

**A CRITICAL ANALYSIS OF THE LAW ON BAIL PRACTICE
IN UGANDA: A CASE STUDY OF THE MAGISTRATE
AND HIGH COURT**

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**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW IN
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DECLARATION

I Ocen Ambrose by the Grace of God and will of humanity do declare that this is my original work and has never been presented to any institution for higher learning for examination purposes for the award of a Diploma.

Sign: 

Date: 18/10/2016

APPROVAL

The following dissertation by Ocean Ambrose titles "**Critical Analysis of the Law on Bail Practice in Uganda. A case Study of the Magistrate and High Court**" has been under my supervision and is now ready for submission with my approval.

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Date: 

DEDICATION

This dissertation is dedicated to my Father; Stephen Otyang and my Mother; Joyce Agwang for her selfless determination to bring us up and plan the future of her children, my dear sisters, and brothers, my lovely wife Medius Apio, my Son Hillary Okello and my daughter Annet Akongo for their compromising characters and endurance.

Also the same dedication goes to all the staff of the school of Law Department of **Kampala International University** including the Assistant Administrator Madam, Dorothy and Administrator Madam Lydia for their wonderful advice and corrections during this course, which will eventually result into my successful award of Diploma in Law. May God bless you all AMEN.

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This dissertation has been very tiring and at the same time a challenge to me. There were times when I felt like giving up the whole issue. So when the faculty kept on making up whole dissertation deadline but still I managed to finish the completion of the research paper.

In this regards therefore, my sincere thanks goes to all those who gave me comforts during such moment, my Friends especially, Mr. Oburu Peter, Wo2 Mr. Epila Signaler of 59th BN cannot be forgotten.

I am extremely most grateful over to my supervisor Mr. Dickson Kahama for his guidance and constructive criticism.

I found a lot of problems in the initial stage of writing this paper and has it not been my supervisor, it is most probable that I would not have started off or at most made a bad beginning.

I should for all the mistakes and omissions from other Jurisdictions, responsibilities rest on my shoulders.

TABLE OF CASES

- i) RTD Col. Dr. Kizza V. Uganda HCBs No. 149/2005.
- ii) RTD Col. Dr. Kizza B. V. Attorney General MISE case No. 161/2005
- iii) UG (DPP) V. Col (RTD). Dr. Kizza B. Ref No. 20/2005
- iv) Gen. David Tenifunza V. U 2016
- v) R.V Baldwin
- vi) Desoza V. Tanga Town Council (1961) ELLR (377)
- vii) Whoolington. V. DPP
- viii) R. V. University of Cambridge
- ix) Aliphusadi Matovu Vs. Uganda Criminal Miscellaneous Application No. 15 of 2005.

LIST OF STATUTES

- i) 1995 Constitution of the Republic of Uganda.
- ii) Children's Act Cap 59
- iii) Criminal Procedure Act Cap 16
- iv) MCA Act Cap 16
- v) TIA Act Cap 16
- vi) Anti Corruption Act Cap
- vii) Justice of peace Act Cap
- viii) Police Act Cap
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ABSTRACT

This dissertation entailed the rights to bail as one of the fundamental rights guaranteed under Article 23 (1)¹.

The research is further examined the rights to bail as enshrined in the 1995 constitution of the republic of Uganda and most of the cases expressed have been practically administered in the Courts of law of Uganda.

Article 23(6) (a) and (c)² prescribes that the law on bail involves 180 days pre-trial remand period for capital offences which is equivalent to 6 months while non capital offences the law provides for 60 days, which is equivalent to 2 months.

By using qualitative and desk research and throughout consultation of many materials from libraries, law journals, internet and among others, the findings showed that non procedural causes or delays have greatly affected bail processes in the criminal justice in Uganda. However, there are other factors like jail crowding which has also negatively affected the administration of the bail practice in Uganda.

The study concluded that however much there are hindrances to the bail practice in Uganda; Bail shall remain a constitutional right and shall be granted according to the relevant laws, as constitution is the supreme law in the governance of the country.

It is also recommended that international community, judges and government join hands to ensure that the bail procedures be left to the judicial sector and be provided with full guarantee and independence.

¹ 1995 Constitution of the Republic of Uganda.

² Ibid.

CHAPTER ONE

1.1 Introduction

Article 23 section (6)c)d³ describes a Bail as something that is granted after when the accused has served his /her pre-trial remand period. For capital offences, the pre-trial remand period is 180 days as amended and for non capital offences; the law provides for 60 days which is equivalent to 2 months.

Art 23⁴ further states that personal liberty is deprived when bail has been denied. So the main legal frameworks governing bail in Uganda constitution among others, personal liberty is a fundamental right, which is being secured under.⁵

Art. 23(1)⁶ which stipulates that "no person shall be deprived of his personal liberty except in any of the following circumstances. The word 'except' in the clause indicates that personal liberty is not an absolute rights meaning at times situation may arise when liberty may be curtailed, one of this may be refused to grant the bail to an accused person and if it is seen that an accused when released is most likely to interfere with the state witnesses, so the Courts may refuse to grant for him the bail, two, when the release of that person is seem to be a threat to the public.

According to **Justice B. Odooki the justice of the Supreme Court of Uganda in his book the Guide to Criminal Procedure at page 72, he defined bail as;** an agreement between the accused (and his surieties, if any) and the Court that the accused person will pay certain sum of money fixed by the Court, should he fail to appear to attend his trial on certain date. It is a constitutional right guaranteed under **Art 23**⁷.

According to S.4 (1)⁸, one may simply define bail as follows;

³ 1995 Constitution of the Republic of Uganda

⁴ Ibid.

⁵ Article 23 (1) 1995 constitution of Uganda

⁶ Ibid.

⁷ 1995 constitution of Uganda

⁸ Trial on Indictment Act

"It is a release from custody by the Court with competent jurisdiction, a person accused of criminal offences after such a person has entered recognizance consisting of a bond with or without sureties for a reasonable sum of money to the effect that he would appear before the Court for his /her trial.

S.15 (1)⁹ states that, notwithstanding S. 14, the Court may refuse to grant bail to a person accused of an offence specified in sub-section (2) if he does not prove to the satisfaction of the Court.**a) That exceptional circumstances exist justifying his /her release on bail.**

Exceptional circumstances include certificate of no objection signed by DPP, Advanced age, grave illness, sound sureties and the right to personal liberty enjoys a right to apply for and be granted bail.

Art 23 (6) (a) reinforced by clause (c)¹⁰ provides that a person arrested in respect of criminal offence is entitled to apply for bail and the Court may grant bail to that person on such condition as the Court may consider reasonable. However, it is not automatic that the bail must be granted to the accused person but it depends on the discretion of the Court as seen in the case of *UG V. Dr. Kizza Besigye and the 22 co-accused.*¹¹

The right to grant of bail is premised on the presumption of innocent until proven guilty or until that person has pleaded guilty. The presumption placed the burden of proving the guilt of the accused person on the state and this legal burden does not shift and it remains the scheduled question of the law from the beginning of the trial up to the end of the trial as it was seen in the case of *Whoolington V. DPP ALLER.*¹² However, in *Aliphusadi Matovu V. Uganda*¹³ it was held that under Art 28 (3) (a) of the Constitution, the applicant is presumed innocent until the contrary

⁹ TIA.

¹⁰ Constitution of the republic of Uganda 1995.

¹¹ 2005.

¹² 1935

¹³ 2005

is proven, that being the case he /she should get the bail until substituted trial is proved. Justice C.A Okello held in response that ***“it should be observed that bail application is not a trial in the substitution charge for which an applicant is held in custody. No evidence of the substantive charge is adduced and the Court does not make any pronouncement on the merits and demerits of the charge.”***

1.2 Statement of the Problem

Much as bail is a constitutional right, it is not a guarantee that is accessible to every individual who seeks it. The fact here is that the law on bail has been subjected to massive abuse and faces several challenges politically, socially and economically and this has made bail in Uganda to be selective to the public as it was seen in 2005 with Dr. Kizza Besigye, he was granted bail by the High Court but the Army surrounded the Court. In addition to that, the law on bail in the magistrate and High Court does not address the yardstick on how much money should be paid for bail to be granted, this must be addressed by parliament.

1.3 Objectives of the Study

1.3.1 General Objective

To investigate the relevancy of and effectiveness of the law of bail in the administration of criminal justice in Uganda.

1.3.2 Specific objectives

- i) To investigate the relevance and effectiveness of the law on bail in the administration or the criminal Justice in Uganda.
- ii) To enlighten member of the public and other stake holders about rights to bail.
- iii) To discuss challenges that suspects encounter in applying for bail in Uganda.

1.4 Justifications of the Study

This dissertation proved to be more relevant in providing the knowledge base on the bail practice to the community, student and the general population at large.

1.5 Hypothesis

Bail is institutional right but Court has the discretion to grant or refuse to grant. The accused has only the rights to apply for bail whereas getting it granted depends on the decent of the Courts.

1.6 Methodology

The Quantitative methods and desk research methods were employed. Thus involved use of statutes, library materials and law journals and takes both published and unpublished reports.

1.7 Literature Review

A lot of useful work has been done in the areas covering the law of bail and its applicability and foreign authors worldwide, there are desires that law to be put in place, there should be efficiency, competent and impartial instrument or mechanism to enforce them.

1.8 Chapterisation

Chapter One

This consisted of the background of the study, statement of the problem, objectives of the study, hypothesis, methodology and literature review.

Chapter Two

This included the general introduction to bail that is bail practice in Uganda, effects and objectives of the bail, rationale of the bail, powers to the grant of bail and considerations for the grant of bail in Uganda.

Chapter Three

This included laws governing bail in Uganda which include, 1995 Constitution of the Republic of Uganda, the Magistrates Courts Act Cap 16, Trial Indictment Act Cap 16, UPDF Act Cap No.7/2005, the Children's Act Cap 59, Police Act Cap 303.

Chapter IV

This included challenges affecting grant of bail, bail administration of criminal justice in Uganda like political factors, interference and unethical conduct of judges, poor conditions of remand, corruption and discretion of the Courts.

Chapter V

This included conclusions and recommendations of findings.

CHAPTER TWO

NATURE OF BAIL

2.1 Nature of Bail

The right to bail is a fundamental rights guaranteed under Art 23 (6)¹⁴ of the Constitution of the Republic of Uganda. Its basis can be traced in ¹⁵Art 28 of the same constitution, which states that an accused person is to be presumed innocent until he /she is proved guilty or until that person has pleaded guilty. As it was stated in the Case of *Whoolington V. DPP*.¹⁶ It further provides that an accused person is entitled to a speedy, fair trial before an independent Court or tribunal that is established by the law.

Art 6¹⁷ states that in handling disputes, Tribunal are evaded with the duties to ensure fair and public trial before an independent and an impartial tribunals. In the case of *Desoza V. Tanga Town council*¹⁸ EA LR (377). The rights to a fair hearing was recognized where the proceedings where conducted in the absent of Desoza. And his lawyer, Court held that he had not been heard.

These two principles are part of the right to a hearing which is declared by Art 44 of the Constitution as being innovable and **Art 42**¹⁹. The idea is that a person who is presumed to be innocent and who is entitled to a speedy trial should not be kept behind the bars unnecessarily long before trial.

The rational of Art 23 (6)²⁰, it is not surprising that Courts have given their interpretation of the law on bail and the case of *R.Vs University of Cambridge* where Bentley had been derived of his degree without giving him an opportunity to be heard. One of the judges observed that even Adam had been called by God to

¹⁴ Constitution of the republic of Uganda 1995

¹⁵ Art 28 (1)

¹⁶ 1935

¹⁷ Human Right Convention

¹⁸ 1961

¹⁹ Constitution of the republic of Uganda 1995

²⁰ Ibid

meet the challenge for having eaten the forbidden fruit before suffering compulsion. The act of the university was declared annuity.

2.2 Definition of bail

Bail according to B.J Odoki, Justice of the Supreme Court of Uganda. In his book a Guide to Criminal Procedure at page 72, he define Bail as an agreement o recognizance between the accused (and his sureties, if any) and the Court that the accused person will pay a certain sum of money fixed by the Court, should he fail to appear to attend his trial on certain date. It is a constitutional right guaranteed under **Art 23²¹**.

2.3 Object/Rationale of Bail

The object of the bail is to ensure that the accused person appears to answer the charge against him and without being detained in prison on remand pending his trial. The effect of bail is therefore to temporarily release the accused person from custody of the Court / police. Bail may be granted with or without sureties. A surety is the pledge by another person guaranteeing that if the accused person does not appear before the Court at the specified time and date, he will pay certain sum of money to the Court.

2.4 Who May Grant Bail

S.14²² Bail is normally granted by the Court. The High Court has powers to grant bail in any case and normally deals with application where the accused is charged with an offense punishable with death²³. Further a Magistrate Court has powers to release an accused person on bail in any case except where the accused is charged with the following offences; an offence triable only by the High Court like murder under Section (198)²⁴PCA, treason (23) of the PCA, Rape (123) of the PCA, Aggravated defilement, Aggravated robbery, PCA and kidnapping with intension to murder. An offense under the PCA relating to acts of terrorism or cattle rustling and an offense under the fire arms Act punishable by sentence of imprisonment of not

²¹ 1995 constitution of the republic of Uganda

²² TID

²³ Sec 14 of TID

²⁴ PCA Cap16

less than ten years. A police officer in charge of a police station has powers to release a person who has been taken into custody without warrant (S.30).²⁵ A justice of the peace has the same powers as a magistrate to release a person on bail under S.4²⁶.

2.5 When Bail may be granted

Stage at which it is granted, Bail may be granted by the High Court at any stage of the proceedings by the Courts having justifications **S.14²⁷ or S. 74²⁸**, bail pending revision by the High Court. A chief Magistrate may release a person on bail under the following circumstances', where the offenses has been committed for sentence by a magistrate G.I, G.II to his Court and he/she considers that the conviction is improper or illegal and forwards the records to the High Court for revision (S. 16 (1)²⁹. Where he forwards a record to the High Court in the Exercise of his supervisory powers contained in **S. 233³⁰**.

2.6 No Bail Pending Sentence on Committal for sense

A magistrate Court has no powers to grant bail in the following circumstances; Where Court considers that it has inadequate sentencing powers and commits the offender to the High Court for sentences S. 160 (10)³¹ and where a person accused of an offence triable by its High Court is remanded to appear before a Magistrate with no justification to conduct primary proceeding **S. 162³²**.

²⁵ S 30 of Police Act 303.

²⁶ Justice of the Peace Act Cap 50.

²⁷ TIA.

²⁸ MCA.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

2.7 No Bail after Committal for Trial

A Magistrate Court has no powers to release the accused on bail after committing him/her to the High Courts for trial. **S. 177³³, Only High Court may grant bail after committal.**

2.8 Bail in Capital Offences

High Court has powers under S.14³⁴ to grant bail to an accused person charged with any offence including capital and non capital offences. However, an offence relating to the act of terrorism cannot be granted bail unless he/she shows that exceptional circumstances exists justifying his release on bail.

Exceptional circumstances include

1. Grave illness certified by the chief medical board.
2. Remand in custody for the period of fifteen months or more unless the accused has been committed to the High Court.
3. Infancy or advanced age of the accused.
4. Certificate of no objection signed by DPP
5. Whether there are other charges pending against the accused.
6. Whether the accused has sound sureties to undertake that the accused will comply with the conditions on his bail.

2.9 Application for Bail

In Magistrate Court, Application for bail may be made orally or in writing and if in writing must be supported by affidavit.

2.10 Considerations for Bail

When the application for bail is made before the magistrate Court. The Court is required to consider the following factors;

1. The nature of the acquisition
2. The gravity of the offence charges

³³ TID

³⁴ Ibid

3. The antecedent of the applicant
4. Whether the applicant has a fixed place of abode with in the jurisdiction
5. Whether the applicant is most likely to interfere with the state witnesses
6. Whether the release of that person is a threat to the public, Court cannot grant bail to him /her

2.11 Mandatory Bail

When an accused person is remanded in detention before his /her trial starts for a continuous period exceeding 180 days for major offences and 60 days for minor offences **Art 23)**³⁵ **The Constitution and the MCA Authorizes the Magistrate before whom that the accused person first appears to release him/her on mandatory bail.** However, the magistrate may refuse to grant bail to an accused person even if he /she has completed the mandatory days on remand, if the accused person is then committed to H/C for trial.

³⁵ constitutional Amendment Act No. 11 of 2015

CHAPTER THREE

MAJOR LAWS RELATING TO BAIL IN UGANDA

3.1 Constitution of the Republic of Uganda

The 1995 Constitution of the Republic of Uganda is the Supreme Law in Uganda. All others laws must conform to the constitution in the event that if any law is inconsistent to the Constitution that law is null and void to the extent of inconsistency with the Constitution that is Art (2). This means that where there is a conflict between the Constitution and any other laws, the provisions of the Constitution must be followed.

Art 23 (6) (a)³⁶ provides for the rights of an accused person to apply to Court for bail to be released on bail subject to the legal requirements and conditions to be fulfilled before Court can grant bail.

Sec (6) (b)³⁷ gives the accused person right to be released on bail, if the person has been on remand for sixty days (60) before trial, in respect of an offence that is triable by the High Court or subordinate Court.

Art 23 (c)³⁸ gives the accused person the right to be released on bail if he /she has spent one hundred and eighty days (180) on remand in respect of an offence which is only triable by High Court But the accused person must fulfill legal requirements and conditions set by Court.

³⁶ The 1995 Constitution

³⁷ Ibid.

³⁸ Ibid.

3.2 Magistrate Courts Act (MCA) Cap 16

Cap 16³⁹ is the law governing the procedure applicable in magistrates Courts. Magistrate Courts are also referred to as lower/subordinate Courts and they consist of the chief Magistrate Court, magistrate G.I, magistrate G.II Courts These Courts have authority to try criminal matters. The MCA gives powers to Magistrates to grant bail to the accused person who have committed offences which can be bailable by them. However, there are other offences which can be tried by magistrate for which they cannot grant bail and also cases which are neither triable nor bailable by them. In these cases, magistrate's duty is to inform the accused person of his /her right to bail and also advises him to apply for bail in the High Court.

3.3. The TIA

The trial on indictment Act Cap 23 (TIA) is the law governing the trial procedure of criminal cases in the High Court. The High Court has unlimited powers to hear criminal matters and appeals from the lower Courts. The TIA gives High Court unlimited powers to grant or any accused persons bail and provides for the procedure adopted by Court in doing so. Bail may be granted by the High Court at any stage of the proceedings. Circumstances when the detainee may be released on bail by the High Court (Section 15 of the TIA).

3.4 Police Act

Cap 303⁴⁰ is the law which governs the structure, organization, discipline and functions of police. This Act gives police officers the duty of keeping laws and order by arresting offenders and bringing them to justice, preventing people from committing offences and making sure that people obey orders issued by the authorities.

³⁹ Magistrate Court Act

⁴⁰ The police Act

3.5 Following Provisions are Very Important

A person arrested by the police is supposed to be produced before the magistrate's Court within Forty eight (48) hours of his /her arrest. The provisions of Act 26 which allows for seven days transfer period for someone arrested by police from the different area then where he committed the offence were held to be un constitutional by the constitutional Court.

If a person is detained in police custody, he /she can state his complaint to the chief magistrate who shall order for his or her examination and medical treatment at the expense of the state and the person responsible for the torture will be charged.

3.6 Uganda People's Defence Force (UPDF) Act

The Uganda Peoples defence Force Act No. 7 of 2005 is the main law governing and establishment and regulation of the army. The Act under **S.219**⁴¹ provides that a military Court may grant bail to a person charged before it on the same considerations that govern bail in civil or ordinary Courts.

Note; Courts have interpreted most of the above provisions and pronounced them null and void for being inconsistent with the constitution and thereby offered parliament to amend the subordinate laws, so as to bring them unconformity with the constitution. This is the major focus of chapter three of this Handbook *Foundation for Human Rights Initiative V. AG Petition*⁴².

3.7 Reasons for arresting and detaining a person

A person would be arrested for any of the following reasons; Section 21 of the Police Act, Cap 303

1. If he/she is accused of having committed an offence or a crime,
2. If he/she has committed a crime,
3. If he/she has to be presented in court to answer charges against him or her.
4. If the police is carrying out investigations against him/her in relation to an offence he/she allegedly committed.

⁴¹ UPDF Act,2005

⁴² No. 20/2006

5. If he/she attempts to commit a crime.
6. If he/she is planning to commit an offence.

3.7.1 Power to Arrest

The power to arrest a person is contained in the following laws;

The Criminal Procedure Code Act thus Criminal Procedure Code Act, Cap 116, which is the major body of law regulating treatment of accused persons? It gives powers of arrest to;

- i) Police officers,
 - ii) Any Magistrate to arrest or direct the arrest of a person who commits a crime in his/her presence within the local limits of his/ her area of control.
 - iii) Any private person to arrest a person who commits an offence, or arrest a person he/she reasonably suspects of having committed a felony or major offence.
- The Police Act Cap.303 No. 21 of 2000 gives and regulates powers of arrest to Police officers. The Local Government Act Cap. 243 No.69 of 2000 gives powers of arrest to chiefs. Uganda People's Defense Forces Act thus UPDF Act, No 7 of 2005 in Section 185 gives powers to the public or member of the army to arrest any member of the armed forces committing an offence or who is wanted to answer to charges, or who is accused of being about to commit a crime.

3.8 Conclusion

The right to bail is fundamental rights guaranteed under **Art 23(6)** of the constitution. Its basis roots from **Art 28(3) (a)** which states that an accused person is to be presumed innocent until he/she pleads guilty. It further provides that the accused is entitled to a fair, speedy trial before an independent and impartial Court which is established by the law.

CHAPTER FOUR
CHALLENGES AFFECTING THE GRANT OF BAIL ADMINISTRATION OF
CRIMINAL JUSTICE IN UGANDA

4.0 Introduction

The law that governs bail in Uganda is contained in article 23-(6) (a) (b) and (e) of the constitution of the public of Uganda as amended by Act 11/2005). All other laws on bail in this country that are inconsistent with or contravene this article are null and void to the extent of their inconsistency. This was pointed out in the case of **Joseph Tumushabe vs AG**⁴³. The same constitution court recognizes the right to bail as a fundamental right guaranteed by the constitution of the Republic Uganda. The constitutional Court in the same case went on to find its basis in **Article 28** of the same constitution, which contains the concept of presumption of innocence and the right of the accused to a fair and speedy trial before an independent and impartial Court or tribunal established by law. These two principles are part of the right to a fair hearing which is declared inviolably in **Article 44** of the constitution of Republic of Uganda . The idea is that a person who is presumed innocent and who is entitled to a speedy trial should not be kept behind the bars for unnecessarily long before trial. It is also the rationale of **Article44**⁴⁴ of the constitution of republic of Uganda which spells out the right to liberty.

Under **Article 23**⁴⁵ **(6) (a) (c)** provisions are made for the release of persons arrested in respect of criminal offences to;

- a) To apply to the Court to be released on bail on such conditions as the court considers reasonable.
- b) If the offence is triable by the High Court and a subordinate Court, such person has the right to be released on bail on such conditions as the Court considers reasonable if he/she has been on remand in custody in respect of the offences before trial for 60 days.

⁴³ Joseph Tumushabe vs AG constitutional petition No. 6 2004

⁴⁴ Art.28 of the Constitution of the Republic of Uganda 1995

⁴⁵ Art. 44 of the Constitution of Uganda

The position prior to the 1995 Constitution was a bit different and all that mattered was that the person must have been brought to Court within a reasonable time. It therefore appears that the High Court has the jurisdictions to grant bail at any time so long as it considered that a reasonable time had elapsed.

4.1. CHALLENGES

4.1.1 Access to Courts of Law

Even when granting bail, many Courts require that a formal recommendation of a fit and proper person who may act as surety should be prepared and signed by a lawyer although this is not required by law.

According to 1995 Constitution guarantees the right of every person who is charged with a criminal offence to defend him or herself in person or to be defended by a legal practitioner of own choice. But few criminal defendants have access to legal representation. A bail of 34.5 per Court of the accused persons surveyed in the study were not aware of this constitutional right. Another 65.3 percent did not obtain the services of a lawyer before their first appearance in Court and of those whose cases had gone to trial 67.9 percent were not represented by a lawyer at the trial in the case of;

In the case of Joseph Tumushabe Vs. AG⁴⁶ the petitioner sought to challenge inter alia the procedure of the general Court martial in trying suspects and its refusal to respect the right to prisoners in trial before the Court especially the right to bail.

Hence the Constitutional Court had that the accused people were entailed to **Article 23(b)** of the constitution to be released on bail after 120 days from the date they were reminded in custody by the General Court martial. Therefore the act of the respondent in keeping them in detention beyond that period is unconstitutional. Therefore lack of legal representations is probably the reason that is rare for an action to be brought for the vindication of the constitutional rights of suspects, despite the many infringements that occurs. And this has affected the grant of bail administration of criminal justice in Uganda.

⁴⁶ Joseph Tumushabe Vs. AG Constitution No. 6 /2004

4.1.2 Failure to meet Bail conditions

Conditions and considerations for granting bail are set out in both the trial on indictment ACT 23 for bail applications made in High Court and the magistrate Courts Act Cap 16 for applications made to the magistrate's Court. Under this usually a Court may require though not in all cases, some form of cash payment depending on the nature of the crime allegedly committed that some criminals and their relatives are very poor to afford such charges for instance in the case of;

Shabahuria Matia Vs. Uganda Criminal Revision cause No. MSK CL005 of 1999.⁴⁷

The accused was arraigned before the magistrates' Court at Masaka on 5th remanded into custody until 19th September 1995. He was regularly returned into Court every after five weeks and the prosecution in all these occasions stated that from 24th June 1996 to 14th October 1996 he was not produced in Court despite production warrants issued for his production. On 14th October 1996, the accused was finally produced before a magistrate grade III and applied for release on bail and was released on terms of 50,000/= cash or produce a substantial surety. In default he was remanded into custody. He failed to meet the terms of his release on bail and stayed in custody.

In case of **Sande Pande Ndimuko Vs. Uganda.**⁴⁸ The applicant aged 43 years convicted prisoner at Luzira Murchison Bay Prison, Applies to be released on bail pending determination of his appeal to this court, criminal appeal No. 799 of 2014 0032 of 2014 of obtaining money by false pretence, procuring another to do an act which would constitute an offence and bary a director of a corporation, was pruny to the act of falsification of company documents. The offences were respectively contrary to **Section 305, Section 19(2) and Sec 323(6) (i) of penal Code Act.**⁴⁹ He was sentenced to two and half years on all accounts to be served concurrently and was ordered to refund Shs. 970, 624, 348 of Uganda Revenue

⁴⁷ Shabahuria Matia vs. Uganda Criminal Revision Cause no. Msk cl005 of 1999

⁴⁸ Sande Pande Ndimuko vs. Uganda

⁴⁹ Section 305, Section 19(2) and Sec 323(6) (i) of penal Code Act

Authority. He had all along complied with the bail conditions during his trial by the High Court.

However in case of an application for bail pending appeal, for the reasons already given, the Court requires that in addition to fulfilling the general conditions required for an application for bail at the pre-trial stage, the applicant must also establish exceptional circumstances otherwise the bail application pending appeal cannot succeed, Hence for an applicant for bail pending appeal to succeed, the applicant must prove to the satisfaction of the Court that he/she has very unusual and outstanding conditions for him/ her to be released on bail.

Inadequate prosecutions; The right to bail is a fundamental right guaranteed by the constitution of Republic of Uganda. Its basis was found in **Article 28**⁵⁰ of the same constitution which contains the concept of presumption of innocence and right of the accused to a fair & speedy trial before an independent and impartial Court or tribunal, established by law. Those two principles are part of the right to a fair hearing, which is declared inviolably under **Article 44** of the constitution. That idea is that a person who is presumed innocent and who is entitled to a speedy trial should not be kept behind the bars for unnecessary long before trial. It is also the rationale of **Article 23** of the constitution which spells out the right to liberty.

In the case of Wabali & others Vs Commissioner of Police 1985, on 23rd October 1980⁵¹ the applicant were suspected of murder, the police arrested them and put them in custody until 11th December 1980, that day the applicant were formally charged before a senior magistrate Court. The magistrate ordered that the accused be detained in prison custody. In an action challenging the jurisdiction of the magistrates to entertain a charge of murder and the legality of the detention it was held that the Court was not competent to hear the charge and the detention was unlawful.

⁵⁰ Article 28 of the constitution of the Republic of Uganda

⁵¹ Wabali & others Vs Commissioner of Police 1985

According to the suspects who were sampled in detention, other reasons for their non-release from custody included the magistrate being on leave at the time of their arrangement and failure to requesting bail. It is not correct to refuse to release an accused person or suspects on bail simply because the magistrate is on leave or there is no legal representation. After all, bail in some instances is a constitutional right. Also legal representation is essential. Hence an accused person must be provided with legal representation by the state if he or she cannot afford it. Therefore the release on bail of an accused person should not be treated trivially.

Absence of Sureties; The usual conditions for bail are that the accused person must produce a surety or sureties who will execute a bond for the sum of money that the Court or police think fit. The surety must be acceptable to the Court or police.

In considering the acceptability of sureties, the police and Courts attach almost equal importance to the gender, age and social standing of the proposed surety as well as the relationship with the accused and financial standing.

Preference is almost exclusively for male sureties although there is nothing in the law that states a woman cannot act as a surety. However in many cases, a formal surety is turned down before any inquiry is made as to whether she has property.

In the case of **Mutembele Hudson Vs Uganda**.⁵² The applicant who is on remand and was dully committed for trial has applied for bail the application is by notice of motion brought under **Sec. 14(1) and 15(4) Trial Indictment Act**.⁵³ It is supported by an affidavit in which the applicant states the grounds of application to be;

- i) He has a constitutional right to bail
- ii) The offence is bailable
- iii) That he has substantial sureties

⁵² Mutembele Hudson Vs Uganda

⁵³ Sec. 14(1) and 15(4) Trial Indictment Act

The applicant is a school student and would like to continue with his education. He presented four sureties to Court, the state objected to the applicant. The provisions above in Sec 15 provide that Court may refuse to grant bail if condition (a) are not satisfied.

Regarding **Sec 5(1) (b)**, the accused presented substantial sureties showing that he has a place of abode. However **Sec 15 of TIA (1) (b)**⁵⁴ requires accused to prove exceptional circumstances and according to **Sec 15 of TIA(3) (a)**⁵⁵ explains exceptional circumstances to mean.

a) Grave illness certified by a medical officer of the prison, certification of no objection from DPP. And none of the above has been pleaded by applicant and failed to satisfactorily prove this to court that exceptional circumstances do exist and warrant his release on bail. And the application for bail is for the above reasons not granted. The application is accordingly rejected.

4.1.3 Corruption

Court further pointed out that accused people were entitled **Article 23(6) (b)** of the constitution to be released on bail after 120 days from the date they were remanded in custody by the General Court martial. Therefore, the act of the respondent in keeping them in detention beyond that period is unconstitutional. Even if a person is kept on remand by reason that a military Court to try him/her has been convened. Such a person is never the less entitled to be released on bail after the expiry of 120 days as commanded by **article 23(6)(b)** of the constitution.

In the case of Charles Onyango Obbo & Anor Vs A.G.⁵⁶ the applicants who had been charged with the offence of publication of false news in the chief magistrate's Court at Buganda Road, Kampala, sought to challenge inter alia the excessive amounts of bail fee fixed by the chief magistrate in a criminal trial against them. The bail fee as fixed by the chief magistrate was at Shs. 2,000,000/= each and bound in

⁵⁴ Sec 15 of TIA (1) (b)

⁵⁵ Sec 15 of TIA(3) (a)

⁵⁶ Charles Onyango Obbo & Anor Vs A.G. Criminal Msc Appn No. 1997 (H/C) (unreported)

sureties in a non cash each bond of Ushs 5,000,000/= each which respective amounts were grossly excessive under all circumstances.

The High Court held that is a fundamental principle of our criminal justice system that an accused person is presumed innocent until proven guilty. This principle in **Article 28(3) (a)** of the constitution and the basis on which the accused person enters into an agreement with the Court on his recognizance that he will appear and attend his Trial whenever summoned to do so.

4.1.4 Independence of judiciary

Article 128(i)⁵⁷ of Uganda Constitution provides that "in the exercise of judicial power, the Courts shall be independent and shall not be subject to the control or direction of any person or authority. The same article goes on to state that the person or authority all interfere with the Court or judicial officers in the exercise of their judicial functions.

In 2005 the commission' s fear were released when one Dr. Kizza Besigye an aspirant presidential candidate was arrested and charged with treason and rape before the High Court and in the same period taken to a general court martial and charged them with terrorism and illegal possession of guns.

In the High Court, Dr, Besigye applied for and was granted bail. On release, he was re arrested and taken to the General Court martial where he was facing the latter charges and had refused to recognize that Courts jurisdiction to try him. The general Court martial denied him bail and was returned to jail. Besigye's lawyers challenged the power and jurisdiction of the military general Court martial over Besigye. The lawyers pointed out the contreveritil double jeopardy of his trial in both the High Court and military tribunal if he were to be tried more or less at the same time.

The issue of whether the High Court and the general Court martial had usual or concurrent jurisdiction was referred to the constitutional court. The constitutional Court held that the general Court martial is subordinate to High Court. It further held

⁵⁷ Article 128(i) of the Constitution of Uganda 1995

that the general Court martial had no jurisdiction to hear the charges of terrorism against Besigye and 22 other suspects that the purported trial in the general Court martial was illegal.

Tinyefunza co-coordinator of security services accused Ugandan judges of always siding with offenders appearing on television with an angered and frightening face typical of a feared terrorist, General Tinyefunza charged "who are these fellow judges? The judges have no power to order the army. The army will not accept this business of being ordered by the judges.

Earlier when Dr. Besigye and his co-accused appeared before the High Court for trial, the high Court was besieged by armed personnel who are members of Uganda people's defence forces. They dressed in black and are known as the black mambas. They caused fear amongst judicial officer's staff, civilians and lawyers. Both the chief justice and principal judge reacted angrily against siege. The learned judge declared the day the black mambas besieged the High Court building will always be recalled in the county's history as a day of infamy. The learned principal judge regarded the siege as the rape and defilement of the temple of justice

At their appearing in Court before three trial judges, consecutively the judges each released the suspects' on bail as permitted by the constitution and laws of Uganda but each time they were re arrested and detained on the orders of the general Court martial. In the confrontation between the judiciary and the army, the prisoners commissioner ignored the orders of Courts and obeyed those of the military forces notwithstanding that the constitution clearly provides that Court martial are subordinate to the High Court and the Uganda peoples defence forces should be no partisan, national in charter, patriotic professional, disciplined, products and subordinate of the civilian authority as established under the constitution.

In conclusion the applicant must be given his freedom to be on bail as granted by the principal judge. The total sum of the deterioration of the applicant at Luzira is illegal and unlawful. He should be released forthwith unless held one other lawful

order. It is therefore with confidence that it must be declared publicly and providing that judicial responses to violation of human rights in Uganda both actual and potential and decisively positive over in cases where judges face danger.

4.1.5 Misapplication of Law

In developing countries, the overwhelming majority of citizens who seek justice in Courts of law are poor.

The common law idea that a judge who presides over a trial is an impartial arbitrator is meaningless to many of such litigant especially where they are legally unrepresented. Consequently it should be permissible for a presiding judge or judicial officer to temper justice with compassion. In a case where the state is adequately represented by a lawyer and the other part is a poor tyrant who is represented. It should be possible for a merciful judge to intervene at appropriate stages of the hearing to protect the constitutional and legal right of all parties in the trial.

Accused persons who are not legally represented are often caught out in legal and procedural arguments which they do not always appreciated it should be possible for a judge or presiding officer to explain in simple terms to the person who is not represented in Court that the person is entitled to and can apply for bail instead of letting the person who is legally represented to be the ones to take advantage of these rule. In common law countries of Africa, persons accused of grave offences such as treason, murder, aggravated robbery and rape are in the happy position of being legally represented while persons accused of less /serious offences have to endure criminal allegations made against them without representation.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS

5.0 Introduction

This chapter provides the summary, recommendations and the conclusion to the various stakeholders, including the policy makers and the law reformers which can be useful for the sustainability and effective implementation of the right to Bail in both Magistrate Court and High Court in Uganda.

5.1 Recommendation

There is a need for legislative reforms several civil society have submitted memorandum on the law relating to remand and detention of suspect in custody for longer period of time. Suspects are kept in custody without even being committed to the High Court over capital offences or even after committed to the high court suspects remain on remand without trial for years. It is a violation of the accused constitution rights for him to be committed to High Court over a capital offence and he is kept on remand for years without trial over unclear reasons or circumstances.

Similarly, those suspects who may have been on remand for the required statutory period under **Article 23 (6) (b) and (c)**⁵⁸ should be released on bail with or without sureties so as to give effect of the constitutional rights of the accused so long as the accused has a fixed abode in the jurisdiction of the court. The restriction for proof of exceptional circumstances before the grant of bail in capital offences should be erased from the law books because it is a claw back on the constitutional recognition of the right to bail to which should have no restrictions whatsoever.

Recruitment

There is need to recruit more judges in the judiciary. There have been complains from the judiciary that they have few judges to handle the back load of cases that are before the court of judicature that some judges have retired, other have died and others have resigned without changes with capital being committed to the high court and it takes years without those offenders being produced in the court to hear

⁵⁸ Article 23 (6) (b) and (c) of the constitution of Republic of Uganda

their cases. The way forward for this problem is for government to recruit more judges in the judiciary. When the number of judges increase. It will enable the judiciary to handle the backload of cases in a short period of the time giving effect to provision of **Art 23(b) and (c)**⁵⁹ of the constitution of the republic of Uganda where the accused person will access justice faster than when there are few judges to adjudicate in the capital and non capital offences.

Expeditiousness

There is also need for quick police investigations in both capital and non capital offences. Most offenders stay on remand for long period of time because police investigations have not been completed in their cases. This makes offenders who are committed to high court remain on remand for such long period of time. Thus police should recruit lightly skilled personnels in the investigation department who will assist in the completion first and court proceeding can be done first hence avoiding the keeping of the offenders on remand for a long time than it is constitutionally provided. **Art 126 2 (b)**⁶⁰.

Remuneration

Corrupt tendencies emanates from poor remuneration and as such if salaries and wages are made better, access to justice through bail will be enhanced. As it is constitutionally provided under **Art. 23 (6) and the case of Ug. Vs Denis Obua**⁶¹ where the status of bail as constitutional right has been affirmed by the court.

Institutional independence

There is a need for courageous judiciary/judicial activism depending on institutional independence. Issues that relate to granting of bail where the government is unwilling to allow the accused to be released on bail require having a bold and courageous judiciary to take challenges of granting bail to give life and vitality to the constitution. We need judicial creativity to bring new thinking to the old

⁵⁹ Article 23 (b) and (c) of the constitution of Republic of Uganda

⁶⁰ Article 126 (2) (b) of the constitution of Republic of Uganda

⁶¹Article 23 (6) Ug. Vs Denis Obua criminal application No. 18/2008 (H/C) (unreported)

problems and seek new solutions. We also need solution to give full meaning of the constitution.

The courage was demonstrated in the case of **Dr. Kizza B. Vs. Ug**⁶². His Lordship James Ogoola. While granting bail to Dr. Kizza Besigye interim bail which government had refused, held that, in our constitution matrix here in Uganda, liberty looms large. The liberty of one is the liberty of all. The liberty of any one must never be curtailed lightly, wantonly or even worse, arbitrarily. **Art 23(b)**⁶³ of the constitution grants a person who is deprived of his or her liberty. The right to apply to a competent court of law for the grant of bail..... Ours is a duty and privilege to jealously and courageously guard and defend the right of all in spite of all.

Sensitization

The public for which the right to bail exist are ignorant of same hence the need for public sensitization and dissemination of knowledge of this rights. If this is done, accessing justice through the grant of bail in both Magistrate Court and High Court can be enhanced in the long run.

Suo Motu jurisdiction

In the protection of fundamental human rights provides under **Art 23 (6) (a)**⁶⁴ is inclusive, the court should at their own initiative peruse through the files of the accused person who have been in custody on remand for large period of time that the period stipulated under **Art 23 (b) and (c)**⁶⁵ and release such accused person on ball. The courts have not as provided under the constitution. That all citizens of Uganda shall have the right and duty to defend the constitution at all times.

⁶² Dr. Kizza B. Vs. Ug criminal miscellaneous application 228/229/2005 (h/c) (unreported)

⁶³ Art 23(b) of the constitution of republic of Uganda

⁶⁴ Art 23 (6) (a) of the constitution of Republic Uganda

⁶⁵ Art 23(b) and (c) of the constitution of Republic of Uganda

Rights based approach

Bail should be given right based approach. Where legislative reform may take years. And courage often needs to be fostered and mustered. This is focused on the rights based approach in the conduct of cases touching grant of bail to accused person.

Priority should be given to upholding and protection of rights over all others in Dr. Kizza Besigye Vs. Ug where the applicant sought bail pursuant to the courts discretionary authority embedded in **Art 23(6) (a) and 28(3) (a)**⁶⁶ of the **constitution of the republic of Uganda**. The court held that the quest for bail is quest for liberty and that the right to liberty of the individual is next to the individual right to life itself. That liberty is crucial in a free and democratic society as breath. The court further held that liberty is precious, a commodity that the American struggle for independence some 300 years ago one of the American independence protagonists known as Thomas Paine summed up the situation with ineloquent and immortal declaration that declaration not of suicide and despair but of defence and trump. Give me liberty or give me death. That judicial comment so that the right of liberty is a right to life hence meaning that bail which is a right under freedom of personal liberty should be given a human right approach in order to achieve the constitutional objectives, fair hearing to the accused person in a capital offence.

5.2 Conclusion

From the foregoing discussion, a number of conclusions can be drawn.

Firstly there is a legal framework providing for bail both in capital and non capital offences though, it should be noted that the law of bail applies irrespective of the nature of the offence with which a person charged with. Further, there are specific conditions that should be met before an accused person charged with capital and non capital offences can be granted bail. These are referred to as exceptional circumstances. However, its should be pointed out that bail in both capital and non capital offences has been used to access criminal justice but rather the capital offence have been used to curtail the grant of bail.

⁶⁶ Art 23(a) and 28 (3) (a) of the constitution of Republic of Uganda

This is notwithstanding the constitutional court ruling that seriousness of the charge should not be used to curtail or deny an accused person right to bail. Further, state interference are also impeded the effective use of bail in capital offences to access criminal charges in instances where it is granted, the state has used police and prison officers not to release the accused persons on bail though court have granted their application for bail.

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