where an accused person is charged with a serious offence than where the charge is minor.9 Seriousness of the crime relates to the gravity of the alleged criminal wrongdoing and how heavy the possible penalties can be if one is found guilty. She bases the right to speedy trial on seriousness of offence. By focusing on the seriousness of the offence as the key determinant in enforcing this right, the writer fails to appreciate the other impacts such as loss of evidence or witnesses due to passage of time which often times, render a trial unfair and unjust irrespective of its seriousness.

7Kameri -Mbote PK and Akech M, _Kenya: Justice sector and the rule of law' Johannesburg; Open society initiative for eastern Africa <http://www.ielrc.org/content/a1104.pdf>accessed 13 January 2014.

[25] 8Zvikomborero Chadambuka, _ Serious Offences and the Right to Trial within a Reasonable Time' (2012) 9

Essex Human Rights Review 1.

9 Ibid

Juwaki,[10] discusses the causes of delays in obtaining a speedy trial for prisoners in custodial remand in Zimbabwe. She analyzes section 18 (2) of the Zimbabwean Constitution under the Bill of Rights which provides that, if any person is charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time'. She concludes that there exists a large gap between what the law is in books and what is in practice in Zimbabwe. There are serious violations of the right to a speedy trial and there seems to be some deliberate neglect over the respect, protection and enforcement of the right.[11] She makes various recommendations to speed trials in Zimbabwe so that prisoners' right to a fair trial is realized. These include increase in the number of courts that preside over criminal cases, increasing well-remunerated judicial personnel, computerization of court records, discipline of judicial officers who contribute to delays of trials, institutional resource capacitation of prisons, participation, accountably and political non-interference.[12] This work will be key in analyzing the right to fair trial. However, it has not analysed in detail the meaning of the right to a trial without unreasonable delay and how courts in Zimbabwe have interpreted and treated this matter. The work further failed to consider what remedies are available in law where a violation of this right occurs. This study seeks to address this gap.

Ried[13] explores the concept of right to have a fair trial without unreasonable delay. She observes that the reasonableness of the length of proceedings should be assessed in light of particular circumstances of a case, regard being had to three factors; the complexity of the case, the conduct of an applicant and the conduct of state authorities. The period to be taken into account in determining the duration of a case, starts from the time a formal charge is brought against an accused until the charge is finally determined or when the sentenced imposed becomes final.

10Yvonne Kudzai Juwaki, _Towards Trial of the Forgotten: An Enquiry into the Constitutional Right to a Speedy Trial for Remand Prisoners in Zimbabwe' (Masters, Netherlands 2012).
11 Ibid
12 Ibid
13Karen Reid, _A practitioners guide to the European Convention on Human Rights' (1998), Sweet and Maxwell, London.

This may be the date of the last appeal or issuing of judgment. In cases where a challenge is brought in ongoing proceedings, the period which has already elapsed since the laying of the formal charge should be considered. This period should exclude any periods which an accused absconds during proceedings. On the issue of complexity, she observes that factors which should be taken into account while analysing this concept include the subject matter of the case, the number of disputed facts, international elements in a trial, the number of witnesses or volume of evidence will be considered. This should, however, be balanced against the general principle of securing proper administration of justice by ensuring that trials are heard and determined expeditiously. With regard to the conduct of parties, she argues that only delays which are attributable to the State may justify a finding of failure to comply with the reasonable time rule. However, the work only considered three factors as the ones which should be used in determining whether the right to a fair trial without undue delay has been violated. These factors are not exhaustive. This study will analyse the other factors which are taken into account in interpreting this right in addition to what has been considered by the writer. It will also consider the appropriate remedies available in the event of violation of the right to a speedy trial and factors which influence the award of a particular remedy as opposed to another.

Bakayana[14] discusses the right to a speedy trial by the Uganda Human Rights Commission (UHRC), a human rights institution in Uganda mandated to protect and promote human rights. The right to fair hearing is one of the key rights enshrined by Uganda's Constitutions since 1962. Bakayana discusses the right to speedy trial as a safeguard to a fair trial. He analyses the key challenges that UHRC faces in promoting the right to a speedy trial. These challenges include legal dilemmas such as lack of legislative anchoring, limited staff for the tribunals, unlimited adjournments, financial constraints and duplication of various human rights institution.[15] Bakayana provides a well-explained framework on institutional implementation of the right to a fair trial by

14Isaac Bakayana, _From Protection to Violation? Analyzing the Right to a Speedy Trial at the Uganda Human Rights Commission' (2006) 2 HURIPEC Working Paper.
15 Ibid

safeguarding a speedy trial. His work will be useful in enriching the present study by making a comparison between Kenya and Uganda.

The underlying theories that will underpin the study are the theories of justice and human rights. In defining the term, right to fair trial' one cannot fail to take into consideration philosophical concepts associated with the category of justice as well, if only for the adjective fair' placed before the word trial'.16 The full realization of the right to fair trial leads to justice to the accused and victim. Theories of justice are a significant and abiding concern of moral, political, and legal theory that have exercised the minds of thinkers since Plato and Aristotle. Whenever a human right is violated it leads to injustice. The concept of justice in itself in an intuitively understandable, and varies from one society to another. More often no distinction is made between justice in the legal sense, moral sense, ethical sense and sociological sense.[17] The different understandings of the concept of justice inevitably lead to different ideas of what it should entail: social order, the fair distribution of assets and values, righteous life, fair and just judicial activity, etc.[18]

Aristotle acknowledged that the concept of justice is imprecise, and it consists of treating equals equally and unequals unequally in proportion to their inequality.19 He recognized that the equality implied in justice could be arithmetical- based on the identity of the persons concerned, or geometrical- based on maintaining the same proportion. He distinguished between corrective or commutative justice and distributive justice.20 Corrective justice in his view was the justice of the courts which was applied in the redress of crimes or civil wrongs and it required that people be treated equally.[21] Distributive justice on the other hand, is concerned with giving each according to his

[35] 16Piero Leanza & Ondrej Pridal, _ Justice and the Right to Fair Trial'

<http://www.search.ask.com/web?q=Piero%20Leanza%20%26%20Ondrej%20Pridal%2C%20%E2%80%98%20Justice%20and%20the%20Right%20to%20Fair%20Trial%E2%80%99&o=15570&l=dis&qsrc=2871>accessed 3January 2014.

17 Ibid

18 Ibid

19 Ibid

20 Ibid

21 Ibid

desert or merit and it was the concern of the legislator.22 The theory of justice as espoused by Aristotle will be used in discussing the concept of the right to a fair trial since by recognising this right, the law seeks to ensure that justice is done. The both concepts of corrective and distributive justice will be used while analysing the appropriate remedies which are available in the event of breach or violation of the right to a fair trial without unreasonable delay.

Plato on the hand argued that a state has two key attributes: it is founded upon justice; and all citizens within it are happy[23]. Plato stressed on the value of education in order to attain justice in a society.

John Rawls was the greatest contributor to political and legal theory of his time. In his book, *A Theory of Justice,* Rawls regards utilitarianism as an unsatisfactory means by which to measure justice[24] He asserted that the primacy of justice is social order and the very fact of disagreements and arguments about justice indicates humankind's commitment to the pursuit of justice. The conception of justice according to Rawl, demands; maximization of liberty, subject only to such constraints as are essential for the protection of liberty itself; equality for all, both in the basic liberties of social life and also in the distribution of other social goods; and fair equality of opportunity and the elimination of all inequalities based on both birth or wealth.[25]This concept is relevant to this study since fair trial safeguards are meant to protect the right to liberty and ensure fairness and equality in administration of justice.

Rawls argued that people in original position as rational individual decide on general principles that will define the terms under which they will live a society. The first principle being, each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all'[26]. The second principle being, social and economic inequalities are to be arranged so that they are

22 Ibid
23 Ibid
24MDA Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell 2008).
25Morrison (n 41).
26Wacks (n 43).

both: to the greatest benefit of the least advantaged, consistent with the just savings principle; and attached to offices and positions open to all under conditions of fair equality and opportunity'. People will therefore put liberty above equality as none is ready to risk and lose liberty when the veil of ignorance is removed.

The theory of justice will be relevant in this research in order to show how the right to fair trial is relevant in realizing justice to both the accused and victim. Everyone has equal rights and must enjoy adequate scheme of equal basic liberties. The judiciary must ensure that the constitution is defended against the vagaries of legislative activity. The theory will also be relevant in explaining the link between the right to fair trial and realization of justice in a just society. According to Rawls and Nozick there is a clear relationship between justice and rights. Rights are grounded in an equal concern and respect, and where a right is violated it leads to grave injustice. According to Dworkin, the protection of minorities is central to any theory of justice as majoritarianism can easily lead to the trampling of the rights of minorities. The essence of theory of justice in this research is to show that a judge cannot reach a just decision without a fair trial in the first instance.

Lon Fuller in *Morality of Law*, who is the major proponent of Procedural Natural Law theory, suggests that when a system violates the idea of procedural law, it can no longer claim to be law. According to HLA Hart the concept of fairness plays a specific role within the general scheme of morality:[27]

> The distinctive features of justice and their special connection with law begin to emerge if it is observed that most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words fair' and unfair'. Fairness is plainly not coextensive with morality in general; references to it are mainly relevant to it in two situations in social life. One is and when we are concerned not with a single individual's conduct but with the way in which classes of individuals are treated, when some broken or benefit falls to be

[49] 27Lon Fuller, *Morality of Law* (Oxford University Press 2002).

distinguished among them. Hence what is typically fair or unfair is a share'. The second situation is when some injury has been done and compensation for redress is claimed.

The concept of human rights has been described as one of the greatest inventions of civilization, which can be compared in its impacts on human social life. The natural law theory led to the natural rights theory, is the theory mostly associated with modern human rights theory. The chief exponent of the natural rights theory was John Locke, who developed his philosophy within the framework of seventeenth century during the Age of Enlightenment. John Locke in his *Second Treatise of Government* claimed that everyone had natural rights to life, liberty and property and that government was a trust established to protect these rights through the rule of law'[28]

The philosophical foundations of human rights can be traced during the Age of Enlightenment in Europe and its rationalistic doctrine of natural law which recognized individual human beings as subjects endowed with rights against the society and placed them at the centre of legal and social systems. Over the centuries the idea of human rights has passed through three generations. The first generation comprises the seventeenth and eighteenth century, mostly the negative civil and political rights. The second generation consists essentially of the social, economic and cultural rights while the third generation are primarily collective rights. The right to fair trial falls under the first generation of rights which are civil and political rights'[29]

28Jerome J Shestack, _The Philosophical Foundations of Human Rights' in Janusz Symonides (ed), *Human Rights:Concept and Standards* (Dartmouth Publishing Company Limited 2000).
29Manfred Nowak, *Introduction to the International Human Rights Regime* (The Raoul Wallenberg Institute of Human Rights Library Vol 14, Brill Academic Publishers 2003).

CHAPTER TWO

LEGAL FRAMEWORK GOVERNING BAIL IN UGANDA

2.0 Introduction

This chapter investigates on the right and rules of the enactment of bail in Uganda, it focuses on the constitutional provisions, the penal code of Uganda and the various legal statutes of Uganda.

2.1 Penal Code of Uganda

In **Foundation for Human Rights Initiative vs Attorney General**[30]Deputy Chief Justice Kikonyogo while addressing the above matter only stated that "..*the accussed's right to bail is not absolute*..." with due respect to the learned Judge, it is not in dispute on this matter, that ones rights are enjoyed in the confines of the law. Yet the law can also infringe on ones rights. The question here is that, if a magistrates' court can try a case on embezzlement, why can't the same court hear the accussed's application for bail and later on grant it? There is no clear justification for such an abuse to the accused's rights and thus Sect 75 (2) is not good law

Section 14 of the Trial on indictment Act Cap 23 mandates the High Court to release an accused person on bail as it may deem fit. However one can be re-arrested if there is need to increase the amount of bond. Sect 14 (a) and(b) state that the accused is rearrested and committed to prison if he or she fails to execute a new bond for an increased amount. The lacuna in this law is that it does not avail an opportunity to hear from the accused. For a fair hearing to proceed, the accused should have an opportunity to be heard of which the Judge should determine whether to release or remand the accused. If not addressed, the lacuna can be used as an instrument to abuse the accuseds' freedom.

30Sect 75(2) b-k.

Notably however, is that although the accused has a right to apply for bail, he/she has no right to be granted bail. It is a contentious issue as to whether the courts are mandated to grant bail applications. In **Uganda (DPP) verses Col. (RTD) Dr. Kiiza Besigye**[31], the court ruled that "*under Act 23 (6) (a) , the accused 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 a discretion for the court to grant or not grant bail" The court strongly reiterated its decision in **Foundation for Human Rights Initiative vs Attorney General**[32]" *the context of Art 23 (6) (a) confers discretion upon the court whether to grant bail or not to grant bail is not automatic".*

In justification of the court's discretion to grant bail, it was held that the court has to be satisfied that the applicant will appear for trial and would not abscond. Well as courts must respect the accused right to liberty and the presumption of his/her innocence, it is important that the rights are exercised within the confines of the law in that they are not abused.

Litigants and human rights activists have continuously argued that the afore said provisions that create circumstances that deny an accused bail are an infringement to the accused's rights and negate the spirit of article 23(6). in **Foundation for Human Rights Initiativevs. Attorney General** (SUPRA) it is argued that there is no need for one who has not been convicted to create circumstances and conditions in order to release him on bail since he/she is still innocent.

Nevertheless, jurists have firmly stated the law that bail is not automatic. In the **Foundation for Human Rights Initiativevs Attorney General** deputy chief justice Kikonyogo stated that violation of the accused's rights does not occur simply because the accused is required to assure court that he will appear to answer the charges *all that is required of the court is to impose reasonable conditions, acceptable and demonstrably justifiable in a free and democratic society..."* rights, be them fundamental rights or not, must be enjoyed within the confines of law.

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31 S 75(3) and (4).)
32supra

It is therefore important to note that where the accused is entitled to the right to bail it is important for him to prove to court that he can be trusted by the court to fulfill its conditions and terms therein. On the other hand, provisions of acts of parliament inconsistent with the grand norm in regards to granting bail have been nullified.

In **Tumushabe versus Attorney General**[33]it was strongly stated " that all other laws on bail in this court that are inconsistent with or which contravene this Article(23)(6)(a),(b)&(c) are null and void to the extent of inconsistency"

2.2 Constitution of Uganda and relevant Statutes

Bail refers to obtaining release of one or another by providing security for future appearance. This implies that the accused has not been acquitted. Article 23 (6) (a) of the 1995 Constitution34 as amended 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. Denial of bail would be denial of rights to an accused person. Fighting corruption is a good cause but the fight should not in any way violate constitutional rights. If the President is not satisfied with bail being granted to accused persons then he has an opportunity to express his discontentment under Article 137 (3) (b) of the 1995 Constitution as amended. He may petition the Constitutional Court on grounds that according to him, bail is inconsistent with or contravenes provisions of the Constitution. It should only be the Judiciary to exercise discretion whether to grant or not to grant bail to the accused person and the Executive should not in any way interfere with the right to bail since it is a court matter .Uganda being a democratic state should be governed basing on democratic principles in relation to the rule of law.

Section 76 of the magistrates court Act[35] and section 16 of the Trial on Indictments Act[36] provide that a magistrate/judge (respectively) grant bail to an accused who has

33Constitutional Ref No.20 of 2005,
34 Constitution of the Republic of Uganda 1995
35 Magistrates Court Act Cap 16

been or brought forward before trial of an offence punishable by death for a period exceeding 480 days. These are in contradiction of Article 23(6)(b) that provide that an accused who has been in custody for 60days before trial has a right to be released on bail with such conditions of Court fulfilled. It has since been nullified by the constitutional court[37].Section 25 of the Police Act that empowers police to hold an accused custody for 48 hours was held to be contrary to Act 23(4) of the constitution (ibid)

It is trite law that conditions set by courts in order to grant bail must be fulfilled in order to be granted bail. Even where the court is mandated to grant bail, it still has the discretion to set conditions of bail.

Article 23(6)(b) and 23(6)(c) mandate the High Court to grant bail to an accused who has been in custody for more than 60 or 180 days without trial respectively. In both articles of the constitution, the accused "*shall*" be released on bail on "*reasonable conditions.*" It is therefore the responsibility of courts to set terms and conditions that they deem reasonable. What is 'reasonable' is not defined but it should be what is affordable and acceptable in a democratic and free state with the rule of law. The question is that if the accused fails to comply with what is deemed reasonable by the court, do they remain on remand even when 'supposedly' granted bail? The accused will have to comply with such conditions stated by the court in order to be released on bail.

Most importantly is that while courts consider granting bail, it should not set terms as punishments to the accused. In **Uganda v George Nduga**[38]the High Court held that imposition of a condition that each accused should pay shillings 2million was failure by the Lower Court to judiciously exercise its discretion. In **Charles Onyango Obbo and Andrew Mwenda v Uganda**[39] Justice Bossa strongly emphasised that while court should take into account the accused's ability to pay, while exercising their discretion to

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36Trial on Indictments Act cap 23
37Foundation of Human Rights Initiative versus Attorney General
38(1978) HCB 221
39HCMA 145/97

grant bail on certain conditions, the court should not impose such tough conditions that bail looks like a punishment to the accused.

Section 77 (2) of the Magistrates Court Act provides that Magistrate Court may consider the following in deciding whether to grant bail. The nature of the accusation, the gravity of the offence changed and the severity of the punishment which conviction may entail, the antecedents of the applicant, has a fixed abode within the area of the Courts jurisdiction and whether the applicant is likely to interfere with any of the witnesses for prosecution or any of the evidence to be tendered in support of the change. It is clear that such restrictions are given to give court guidance and mandate to grant bail to the accused. However it creates a conflict of laws. If one is innocent till proven guilty then why should the accused prove that he/she needs to be granted bail?

In relation to Sect 77(2) above, under Section 15 (1) of the trial on indictment Act, the accused person has to prove "exceptional circumstances" that exist to justify their release on bail. Such circumstances are provided for under section (14) (3) of the Trial on Indictments Act cap 23 as grave illness , infancy or advanced age of the accused , a certificate of no objection signal by the DPP. Courts should use these as mere guidelines in considering whether they should grant bail or not. If used in their strict sense, the guidelines would limit the discretion of the judge to grant bail. If an average aged person who is well without illness and has no fixed abode in the courts jurisdiction is accused, he is entitled to apply and later on be granted bail as that person of age and is ill with a fixed abode. The law should thus be applied equally to all people in society.

An appellant has a right to apply for bail pending hearing of his /her appeal . Section 40 (2) of the criminal procedure code Act Cap 116 states that an appellant court has the discretion to grant bail as it may deem fit pending the determination of his /her appeal. However an appellant sentenced to death can not apply for bail

due the gravity of the offence and severity of the punishment .(Section 132 (4) of the Trial on Indictment Act cap 23).It is pertinent to note that conditions for bail of an accused person on trial may differ from those of an appellant . The rationale that an accused is innocent until proven guilty does not apply since the appellant has been convicted .

In **Arvind Patel v Uganda Supreme Court Criminal Appeal No. 1 of 2003** , the supreme court gave guidance on considerations of granting bail in an appellant court . These conditions were summarized in **Teddy Sseezi Cheeye v Uganda (Miscellaneous Criminal Appeal No.37 of 2009)**as; The character of the applicantii. Whether he /she is a first time offender or not iii. Whether the offence of which the applicant was convicted involved personal violence. iv. The appeal is not frivolous and has a reasonable possibility of success. v. The possibility of substantial delay in the determination of the appeal. vi. Whether the applicant has complied with built conditions granted before.

Lastly courts also have the jurisdiction to arrest the accused despite granting bail. This strengthens its mantle to control the accused on bail. For instance, in case the court deems that the amount of the bail needs to be increased, a re-arrest can be made directing that a new bond for the increased amount be paid.(section 14(2) of the Trial on Indictment Act Cap 23). In case of fraud, a mistake, insufficient sure ties or otherwise have been accepted by the court, the High court can also issue a warrant of arrest to re-arrest the accused released on bail.

All in all, bail is a fundamental right of an accused person which should be exercised judiciously. Conditions set for the granting of bail should indeed be "reasonable" that the applicant is able to meet them thus they are not viewed as punishments as if an accused person is remanded but is subsequently acquitted, he/she may have suffered gross injustice.

2.3 Conclusion

The courts in Uganda have firmly developed the right to bail positively to suit the spirit of the constitution. They have recognised that it is a fundamental right that should be granted to an accused person irrespective of their crime and that it is not a punishment. They have also scrapped out laws that are inconsistent with the constitution in regard to awarding of bail. However they have also failed to balance as to what exactly is a reasonable condition to grant bail.

CHAPTER THREE

EFFECTIVENESS OF THE LAW ON BAIL IN UGANDA

3.0 Introduction

No single legislative enactment in Uganda defines the term "bail". Fortunately however, several scholars have provided useful definitions. B.J. Odoki defined bail as "...an agreement or recognisance between the accused (and his sureties, if any), and the court that the accused will pay a certain sum of money fixed by the court should he fail to appear to attend his trial on a certain date." The Oxford Dictionary of Law defines bail as "The release by the police, magistrates' court, or Crown Court of a person held in legal custody while awaiting trial or appealing against a criminal conviction.

3.1 The legal basis of bail.

Bail is a constitutional right guaranteed under article 23(6) of the 1995 constitution and it states as follows:- 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; (b) in the case of an offence which is triable by the High Court as well as by a subordinate court, if that person has been remanded in custody in respect of the offence for sixty days before trial, that person shall be released on bail on such conditions as the court considers reasonable; (c) in the case of an offence triable only by the High Court, if that person has been remanded in custody for one hundred and eighty days before the case is committed to the High Court, that person shall be released on bail on such conditions as the court considers reasonable.

In the case of Attorney General Vs Joseph Tumushabe[40] , Mulenga J.S.C. (as he then was), stated that "...the genesis of the right to bail is the protection of the right to

40 Constitutional Appeal No. 3 of 2005

liberty." Article 23(6) is beefed up inter alia[41] by sections 14 and 15 of The Trial On Indictments Act[42]. Section 14 concerns release of accused persons on bail. Sub-section (1) thereof grants discretionary powers to the High Court to ...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 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.

Section 15 provides for refusal to grant bail. Under sub-section (1), the High Court may refuse to grant bail to an accused person upon his/her failure to prove to court's satisfaction:- (a) that exceptional circumstances exist justifying his or her release on bail; and (b) that he or she will not abscond when released on bail. Under sub-section (3), it is enacted that:- In this section, "exceptional circumstances" means any of the following (a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody; (b) a certificate of no objection signed by the Director of Public Prosecutions; or (c) the infancy or advanced age of the accused. Sub-section 4 provides that:- In considering whether or not the accused is likely to abscond, the court may take into account the following factors— (a) whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda; (b) whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail; (c) whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and (d) whether there are other charges pending against the accused.

The constitutionality of these provisions was challenged in the case of Foundation for Human Rights Initiatives v Attorney General[43], wherein it argued that they are

41 section 75 of the Magistrates Courts Act, Cap. 16, Laws of Uganda.
42 Cap. 23, Laws of Uganda.
43 (2008) AHRLR 235.

inconsistent with article 23(6) among others. In rejecting this contention, the Constitutional Court held that they only set guidelines not directions and are therefore justified. In their Lordships' view, "Rights, be they fundamental rights or not, must be enjoyed within the confines of the law[44]."

3.2 The interpretation and application of bail provisions by the courts.

The perennial question has been, whether bail is an automatic right; in other words, whether it is discretionary or mandatory. In the case of S. Ruparelia Vs Uganda[45], the High Court held that the granting of bail is not automatic: court has to exercise discretion whether to grant bail or not. This question again arose in the case of Uganda (D.P.P) Vs Col. (Rtd) Dr. Kizza Besigye[46], where the issue was whether under article 23(6) of the Constitution, courts have the discretion to grant or not to grant bail. The Constitutional Court applied the literal rule of interpretation in resolving this issue.

Commenting on paragraph (a), it held that "...the context of article 23(6)(a) confers discretion upon the court whether to grant or not to grant bail" and concluded that, "Bail is not an automatic right." The court reasoned that, "Under **article 23(6)(a)**may" creates a discretion for the court to grant or not to grant bail." Accordingly, the word "may" was understood to be permissive, optional or discretional[47]. Turning to paragraphs (b) and (c), the Constitutional Court held that, "...the court has no discretion to grant or not to grant bail after the accused has shown that he/she has been on remand in custody for 60 days before trial or 180 days before committal to the High Court[48]."

Regarding paragraph (b) the court held that, "...where the accused has been in custody for 60 days before trial for an offence triable by the High Court as well as a subordinate court, that person shall be released on bail on such conditions as the court considers

44 Ibid., at p. 245
45 [1992-1993] HCB 52
46 Constitutional Reference No. 20 of 2005
47 Ibid., at p. 8
48 Ibid

reasonable. Here the court has no discretion. It has to grant bail because of the use of the phrase *'shall be released on bail'*, appearing therein. This is the opposite of the phrase *'may be released on bail'* as appears in **23(6)(a)**...." Accordingly, the word "shall" was understood to be imperative or mandatory, thereby denoting obligation.

As regards the complementary provisions like section 15 of The Trial On Indictments Act (and by necessary implication other laws like the Magistrates Courts Act), the court observed that these are regulatory. It was stated that, "In this case, the court may refuse to grant bail where the accused fails to show to the satisfaction of the court exceptional circumstances...." Thus, in a number of cases, the applicants were denied bail for failing to fulfill the conditions given. In others, the courts concerned gave reasonable guidance as the ensuing discussion demonstrates.

In Hon. Godi H. Akbar Vs Uganda[49], the state, wishing to defeat the application for bail, contended that the applicant would interfere with its undisclosed allegedly delicate and sensitive witnesses. In rejecting the objection, Justice Zehurikize said that, "It was necessary to tell Court as to what makes the witnesses so delicate to warrant the need to handle them with diligence and sensitivity....Court cannot act on bold allegations which are devoid of any proof." In Uganda Vs Wilberforce Nadiope & 5 Ors[50], bail was refused on the ground that because of the accused's prominence and apparent influence in life there were high chances that he would use his influence to interfere with witnesses.

In exercising discretion whether or not to grant bail, two things must be noted:- (i) Courts should not rely on fanciful fears to deny bail. In Panju Vs Republic[51], the Tanzanian High Court held that, "If the Courts are simply to act on allegations, fears, or suspicions, then the sky is the limit and one can envisage no occasion when bail would be granted whenever such allegations are made." (ii) The Ruparelia Case above held

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49 High Court Miscellaneous Application No. 124 of 2008.
50 eported in Ayume, CRIMINAL PROCEDURE AND LAW IN UGANDA, at p. 57.
51 [1973] E.A 282, 283

that at this stage of the proceedings, the parties are not required to prove their allegations beyond reasonable doubt. It is enough to adduce facts showing reasonable cause for belief.

3.3 Analyzing judicial discretion.

In my view, bail is a creature of statute, whose grant or not must be guided by the statutory provisions. Hence even where bail is discretionary such as under article 23(6)(a), the grant or denial of it must be exercised judicially. It was stated in the Besigye's case above that, "Remanding a person in custody is a judicial act and as such the court should summon its judicial mind to bear on the matter before depriving the applicant of their liberty[52]." The decision must be fair and well within the legal provisions. In short, discretion is not unfettered, like this statement insinuates.

For instance, where bail is discretionary, it cannot be taken to mean that a judge can deny it based on unreasonable considerations, as bail should not be refused mechanically simply because the state wants such orders. Declining to grant bail should not be based on mere allegations. The grounds must be substantiated. I cannot put it any better than the Constitutional Court did in the Foundation for Human Rights Initiatives case[53] above that, "The courts have clear guidelines as to how to exercise the discretion to grant or not to grant bail and the basis on which to be exercised." This discretion is not entirely absolute, which explains why the law maker succinctly included the word ***"reasonable"*** in our legislation.

Therefore, the test is that of reasonableness—the question being whether a prudent man, being guided upon such rational considerations of ordinary human conduct, would have done or abstained from doing what the judge in fact did. For this reason, in the case of Onyango Obbo & Andrew Mwenda Vs Uganda[54], the High Court overturned the Chief Magistrate's decision to fix a bail bond of Ug. Shs. 2,000,000 for each accused,

52 Constitutional Reference No. 20 of 2005, at p. 12.
53 (2008) AHRLR 235, 244
54 High Court Criminal Miscellaneous Application No. 145 of 1997

considering it to be excessive and instead reduced it to Ug. Shs. 200,000 for each one of them.

The express fetters on discretion included in paragraphs (b) and (c) of article 23(6) are for policy reasons and are really 'just in case' safeguards, in consideration of our history that is characterized by violence and wanton abuse of human rights which the 1995 Constitution recalls and recognizes in the preamble. Indeed, the Constitutional Court seems to have been alive to this in the Besigye case[55] above, when it stated that, "We, however, feel constrained for the sake of completeness of the exercise, to offer some general observations on the 'reasonable conditions' the court should keep in mind when deciding to grant bail or to refuse to grant bail.

While considering bail the court would need to balance the constitutional rights of the applicant, the needs of society to be protected from lawlessness and the considerations which flow from people being remanded in prison custody which adversely affects their welfare and that of their families and not least the effect on prison remand conditions if large numbers of unconvicted people are remanded in custody...The applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment....The court must consider and give the applicant the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially."

3.4 Conclusion.

The right to bail is a creature of statute, with clearly set guidelines as to how it should be exercised and enjoyed, even where discretion is permitted. Where a judge has a lee way to grant or decline bail (such as under A. 23(6)(a)), the test of reasonableness restricts the extent to which he/she can go in this. Under A. 23(6)(b) and (c) the judge has no choice but to grant bail upon such reasonable conditions deemed fit. To my mind, this results in two levels of release (so to speak) i.e. release de jure (or release as of right) and release de facto (or physical/actual release. The former is an

55 Constitutional Reference No. 20 of 2005, at pp. 10 to 11.

entitlement; the latter is dependent upon fulfillment of the reasonable conditions imposed by court. It follows therefore, that the judges' discretion to grant or refuse bail must be within the scope of authority permissible within the confines of the law.

CHAPTER FOUR

EFFECTIVENESS OF THE INSTITUTIONAL FRAMEWORK ON BAIL IN UGANDA

4.0 Introduction

Bail refers to obtaining release of one or another by providing security for future appearance. This implies that the accused has not been acquitted. Article 23 (6) (a) of the 1995 Constitution as amended 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. Denial of bail would be denial of rights to an accused person. Fighting corruption is a good cause but the fight should not in any way violate constitutional rights. If the President is not satisfied with bail being granted to accused persons then he has an opportunity to express his discontentment under Article 137 (3) (b) of the 1995 Constitution as amended. He may petition the Constitutional Court on grounds that according to him, bail is inconsistent with or contravenes provisions of the Constitution. It should only be the Judiciary to exercise discretion whether to grant or not to grant bail to the accused person and the Executive should not in any way interfere with the right to bail since it is a court matter .Uganda being a democratic state should be governed basing on democratic principles in relation to the rule of law.

4.1 Inspectorate of Government offices

Both national and international mechanisms serve external oversight and accountability functions concerning the right to Bail. At the national level, mechanisms include the Inspectorate of Government, the UHRC, the judiciary, Parliament and civil society organizations. The Inspectorate of Government (IG), which is the Ombudsman of Uganda, engages in investigations of corruption and abuse of office and can provide some form of oversight for those in detention. The IG is guaranteed independence under the Constitution and investigates various cases of corruption and abuse of office.

However, it does not appear to have dealt with many, if any, cases involving accountability in places of detention or cases of torture or other ill treatment. Nevertheless, the Inspectorate has noted that corruption is rampant among the police.

4.2 Uganda Human Rights Commission

The Uganda Human Rights Commission (UHRC) is the main external body with a mandate to investigate complaints of human rights violations including those relating to pre-trial detention. The UHRC was established under the Constitution as an independent body with a mandate to promote and protect human rights, including investigating complaints of torture and other ill treatment. The Commission is currently composed of five members, including the Chairperson, who are appointed by the President with the approval of Parliament. Staffs are appointed by the members of the Commission in consultation with the Ministry of Public Service. Currently the Commission has about 208 staff members in nine regional offices and at the Kampala headquarters. The UHRC has a broad investigative mandate and does not require a complaint to be submitted, and may institute investigations itself.

The UHRC also has broad powers with a quasi-judicial function. If satisfied that there has been an infringement of a right, the UHRC may order the release of a detained or restricted person, the payment of compensation, or any other legal remedy or redress. A person or authority dissatisfied with an order made by the Commission has the right to appeal to the High Court. The process of the investigation of complaints can take between one to four years to complete, depending on the particular circumstances of the case. There have been cases that have been delayed for even longer than four years because there are currently only four members who are hearing cases. The Uganda Human Rights Commission is fairly accessible as the services offered are free and there are regional offices in Kampala, Masaka, Fort Portal, Mbarara, Jinja, Soroti, Moroto, Gulu and Arua. Since its inception, the UHRC has handled thousands of complaints and some victims have been awarded compensation.

4.3 The judiciary

The judiciary has the power to play an important role as an oversight and accountability mechanism for pre-trial detainees. Courts have an oversight role while hearing both criminal and civil cases. Pre-trial detainees have an opportunity to complain about long detention periods, torture and illtreatment or any other human rights violation to courts. Indeed a few detainees have used the courts as a channel of redress for these sorts of violations. An example of this is the case of *CPL Opio Markv. Attorney General*, where the plaintiff sought redress for detention in a police cell for 11 days without appearing in court. The plaintiff was awarded damages of up to UGX 6 000 000 (approx.USD 2 400). In another case, *Martin Edeku v. Attorney General,* the plaintiff was awarded damages for a violent arrest, detention beyond 48 hours and torture while in detention. The courts, however, face problems such as case backlogs, corruption and inadequate resources, among others. As a result, only a few cases make it to court and are heard to completion within a reasonable period of time.

4.4 Parliament

Parliament also has an oversight role to play with respect to places of detention. Members of Parliament have many routine opportunities for oversight during question time and annual reviews of performance, especially at budget allocation time. Parliamentarians have raised concerns relating to conditions of detention especially torture and other ill treatment, and a few Members of Parliament have also condemned the excessive use of force by security agencies.

4.5 Visiting justices

The Prison Act makes provision for what is described as 'visiting justices'. These are persons who are allowed to visit and inspect prisons on a regular basis and are appointed by the Minister. Nonetheless, the Act recognizes some people as *ex-officio* visiting justices. These include the Chairperson and members of the UHRC; a judge of the High Court, Court of Appeal and Supreme Court; the minister responsible for

internal affairs; the minister responsible for justice; all cabinet ministers; a Chief Magistrate and resident magistrates in any area in which the prison is situated; the Chief Administrative Officer of the District in which a prison is situated; the Permanent Secretary in the ministry responsible for internal affairs; and the Inspector General of Government.

The functions of the visiting justices are detailed in the Act and include: inspect every part of the prison and visit every prisoner in the prison where practicable, especially those in confinement; inspect and test the quality and quantity of food ordinarily served to prisoners; inquire into any complaints or requests made by a prisoner; ascertain as far as possible whether the rules, administrative instructions, standing orders issued to the prisoner and the prisoner's rights are brought to their attention and are observed; inspect any book, document or record relating to the management, discipline and treatment of prisoners; and perform such other functions as may be prescribed. Other persons allowed to inspect prisons include cabinet ministers and judges. This is in addition to the African Commission's Special Rapporteur on Prison Conditions.

4.6 Civil society organizations

Some civil society organisations (CSOs) visit places of detention, but at times their access may be limited, or they may be expected to give advance notice of their intention to visit. The Prisons Act provides that they require the permission of the Commissioner General of Prisons to inspect places of detention. Information regarding the frequency and methodology of the CSOs' visits to places of detention is limited. Some of the CSOs that undertake visits include the African Centre for Treatment and Rehabilitation of Torture Victims, the Uganda Prisoners' Aid Foundation, the Foundation for Human Rights Initiative, Avocat Sans Frontières and the Human Rights Network Uganda.

4.7 African Commission on Human and Peoples' Rights

Under the African Charter, the African Commission on Human and Peoples' Rights (ACHPR) has the mandate to promote and protect human rights. Uganda is party to the African Charter and is therefore subject to the African Commission. The ACHPR, which has been greatly supported by NGOs, fulils its mandate through a complaints mechanism, consideration of State Reports, Special Rapporteurs, site visits and resolutions which contribute to oversight and accountability. The ACHPR has received two communications relating to illegal arrest, arbitrary detention and torture relating to Uganda.

The case of *Nziwa Buyingo v. Uganda* involved a complaint of alleged illegal arrest, arbitrary detention, torture and extraction of money from the complainant by Ugandan soldiers in Kisoro contrary to articles 5, 6, 12 and 14 of the African Charter. The ACHPR dismissed the complaint as inadmissible as the complainant failed to demonstrate that local remedies had been exhausted. The other case was an inter-state communication, namely the *Democratic Republic of the Congo (DRC) v. Burundi, Rwanda and Uganda*. In this communication, the DRC alleged numerous violations of the African Charter and other international obligations by the respondent states. In its decision, the ACHPR found that the respondent states had violated articles of the African Charter, including article.

During the consideration of the State Reports from Uganda, the ACHPR has made specific recommendations in respect of pre-trial detention. It expressed concern that ordinary Ugandans cannot afford legal services to litigate against the government and obtain compensation for human rights abuses. It has also expressed concern about the fact that only 19% of prisoners have access to clean water and only 62% are provided with meals on a daily basis. The ACHPR has also expressed concern about, among other things, the lack of legislative measures to criminalize torture and violence against children, the trial of civilians by military courts, the lack of adequate legal aid, and the retention of the death penalty.

4.8 United Nations Human Rights Committee

The Human Rights Committee (HRC), which is the monitoring mechanism for the implementation of the International Covenant on Civil and Political Rights (ICCPR), is one of the mechanisms for oversight and accountability. During its consideration of Uganda's initial report, the HRC noted various important human rights concerns that demonstrate Uganda's lack of compliance with the ICCPR. The Committee noted the frequent lack of implementation by the government of UHRC recommendations and decisions concerning awards of compensation to victims of human rights violations and the prosecution of human rights offenders.

It further noted that state agents continue to arbitrarily deprive persons of their liberty, including in unacknowledged places of detention. It also noted the deplorable prison conditions such as overcrowding, scarcity of food, poor sanitary conditions and inadequate material, human and financial resources. The Committee was concerned about the treatment of prisoners, especially the use of corporal punishment, solitary confinement and food deprivation as disciplinary measures, and the fact that juveniles and women are often not kept separate from adults and males. The Committee also noted the practice of imprisoning persons for financial debt, which is incompatible with article 11 of the Covenant.

Visits from the International Committee of the Red Cross (ICRC) are based on the 1949 Geneva Conventions for situations of conflict, and take place on the basis of an agreement with the state in other situations. Monitoring of conditions of detention is targeted at persons arrested and detained in relation to a situation of conflict or internal strife. In certain situations, monitoring extends to other categories of persons deprived of their liberty. In the situation of an international conflict, the States Parties to the conflict are obliged to authorize visits to military internees and civilian nationals of the foreign power involved in the conflict.

In other situations, visits are subject to prior agreement by the authorities. The ICRC visits are often permanent and regular during times of conflict or strife (or its direct consequences). The ICRC often provides relief or rehabilitation activities with the agreement of the authorities and helps to restore family links. Their procedures and reports are confidential. The ICRC has been working in Uganda for the last 33 years, monitoring the treatment of detainees in both civilian and military places of detention and working with the authorities to improve conditions of detention.

CHAPTER FIVE

CONCLUSION, RECOMMENDATIONS

5.1 Conclusion

Despite a legal framework that is, on the whole, compliant with international human rights standards, implementation of the procedural safeguards for arrest and detention is weak in Uganda. Most pretrial detainees are victims of arbitrary arrests and do not enjoy the rights that accrue to them during their arrest and detention. Sometimes this is based on inadequate police training and capacity for criminal investigations, discrimination, political interference and corruption, among others. Detainees who are poor and cannot afford legal services often remain in custody for a longer time. Prolonged pre-trial detention has adverse effects on the rights of detainees to a fair and speedy trial. Detainees are often held in overcrowded facilities, which may have an impact on their health and which increases their risk of being subjected to torture and other cruel, inhuman and degrading treatment or punishment. Most detention facilities in Uganda are not suitable for housing detainees, and there are frequent challenges providing food, water and other basic necessities such as hygiene, sanitation and bedding.

Moreover, many of these facilities are dilapidated, overcrowded and have inadequate space, lighting and ventilation. Most inmates do not have access to adequate food and water especially in police cells. Inmates often lack clothing and bedding, access to health services, facilities for personal hygiene and access to opportunities for exercise. There are oversight and accountability mechanisms at the national and international level. National mechanisms include both the internal and external mechanisms, but these are weak and need to be strengthened if they are to contribute to improved accountability. The mechanisms at the regional and international level also provide such opportunities, but cannot work in isolation, and need to be understood as

complementing national measures. Therefore, for the regional and international mechanisms to work, it is important for them to work in cooperation with the State, and other national mechanisms.

5.2 Recommendations

Strengthening Internal and External National Oversight and Accountability Mechanisms

The internal and external national oversight and accountability mechanisms on pre-trial detention should be strengthened by building their capacity to enable them to efficiently perform their mandates. It is important to devote resources to promote the increased capacity of mechanisms, and to allow for an increased capacity to investigate complaints, as well as to apply to other functions such as prevention and public education. Furthermore, efforts should be made to follow-up and implement their recommendations. This would lead to an improvement in the situation of pretrial detainees.

Civil society remains a central stakeholder in the issue of pre-trial detention given the vast potential for the violation of the rights of citizens, and the range of negative consequences that may result from these violations. It is important to encourage the engagement of organised civil society in national and regional efforts to raise the profile of pre-trial detainees, and to campaign for improved law and practice. Civil society organisations are also in a strong position to petition with the national government to address the root causes of the inappropriate use of pre-trial detention, as well as the violation of rights during detention.

Review of the Law and Practice to Address the Right to Bail

It is necessary to review the laws and practice relating to pre-trial detention to enhance compliance with all international, regional and national obligations. It is also important for efforts to be made to identify and address the causes of pre-trial detention, such as

inadequate police training and capacity for criminal investigations, discrimination, corruption, political interference and the inadequate provision of legal aid services, among others.

Use of the Regional and International Mechanisms

Regional and international mechanisms should be used to address the issues of pre-trial detention for example by:

- Motivating for the African Commission on Human and Peoples' Rights (ACHPR) to pass are solution on pre-trial detention.
- Assisting victims to file complaints before the ACHPR, the Human Rights Committee and the
- East African Court of Justice.
- Encouraging the government to allow visits of the Special Rapporteur on Prisons and
- Conditions of Detention in Africa and the UN Special Rapporteur on Torture and Other Cruel,
- Inhuman or Degrading Treatment, and Uganda should be encouraged to ratify the Optional Protocol to the Convention Against Torture.

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