

**REALIZATION OF THE RIGHT TO LIBERTY: AN APPRAISAL OF THE BAIL
REGIME IN KENYA.**

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**A research project submitted in partial fulfillment of the requirements for the award of the
degree of master of laws (LLM) of the University of Nairobi.**

9th October, 2018

Declaration

I, **Karanja Mary Mbaire**, hereby declare that this is my original work and it has not been presented for the award of a degree or any other award in any other university. Where works by other people have been used, references have been provided.

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Dedication

To my parents for instilling education within me and my siblings at a very early age.

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List of Abbreviations and Acronyms

ACHPR African Charter on Human and Peoples Rights

CA Children Act

CPC Criminal Procedure Code

ICCPR International Convention on Civil and Political Rights

NPSA National Police Service Act

PC Penal Code

PTA Prevention of Terrorism Act

UDHR Universal Declaration of Human Rights

List of Domestic Cases

Republic v Abraham Irungu Mwangi (2014) eKLR; Nairobi HC Criminal Case No. 68 of 2014.

Ali Mcheni Ali alias Shee lako v R (2011) eKLR; Mombasa HC Miscellaneous Application No. 7 of 2011.

Republic v Beth Wanjiru Mwarangu (2017) eKLR; Nanyuki HC Miscellaneous Application No. 7 of 2017.

Republic v Boniface Mutwiri Cheme; Nairobi HC Criminal Case No. 74 of 2015.

Republic v Cosmas Mutua Muvia Embu High Court Criminal Case Number 33 of 2015.

Republic v Daniel Ndegua Wachira (2015) eKLR; Nyeri HC Criminal Case No. 12 of 2015.

Republic v Danson Mgunya and Kassim Sheebwana Mohamed (2010) eKLR; Mombasa HC Criminal Case No. 26 of 2008.

Republic v David Ochieng Ajwang alias Daudi and 11 Others (2013) eKLR; Kisii HC Criminal Case No. 96 of 2013.

Republic v Diana Salim Suleiman (2014) eKLR; Mombasa HC Criminal Case No. 23 of 2014.

Republic v Eric Mailu, Commissioner of Police and Director of Public Prosecutions (2013) eKLR; Nairobi Miscellaneous CR Application No. 24 of 2013.

Republic v Francis Kirima M'ikunyua (2016) eKLR; Machakos HC Criminal Case No. 11 of 2016.

Republic v Fredrick Ole Leilman & 4 Others (2016) eKLR; Nairobi HC Criminal Case No. 57 of 2016.

Republic v Gilbert Kipkorir Koech (2017) eKLR; Kabarnet HC Criminal Case No. 58 of 2017.

Harun Mwau and 3 Others v AG and 2 Others Nairobi HC Constitutional Petition No. 65 of 2011.

Republic v Hassan Mahati Omar and Fardosa Mohamed Abdi (2014) eKLR; Nairobi HC Criminal Case No. 31 of 2014.

Republic v Hassan Abdulhafedh Zubeidi, Ali Bashir Sheikh and Prof. Wilson Hassan Nandwa (2015) eKLR; Nairobi HC Miscellaneous Criminal Application No. 453 of 2015.

Republic v Job Kenya Musoni (2012) eKLR; Nairobi HC Criminal Application No. 399 of 2012.

Republic v Jakton Manyende and 3 Others (2012) eKLR; Bungoma HC Criminal Case No. 55 of 2009.

JMK and 9 Others v Republic (2015) eKLR; Garissa HC Criminal Case No. 24 of 2014.

Republic v Kokonya Muhssin (2013) eKLR; Busia HC Criminal Case No. 2 of 2013.

Leonard Archibala Muyonga v Republic (2007) eKLR; Nairobi HC Miscellaneous Criminal Application No. 535 of 2007.

Nganga v Republic [1985] KLR 451.

Republic v Mahadi Swaleh Mahadi (2014) eKLR; Mombasa HC Criminal Case No. 23 of 2014.

Republic v Nzaro Chai Karisa and 3 Others (2011)eKLR; Mombasa HC Criminal Case No. 5 of 2011.

Republic v Peter Muia Mawia (2016) eKLR; Machakos HC Criminal Case No. 48 of 2015.

Republic v Perry Muhindi Achega (2007) eKLR; Nairobi HC Miscellaneous Application No. 239 of 2007.

Republic v Richard David Alden (2016) eKLR; Nairobi HC Criminal Case No. 48 of 2016.

Republic v Stephen Robi Marwa and Daniel Marwa Boke; Kisii (2014) eKLR; Kisii HC Criminal Case No. 76 of 2013.

List of International Cases

Alhaji Mujahid Dukubo-Asari v Federal Republic of Nigeria S.C. 20A/2016.

Riggs v Palmer 115 N.Y 506, 22 N.E 188 (1889).

List of Domestic Legislation

Children Act, Chapter 141 Act No. 8 of 2001 Laws of Kenya.

Criminal Procedure Code, Chapter 74, Act No. 20 of 1965 Laws of Kenya.

The Constitution of the Republic of Kenya, 2010.

National Police Service Act, Chapter 11A of 2011 Laws of Kenya.

Penal Code, Chapter 63, Act No. 24 of 1967 Laws of Kenya.

Prevention of Terrorism Act, Act No. 30 of 2012 Laws of Kenya.

Treaty Making and Ratification Act No. 45 of 2012 Laws of Kenya.

List of International and Regional Legal Instruments

African Charter on Human and Peoples Rights OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M.

58(1982) entered into force 21 October 1986.

International Convention on Civil and Political Rights G.A. Res. 2200A (XXI), 999 UNTS 171 adopted 16 December 1966, entered into force 23 March 1976.

Universal Declaration of Human Rights G.A. res. 217a (III), UN Doc. A/810 at 71 (1948).

List of Foreign Legislation

Bail Act of England 1976 Chapter 63.

Constitution of the Republic of South Africa (1996).

New York State Criminal Procedure Law 2016.

South African Criminal Procedure Act, 1977.

South Africa Criminal Procedure Code Act 51 of 1977.

CHAPTER ONE

1.0 Introduction

The meaning and scope of liberty is often a subject of debate. Defined in the simplest of terms, liberty refers to the ability to control ones destiny. It is what Immanuel Kant called our ‘freedom and rationality’.¹ Liberty grants individuals the ability to make choices. It therefore follows that no one has the right to interfere with the choices of another unless violation of their own rights occurs under the understanding of mutual noninterference of rights.² Specifically, the right to liberty also encompasses the protection of individual freedom from arbitrary arrest and detention. The Constitution provides for the right to liberty and further states that a right contained in the Bill of Rights should not be limited except were expressly provided by the law.³ Therefore, although the Constitution makes provision for the right to liberty, it is not absolute and can be limited by law. For example, a person suspected of involvement in committing an offence may be held in custody hence limiting the right to liberty.⁴

The Constitution makes provision for the release of every accused person on bail unless there exist compelling reasons preventing the release.⁵ The Constitution also prohibits pretrial detention where the punishment to be imposed is a fine only or where the imprisonment term

¹ Charles Fried, ‘The Nature and Importance of Liberty’ (2005) 29 *Havard Journal of Law and Public Policy*. <<https://www.questia.com/library/journal/1G1-142057893/the-nature-and-importance-of-liberty>> accessed 4 March, 2018.

See Immanuel Kant, *Groundwork of the Metaphysics of Morals* (3rd edn, Harper Torchbooks 1948) where he stated that, ‘to every rational being possessed of a will we must also lend the idea of freedom as the only one under which he can act’.

² *ibid.*

³ The Constitution of Kenya 2010, Art 24.

⁴ Monica Macovei, ‘The Right to Liberty and Security of persons: A Guide to the Implementation of Article 5 of the European Convention on Human Rights’ (2002) 5 <<http://www.echr.coe.int/libraryDocs/DG2/HRHAND/DG2-EN-HRHAD-05%282004%29.pdf>> accessed 7 September 2015.

⁵ Art 49(1)(h).

does not exceed 6 months.⁶ In protecting the accused person's right to bail, the Constitution requires that the bail terms be reasonable. Similarly, the Criminal Procedure Code provides that the bail granted should not be excessive and should have due regard to the circumstances of each case.⁷ The rationale is to ensure that accused persons are not unnecessarily overburdened by bail terms that they cannot meet.

Pretrial bail is conditional liberty enjoyed until an accused person is charged, undergoes fair trial and is subsequently convicted or acquitted. It enables an accused person to prepare for his or her defence and avoid incarceration before conviction in recognition of the fact that every accused person has the right to be presumed innocent until the contrary is proven.⁸ It is therefore granted as a guarantee of the accused person's future appearance in court.

In Kenya, the mode of granting bail is a discretionary exercise. The courts have discretion to grant bail with or without sureties.⁹ They can also grant bond which may be granted as free bond or in addition, the accused may be required to give sureties.¹⁰ In other instances, the accused may be required to deposit securities in court such as a title deed or a log book. Irrespective of the mode of the bail granted by the court, it is meant to act as an incentive to guarantee an accused persons future court attendance. However, the question that arises is whether the courts are able to strike the right balance in protecting the public interest without violating the accused person's right to liberty when no compelling reason to deny bail has been established by the prosecution.¹¹

⁶ Art 49(2).

⁷ Criminal Procedure Code (CPC 1930) CAP 75, s 123.

⁸ The Constitution of Kenya 2010, Art 50(1)(a).

⁹ CPC 1930, s 123.

¹⁰ *ibid.*

¹¹ The Constitution of Kenya 2010, Art 49(1)(h).

In Kenya, the grant of bail without regard to the economic status of the accused person has led to a scenario where accused persons without means are unable to meet the bail terms and therefore have to await trial in jail. Accused persons with means are however placed in a relatively easy position where they can readily meet the bail terms imposed. It is noteworthy that the Constitution in using the operative word ‘shall’ under Article 49(2) is meant to ensure that accused persons covered under this provision are not subjected to pretrial detention. However, this is not the scenario as the accused person’s inability to meet bail terms notwithstanding the nature of offence committed means that he has to await trial in jail.

The field survey carried out which sought among other issues to interrogate the extent to which the right to liberty is protected or undermined in Kenya revealed that while the right to bail exists and accused persons are granted bail, in many cases they are unable to meet the bail terms.¹² Although the Constitution on one hand seeks to protect accused person’s right to liberty, the imposition of excessive bail terms by the courts on the other hand has led to pretrial detention violating the accused person’s right to liberty.

In light of the foregoing, this study interrogates the effectiveness of the bail regime in Kenya and identifies the need to adequately protect every accused person’s right to liberty.

1.1 Statement of the Problem.

The Constitution makes provision for accused person’s right to bail unless compelling reasons exist to fetter the right.¹³ The rationale of this provision is to ensure that accused persons are able to secure their pretrial freedom where no compelling reasons exist. The fundamental issue that

¹² Interview with accused person Milimani Nairobi 4 October 2016 and 5 October 2016.

¹³ The Constitution of Kenya 2010, Art 49(1).

arises is despite the averments in the Constitution, there are still a large number of accused persons who await trial in jail.

This study aims to determine the effectiveness of the legal framework pertaining to bail and establishing the manner through which the right to pretrial liberty can be further protected. Although the right to pretrial liberty should benefit all persons, only a few people who are able to meet the bail terms benefit. All persons are equal before the law and enjoyment of the right to pretrial liberty is no exception.

This research aims to address the issue of imposition of excessive bail terms which a large number of accused persons are not able to meet. It highlights the inequalities posed by imposition of excessive bail terms and makes recommendations to improve the same in a bid to improving the bail system in Kenya.

1.2 Justification of the Study

The right to pretrial liberty is a fundamental right whose enjoyment should be protected. With the rising cost of living, the amount granted as bail by the courts has steadily increased over time. While a number of accused persons are able to meet the bail terms without difficulty accused persons without means are put in a relatively difficult position. The International Centre for Prison Studies has stated that the occupancy rate of Kenyan prisons is 226% and is ranked as the tenth in prison congestion worldwide.¹⁴ The World Prison Brief has estimated the prison population rate to be 55,000 which includes pretrial detainees whose population is estimated as

¹⁴ Galgallo Faya, 'Kenya Pardons 6,700 inmates in move to Ease Congestion' *Business Daily* (Nairobi, 21 December 2012) < <https://www.businessdailyafrica.com/news/Kibaki-pardons-6700-inmates-in-move-to-ease-congestion/539546-1649268-m2ov7az/index.html> > accessed 23 May 2016.

43.1%.¹⁵ Were the accused person is unable to meet the bail terms, he has no option but to await trial in jail.

This study contributes to the advancement of knowledge in this area by highlighting and recommending ways of addressing the gaps between the law and the practice in relation to pretrial liberty in a bid to ensure that the right to bail is realized by all citizens including the economically disadvantaged. Although the Constitution and the various statutes touching on bail call for equal enjoyment of the right to liberty, in practice due to the financial disparity existing in Kenya a large number of accused persons do not benefit from this right. Both the criminal law practitioners, accused persons, judges and judicial officers will find this study useful in pointing out the loopholes and contentious issues in the award of bail.

This research is justified because it seeks to address the problem of granting of excessive bail terms resulting to pretrial detention, identify the legal and administrative loopholes pertaining to bail and highlight the need to ensure that all accused persons right to pretrial liberty is protected.

1.3 Hypothesis

This study proceeds on the assumption that excessive bail terms are granted by the courts thus undermining the accused persons right to liberty.

1.4 Objective of the Research

The general objective of this research is to examine to what extent the accused persons right to liberty enshrined in the Constitution is violated or protected by the courts as they award or deny bail in Kenya. The specific objectives of this research are to:

¹⁵ World Prison Brief Report (WPB) 2016 < <http://www.prisonstudies.org/country/kenya> > accessed 23 May 2016.

1. Determine the scope of the right to liberty in Kenya
2. Interrogate the extent to which the right to bail is protected or undermined by the courts.
3. Examine the extent to which the failure to determine reasonable bail and bond terms undermines the right to bail.
4. Interrogate the effectiveness of the Bail and Bond Policy Guidelines in guiding the courts in exercising their discretion to award or deny bail or bond.

1.5 Research Questions

This study seeks to answer the following research questions:

1. What is the scope of the right to liberty in Kenya?
2. To what extent are courts protecting or undermining the right to liberty by awarding or denying bail and bond?
3. Are excessive bail and bond terms imposed hence undermining the right to liberty?
4. How effective are the Bail and Bond Policy Guidelines in guiding courts to exercise their discretion properly thus protecting the right to liberty?

1.6 Theoretical and Conceptual Framework

This research is grounded on the choice theory approach on human rights and Ronald Dworkin's theory of law as integrity. Proponents of the choice theory approach view human beings as social agents who possess certain rights that ought to be promoted and protected. The right to liberty is recognized as a human right which every accused persons is entitled to without discrimination or differentiation subject to limitations set out under the law.

Dworkin's argument on the theory of law as integrity is based on the understanding that people should be treated fairly, justly and in accordance with the due process of the law. The judge is called to look at the unique circumstances present in every case brought before him before making any judicial decision with a view of trying to make the law the best it can be while seeking to protect people's rights.

Chapter 2 of this research paper discusses in detail the choice theory approach on human rights and the theory of law as integrity as espoused by Ronald Dworkin.

1.7 Research Methodology

Primary desk research was undertaken. This involved an analysis of international, regional and domestic legal instruments as well as existing literature on the subject. Reference was made to books, journals, reports and web based resources.

Field research was also undertaken. However, this was limited to a survey targeting individuals who had experienced the process. Thus, a qualitative analysis from this survey was undertaken. In view of the objective and the limited scope of the survey, the findings were not intended to provide conclusive arguments but rather provide views that shed light on arguments put forth in this paper. Thus the respondents' views were incorporated in different sections of this work.

1.7.1 Site of the Study

The field survey was carried out in Nairobi County.

1.7.2 Study Population

The survey targeted four groups of respondents. First, accused persons who have been in conflict with the law and have therefore sought bail. Secondly, the key actors in the criminal justice

system involved in the process of granting bail. That is, the probation officers, prosecution counsels, judicial officers, defence counsels and police officers.

A total of twenty one respondents were interviewed. Ten accused persons were randomly selected and interviewed. The sample population comprised of five adult male persons and five adult female persons to enable collection of information and views from both genders. Three probation officers, one from Milimani probation office and two from Kibera probation office. This was intended to understand the practice in the two offices and compare the views. Two prosecution counsels, one from the magistrate's court in Milimani and one from the high court in Nairobi. This was intended to shed light on the practices by the prosecution counsels in the two courts. Two defence counsels, two magistrates and one police office were interviewed. The respondents were guaranteed anonymity and their names are not referred to in this paper. However, the list of respondents is on the file with the author.

The sample population was selected through probability sampling through the simple random sampling method as it provides an equal opportunity of selection for each element of the population.

1.7.3 Research Instruments

Face to face interviews were conducted with the respondents. An open ended research instrument was used to guide the interviews.

1.7.4 Limitation of the study

The scope of the research is limited due to time and budget limitations. The study has a relatively small sample size which represents a small portion of the entire population. The selection of the small sample size is deliberate as the total number of accused person's awaiting trial in jail is

substantial. The research paper also engages in extensive desk research. The study also focuses on a selected county that is Nairobi leaving out the rest of the counties in Kenya. However, despite these limitations, the findings of this thesis still form a useful indicator of the deprivation of the accused person's right to liberty and the right to bail in Kenya.

1.8 Literature Review

There are several scholarly writings in the area of bail both in Kenya and other jurisdictions. These are examined in depth in this section with a view of establishing the extent to which prior research in the area has covered the issue of accused person's right to bail and especially on realizing the right. The research highlights the gaps and shortfalls in these literatures in order to illustrate how this study contributes to the existing literature. The right to liberty is a fundamental right which is universally recognized. Protection of the right to liberty dates as far back as 1215 as stated in the English Magna Carter of 1215. To date, bail is an issue that continues to be the subject of debate.

Scope of the right to liberty in Kenya.

Patrick O. Kiage¹⁶ in chapter 8 discusses the concept of bail in Kenya. He does recognize the importance of an accused person being granted bail as detaining an accused person during trial is not necessary. This book is useful because towards the end of the chapter he recognizes the inequalities in the Kenyan criminal justice system in granting of bail putting into consideration that most of the accused persons are poor thus unable to meet the bail terms. He notes that ultimately, 'bail becomes an empty shell devoid of succor to them'. The arguments in this

¹⁶ Patrick O Kiage, *Essentials of Criminal Procedure in Kenya* (Law Africa Publishers 2010).

chapter are useful to the current research as it provides a basis for the need to consider other feasible methods for pre-trial release before resolving to monetary bail. Although Justice Kiage recognizes the inequality posed by the current bail system, he does not go on to state how bail can become affordable to accused persons to avoid bail becoming an empty shell devoid of succor to the accused persons which this research paper discusses.

P.L.O Lumumba¹⁷ in chapter five of his book lays out the bail system in Kenya and further discusses bail as viewed by the courts. He discusses legislation touching on bail such as the Constitution of Kenya and the factors such as the seriousness of the offence and the likelihood of interference with witnesses which the court takes into consideration before making a decision on whether or not to grant bail. He further discusses the need to balance the accused right to liberty while at the same time seeking to protect the security of the community. The chapter is useful in justifying the need for consideration of each accused persons bail terms on its own merits. Although the chapter extensively discusses the bail system in Kenya and the legislation governing the grant of bail, it does not make recommendations on how to make bail affordable to every accused person which this research paper seeks to discuss.

Joshua Muchera¹⁸ in his article examines the legal framework surrounding bail in Kenya. He begins by examining the grant of bail as provided under the Constitution. He notes that all offences are bailable as the Constitution does not distinguish between bailable and non bailable offences. He also discusses other legislation touching on bail such as the Criminal Procedure Code, the Police Act and the Penal Code. He recognizes that the purpose of bail is to serve the

¹⁷ P L O Lumumba, *A Handbook on Criminal Procedure in Kenya* (PLO Foundation Publication 1998).

¹⁸ Joshua Muchera, 'Rights of an Arrested Person to Bail/Bond: The Kenyan Legal Perspective.

interest of justice and that the courts are required to balance the accused person's right to release on bail while taking into account the interest of justice. He does state that where the court is of the view that grant of bail would go against serving the interests of justice, then bail should not be granted. Despite extensively discussing the legislative framework touching on bail, the article does not discuss the challenges faced by accused persons in their attempt to meet bail terms which this paper discusses.

Extent to which judges and magistrates protect or undermine the right to liberty.

Migai Aketch and Sarah Kinyanjui¹⁹ in their article examine how the courts and police exercise their power to grant bail. The article goes on to describe the bail practice in Kenya where initially upon arrest, a person is detained in police detention facility before arraignment in court. A person can initially apply for bail at the police station. The court then sets bail once the charge is read and the accused person denies the charges. The article argues that before the police grant bail, they have to ensure that the amount granted as bail is of such a nature that accused persons would fear its forfeiture in the event that he absconds.

It further notes that bulk of bail applications are handled by the subordinate courts. The article argues that in making the decision on whether to grant bail or not, the courts are assisted by pre bail reports prepared by probation officers who make recommend on the suitability or lack thereof of an accused person being granted bail although the courts still retain discretion. This article does recognize that in granting bail the courts make different decisions where a court in one district may grant bail much higher than what is granted in another court. The article argues

¹⁹ Migai Aketch, Sarah Kinyanjui, 'Pretrial Detention in Kenya: Balancing the Right of Criminal Defendants and the Interests of Justice' (2012) 19:1 East African Journal of Peace and Human Rights 1.

that police officers and the courts do exercise their discretion reasonably in granting bail terms in majority of the cases. However, the article also recognizes that Kenyan prisons are overcrowded due to the high number of pretrial detainees. The articles make recommendations for implementation of the Bail and Bond Policy Guidelines. This research paper seeks to determine the efficiency of the Bail and Bond Policy Guidelines as proposed in this article.

B.D Chipeta²⁰ in chapter five of his book discusses bail pending trial. He states that the court's decision to grant or deny bail is a weighty issue as it involves personal liberty of a person. He argues therefore that the decision should not be made mechanically or capriciously as the accused person may be innocent. He further discusses the duty of the public prosecutor arguing that there is need for the prosecutors to exercise their duty honestly and sincerely and refrain from making wild and vague allegations with a view of having the accused person detained pending trial. He notes however that ultimately, the decision of granting or denying bail rests on the magistrate who must exercise his judicial discretion judicially. Chipeta recognizes the importance of bail as he states that if every person charged with an offence were to be detained, the already crowded jails would not cope with the situation bearing in mind that the financial burden on jail would substantially increase. Although Chipeta states that bail fixed should not be excessive, he does not discuss how bail can be made affordable to reduce the financial burden placed on indigent persons in meeting bail terms which is discussed in this paper.

²⁰ B.D Chipeta, *A Handbook for Public Prosecutors* (Mkuki na Nyota Publishers 2009).

Clever Mapaure and others²¹ in chapter eight of their book discuss bail and other forms of pretrial release. They argue that in making bail decisions, the judicial officer should ensure that he has sufficient facts to enable him exercise his discretion in a judicial manner. The judicial officer may then proceed to deny an accused person bail where upon inquiry it is in the interest of justice to deny him bail. They however argue that once the judicial officer comes to a conclusion that bail should be granted, it therefore becomes vital to determine the amount to be paid as bail because the amount granted sometimes defeats the entire purpose of bail. The authors further argue that bail should serve as a security to ensure that the accused avails himself to attend trial without hampering the administration of justice. The authors further state that the judicial officer should take into account the seriousness of the offence, the charge made against the accused and the financial standing of the accused before making the bail decision. Although the authors recognize the need to consider the accused financial standing before granting bail, they do not discuss actual situations where accused persons are granted excessive bail terms which they are unable to meet which is discussed in this paper.

Excessive bail and bond terms imposed hence undermining the right to liberty.

Urvashi Saikumar²² in his article examines the bail system in India. Just like in Kenya, the Indian criminal jurisprudence is adopted from the British. Saikumar argues that accused persons in India are subjected to bail terms which they cannot furnish due to the high level of poverty especially in rural India. He argues that the courts have not been sensitive to the economically

²¹ Clever Mapaure and others, *The Law of Pretrial Criminal Procedure in Namibia* (University of Namibia Press 2014).

²² Urvashi Saikumar, 'Indian System of Bail: Anti Poor' <http://www.legalserviceindia.com/articles/bail_poor.htm> accessed 17 April 2015.

disadvantaged in the society leading to unreasonable and exorbitant bail and bond terms being granted. He further argues that the benefit of bail has been enjoyed by a few people although the same should be enjoyed by all persons including those who are economically disadvantaged and may not afford bail.

Saikumar proposes that the bail system in India should be completely reviewed to cater for the majority of the accused persons who are poor. He proposes to have the socio-economic condition of the accused person to be taken into account before granting bail. He also argues that courts should have a compassionate attitude towards accused persons when granting bail and courts should take into account the accused persons employment status, history and financial condition.

This thesis to a large extent affirms Saikumar's writings however, it is noteworthy that his work did not explore the measures which the courts should take when considering the socio-economic condition of the accused person in order to make bail affordable to all persons.

In the Article 'Bail and its Discrimination against the poor: A civil rights action as a vehicle of reform',²³ it discusses the weakness associated with a money based bail system arguing that it is discriminatory against the poor accused persons. The bail is set by the judge based on a master bail schedule which takes into account how serious the offence committed is and totally ignores the accused person's ability to pay. The article argues that the criterion distinguishing accused persons who enjoy pre-trial freedom from those who are subjected to pretrial detention is their economic status.

²³ 'Bail and its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform' (1974) 9 Val UL Rev 167 Valparaiso University Law Review. <<http://scholar.valpo.edu/vulr/vol9/iss1/6>> accessed 23 May 2016.

The article further argues that classification based on wealth should be treated as suspect because it not only infringes on an accused persons right to pretrial freedom but also his right to fair trial. It argues that the indigent accused person may not have any money to forfeit while wealthy accused person will not be deterred from fleeing by mere forfeiture. The article concludes by stating that the accused in his prayer for relief may include a declaratory judgment that the present money based bail system is unconstitutional. The article argues that were an indigent is aggrieved by the bail system which inherently relies on the bail schedule he can bring a class action²⁴ which is a civil rights approach. The Article explored the possibility of bringing a 1983 action while attacking the present money based bail system.

Despite the authors contribution on the issue of pretrial detention and the burden associated with a monetary bail system, the article does not offer a solution on how to make bail affordable to indigent defendants where the option for release on one's own recognizance is not available.

Bail and Bond Policy Guidelines (2015)

The Bail and Bond Policy Guidelines seek to guide the police and the courts in exercising their power in making bail decision. The Policy Guidelines seek to ensure that the right to liberty of the accused person is balanced with the public's interest. The Policy Guidelines make provision for the request for a bail report by the court where it is of the opinion that it may not contain sufficient information in assessing bail which would be deemed fair and appropriate.²⁵ It further gives an example were the courts grant bail but the accused person is unable to furnish the bail amount required and therefore seek review of the bail terms. However, although the Policy

²⁴ An alternative approach could be bringing a class action in federal court under 42 U.S.C 1983.

²⁵ Bail and Bond Policy Guidelines (2015) 25.

Guidelines advocate for preparation of a bail report, the issue of accused person's ability to meet the bail terms has not been adequately addressed. Emphasis has been placed on considering how serious the offence committed is and the likelihood of the accused absconding. This thesis contributes by interrogating affordability of bail in the wake of Bail and Bond Policy Guidelines.

From the literature above, no literature is directly addressing the issues that this research paper seeks to address in the Kenyan context.

1.9 Chapter Breakdown

Chapter One: General Background

This chapter introduces the area of study. It provides a background to the study and introduces the research problem while setting out the objectives of this research.

Chapter Two: Theoretical and Conceptual Framework

This chapter looks at the theories upon which the research will be grounded on and their applicability in this research.

Chapter Three: Legal and Institutional Framework Governing Bail and Bond in Kenya

This Chapter examines the domestic, international, and regional instruments pertaining to the right to liberty. It will also look at the various institutions involved in governing the realization of the right to liberty in Kenya.

Chapter Four: Realization of the Right to Liberty in Kenya

This chapter will analyze in depth the extent in which the right to liberty in Kenya is protected or undermined. This chapter will look at the best practices that have been employed by the courts in Kenya to protect the accused person's right to bail. This chapter will also disclose the shortfalls that have resulted to undermining of the right to liberty in Kenya.

Chapter Five: Summary of findings of the study, recommendations and conclusions.

This chapter will sum up the findings of this research and make recommendations and conclusions based on the entire findings.

CHAPTER TWO

THEORETICAL AND CONCEPTUAL FRAMEWORK

2.0 Introduction

This chapter discusses the theoretical and conceptual framework which underpins this study. It examines the concept of human rights. It further analyses the theory and practice of human rights as a basis for grant of bail in Kenya. It also examines the theory of law as integrity espoused by Ronald Dworkin which provides a lens through which the discretion to grant bail can be exercised. These theories are discussed below in greater detail and how they relate to the study.

2.1 The Concept of Human Rights

Human rights have been defined differently by various scholars. In simple terms, human rights are entitlements which people have by the very nature of being human beings. Human rights have also been defined as legitimate claims which every individual has on his or her own society for certain freedoms and benefits.²⁶ They have also been defined as constituting a set of norms which govern how individuals are treated by both state and non-state actors based on the ethical principles which are considered as fundamental by the society for leading a decent life.²⁷

The concept of human rights is the subject of many human rights theories. However, for the purposes of this paper, this concept provides a lens through which the importance of the right to bail in the criminal justice system is interrogated. The paper is premised on bail which is at the heart of justice in the criminal justice system. An understanding of the human rights concept

²⁶ Louis Henkin, 'The Universality of the Concept of Human Rights Annals of the American Academy of Political and Social Science' (1989) 506 Human Rights around the World 10.

²⁷ Stephen P. Marks, 'Human Rights: A Brief Introduction. Working Paper, Harvard School of Public Health' (2016) < https://dash.harvard.edu/bitstream/handle/1/27015684/Human_Rights-A_brief_intro_2016.pdf?sequence=1 > accessed 20 March 2018.

illuminates the rationale behind including the right to bail in the Bill of Rights. Thus the sub concepts on human rights discussed hereunder provides the lens through which the right to bail is interrogated throughout this paper.

Grounded within the concept of human rights, the paper therefore interrogates excessive bail terms and other bottlenecks that hinder the enjoyment of the right to bail. This paper therefore questions the implementation of the right to bail in its entirety.

Human beings are viewed as social agents who possess certain interests which ought to be protected and promoted. There have been attempts to justify the existence of human rights through two main theories; the interest theory approach and the choice theory approach. This paper follows in the line of thinking of the choice theory approach which has as its main concern individual liberty and equality.²⁸

Equality has been predominantly understood as non-discrimination in the sense that individuals are accorded equal moral and legal standing within the principle and legal institutions in any give society.²⁹ From a human rights perspective, individuals claim to equality is not based on merit or the whim of the state but because human rights are possessed inalienably and should be enjoyed by all persons without discrimination or differentiation.

The theoretical understanding of individual liberty owes much to the distinction drawn by the political philosopher Isaiah Berlin.³⁰ He distinguished between two concepts of liberty which he referred to as negative and positive liberty. Negative liberty he argued entails non-interference in

²⁸ Thomas Cushman (ed), *Handbook of Human Rights* (Cenveo Publisher Service 2012).

²⁹ *ibid* 14.

³⁰ *ibid*.

an individual's private sphere in the sense that a person has the ability to act without any obstruction from others. It can therefore be enjoyed without a person having to do anything as it focuses on restricting the interference by others.³¹ Positive liberty on the other hand entails the ability of an individual to exercise liberty through pursuing goals and projects with the aim of realizing ones fundamental purpose.³² Individual liberty therefore has the condition of non-interference and the ability to exercise liberty through playing an active role in pursuit of goals as its essential elements.

Choice theorists view the ability to exercise free choice as the foundational stone for human rights. They argue that to be a human agent entails possessing the condition of liberty and having opportunity that is sufficient to exercise that liberty.³³ One of the proponents of the choice theory approach H.L.A Hart propounds that all rights are capable of being reduced into a single fundamental right which is the "equal right of all men to be free" and exercise free will. Hart argued that other rights which human beings pursue such as political participation can be reduced to individual right to liberty.

Henry Shue developed Harts argument positing that the rights which people have are not limited to individual liberty as it encompasses security from violence and other material conditions to enable personal survival. He therefore grounded rights upon liberty, security and subsistence.³⁴

Alan Gewirth makes profound contribution to the choice theory approach. He argues that human rights should be held with supreme importance as they are central to all other moral

³¹ *ibid.*

³² *ibid.*

³³ *ibid* 15.

³⁴ *ibid.*

considerations. He posits that human beings are moral agents and as a result possess certain purposes and goals which they are in pursuit of. If a person possesses human rights, this will logically commit him to accept all other agents also possess human rights. Gewirth further argues that human rights are the essential means by which people secure the realization of their goals because as human agents in the first place they seek to have and realize their goals. It therefore follows that as respondents and subjects of rights, all rational agents should enjoy the fundamental human rights.

Being a moral agent entails enjoyment of human rights while at the same time respecting other agent's possession of human rights. If an individual recognizes himself as a rational agent, then he accepts that he shares basic characteristics with all other rational agents. According to Gewirth therefore, all human beings as rational agents are logically bound to accept that all other rational agents possess human rights. The denial of human rights by a rational agent to another would therefore mean that he is acting irrationally because logically all other rational agents possess human rights.³⁵

Counterarguments have been advanced against the choice theory. It has been argued that the strict application of choice theory would exclude certain class of persons from the enjoyment of human rights. This is because, if the requisite condition for possessing human rights according to Gewirth is that a person has to act in a rational purposive manner, individuals who suffer from

³⁵ *ibid.*

temporary or permanent incapacity such as clinically depressed persons or schizophrenics would have no legitimate claim to human rights.³⁶

Despite this criticism, the general tendency has been to extend human rights considerations towards all persons including the marginal cases in line with the principle of universality of human rights.³⁷ The case for human rights remain a powerful one as without protection of human right, the sanctity of life would not be protected. Death and displacement would be the norm. If an individual's liberty could be taken away arbitrarily, there would be chaos. Brutality and torture towards accused persons would be the order of the day. Individuals in custody would be at the mercy of the state. Consequently deprivation of human rights should not occur without a grave affront to justice.

One of the rights recognized in the human rights discourse as pivotal in the promotion of the criminal justice system is fair trial which encompasses the right to bail. The right to bail and bond form part of the accused person's right to due process of the law. Chapter 4 of the Constitution of Kenya provides for the Bill of Rights. Article 20(2) provides that all people have the right to enjoy fundamental rights and freedoms to the greatest extent so long as they are consistent with rights or freedoms in the Bill of Rights. Further Article 20(4) provides that the Bill of Rights should be interpreted by the courts in a manner that promotes its spirit, purport and object. The Constitution of Kenya provides for right to bail or bond which has been recognized as a human right.

³⁶ Andrew Fagan, 'Human Rights' University of Essex United Kingdom.

³⁷ *ibid.*

Choice theory approach has liberty and equality as fundamental attributes which feature prominently in many modern day Constitutions. Choice theorists argue that to be human agents entail possessing the conditions of liberty and having an opportunity to exercise that liberty. Positive liberty entails individuals, including accused persons, taking an active role in pursuit of personal goals and objectives. Choice theory approach recognizes the importance of human rights and that liberty and equality are fundamental in enabling individuals to realize their personal goals. In line with the choice theory approach, human beings are recognized as moral agents possessing human rights which ought to be respected and protected. The Constitution of Kenya under Article 27 provides for equality of all persons before the law which entails equal enjoyment of rights and fundamental freedoms. Further, Article 49(1)(h) provides for the right to bail which seeks to ensure that accused persons are not held in custody pending trial where no compelling reasons exist. It is through protection of the right to liberty and equality that accused persons can benefit from the grant of bail. It is no doubt that the equal treatment of accused persons is fundamental which is achieved through ensuring that accused persons are not only afforded a fair hearing but also granted fair and equal opportunity in the award of bail.

Every accused person being a moral agent seeks the realization of his purpose and goals in the cause of his life. Relying on the presumption of innocence, he is therefore innocent until the contrary is proven. In the absence of compelling reasons the accused ought to enjoy his right to liberty pending the hearing and determination of his case. As a human being one is a subject of human rights and as such also recognizes that other human beings also possess human rights which ought to be protected.

In essence, human rights are basic moral guarantees which people have by virtue of being human beings. Human rights are indivisible, interrelated and interdependent. The deprivation of one right invariably affects the enjoyment of other rights while the improvement of rights also leads to the enhancement of the other rights that the individual enjoys. If rights are limited such as limiting the right to liberty, other rights will inevitably be affected such as the right to work or pursue education.

The fact that an accused person is accused of committing a crime does not mean that he ceases to be human thus disentitled to the enjoyment of human rights. Though not absolute, the right to bail and bond is recognized and protected under the Constitution of Kenya, the Criminal procedure code, international and regional human rights treaties, conventions, declaration and agreements which Kenya has acceded or ratified.³⁸ The courts and police in granting bail should as far as possible seek to enhance and protect the enjoyment of the right to liberty. Deprivation of the right to bail should therefore be exceptional, objectively justified and should not be longer than necessary.

2.2 Law as Integrity

While the right to bail is guaranteed in the Bill of Rights, discretion is exercised as to whether there are compelling reasons as to why bail should be denied. The compelling reasons also present different interests to be balanced during this process. This paper therefore interrogates the exercise of judicial discretion in light of the law and other principles that guide this process. Dworkin's theory of law as integrity, discussed below provides a lens through which the exercise of this discretion is interrogated.

³⁸ See Chap 3.

Ronald Dworkin propounded the theory of law as integrity which he termed as a morally better theory of law which provides a lens through which the exercise of discretion in the granting of bail can be examined.³⁹ He argues that integrity is based on the political ideal of integrity which requires the government to act in a principled and coherent manner by extending to its citizens the same substantive standard of justice and fairness which it extends to other citizens.⁴⁰ Dworkin's argument is based on the understanding that if the government decides to apply different standards about justice, fairness and procedural due process, to a certain group of its citizen and a completely different set of standards of procedural due process, justice and fairness, to yet another group it will be impossible for a government to claim that its subjects are treated with equality and uniformity while applying fair practices.⁴¹

Dworkin however recognize that when the principles of procedural due process, justice and fairness are applied together, justice and fairness sometimes conflict pulling in opposite directions.⁴² The difficulty he notes, arises when justice and fairness 'conflict'. Take an example of the right of liberty. How do you respect and protect accused persons rights and at the same time protect the rights of the victim? On one hand, the accused person's understanding of justice is the court granting bail terms which he is able to meet based on his presumption of innocence and in order to have an opportunity to substantively prepare for his trial. On the other hand, the victim of crime understanding of justice is to have the perpetrator of the offence punished,

³⁹ 'Theory of Law as Integrity Philosophy Essay' (2015), <<https://www.ukessays.com/essays/philosophy/theory-of-law-as-integrity-philosophy-essay.php>> accessed 10 January 2016.

⁴⁰ Ronald Dworkin, *Law's Empire* (The Belknap Press of Harvard University Press 1986).

⁴¹ Nicholas J. Mc Bird Sandy Steel, *Great Debates in Jurisprudence* (Palgrave Macmillan 2014) 88.

⁴² Dworkin (n 40) 22.

immediately if possible. Therefore what is just and fair to the accused and the victim is inherently different.

Dworkin therefore introduces a third and independent ideal called integrity.⁴³ Since fairness and justice sometimes pull in opposite directions, in case of conflict between the two or where there is disagreement between the two, Dworkin argues that fairness or justice must sometimes pave way for integrity.⁴⁴ Dworkin argues that in interpreting text, a judge is not completely free in that he is not free to apply personal morality. He must consider moral and political principles that make the most sense of the community's history of the law.⁴⁵ He is therefore supposed to interpret the text with the intention of establishing coherence taking into account the integrity present in existing law.⁴⁶ This coherence requirement is what Dworkin means by law as integrity.

Dworkin therefore argues that judges must decide as a matter of abstract justice, which principles of justice and fairness are better and which ones are desirable as a matter of political fairness taking into account the moral principles of the community under consideration.⁴⁷ Dworkin examines the reasoning of the judges in deciding hard cases. This occurs for example in instances where what the law stipulates has not been unanimously agreed.⁴⁸ Dworkin therefore argues that judges in such instances should not make arbitrary decision as they are not confined

⁴³ *ibid* 178.

⁴⁴ Dworkin (n 40) 22.

⁴⁵ Michael Robertson, *Stanley Fish on Philosophy, Politics and Law: How Fish Works* (Cambridge University Press 2014).

⁴⁶ *ibid*.

⁴⁷ Dworkin (n 40) 249.

⁴⁸ Hard cases are cases in which the facts of the case and what positive rules require is not in dispute as between the judges but a matter in which they continue to debate what the law is.

to applying rules only. Rather, judges should appeal to something beyond rules and in the absence of rules they must turn to principles in making decisions.⁴⁹

Dworkin cites the case of *Riggs v Palmer*⁵⁰ where although the presiding judges were in agreement on the facts of the case and what the posited law dictated, there was a difference of opinion on what the law required. The majority of the presiding judges relied on an unposited consideration that a man should not profit from his own wrong doing. The court therefore appealed to moral reasoning citing the principles that it is not permissible for a person to profit from his own wrong doing.⁵¹

2.2.1 The Right Answer Thesis.

Dworkin argues that where contention arises on people's rights the best interpretation would be the right answer thesis that is as a matter of law there exists a right answer which judges must seek to discover. Dworkin demonstrates how the integrity as law system could work by the use of a model judge who he calls Hercules.⁵² He argues that Judge Hercules is an ideal judge who is immensely wise and possesses extensive knowledge of legal source and is therefore able to narrow it down to one right answer for every case that comes before him. In deciding cases, Hercules has to go through three stages.

⁴⁹ Frederick F. Schauer, Walter Sinnott-Armstrong, *The Philosophy of Law: Classic and Contemporary Readings with Commentary* (Harcourt Brace Publishers Company, 1996) 74-89.

⁵⁰ 115 N.Y 506, 22 N.E 188 (1889).

Francis Palmer wrote a will naming Elmer as one of the heirs. Feeling that his share of the estate was threatened by Palmers new wife, Elmer killed his grandfather. There was no provision in the statute categorically preventing a murderer from inheriting from the estate of the person he had murdered.

⁵¹ Schauer (n 49).

⁵² David Dyzenhaus and Malcom Thorburn (eds), *Philosophical Foundations of Constitutional Law* (1st edn, Oxford University Press 2016).

- i) **Pre-interpretive stage**-Hercules begins by looking at what is acknowledged as being sources of laws in the community that is the statutes and case laws.⁵³
- ii) **Interpretive stage**- Hercules has to ask himself what set of principles about justice, fairness and procedural due process provides the best interpretation on what has been dealt with before. He considers the legal principles that can fit the materials he seeks to interpret.⁵⁴

Dworkin therefore proposes a test involving two steps that is fit and justification. In essence the 'fit' test requires the judges to establish the principles of procedural due process, justice and fairness that would give the best explanation of the posit law as if structured by a coherent set of such principles.⁵⁵ To understand the idea of 'fit' Dworkin developed the idea of a 'chain novel'. He gives the example of a novel being written by a number of novelists who are in agreement to have each write one chapter.⁵⁶ The subsequent author has to attempt as much as possible to create continuity in the novel in the best way possible after reading what was written by his predecessors.⁵⁷ This therefore means, when a case comes before a judge, though the case is not entirely identical, he must think about the part of a long story which according to his own judgment he has to try and make it the best it can be.

The chain novel sets the basis of how to arrive at the right answer. Dworkin simply equates the writing of a chain novel to the process of making judicial decisions where the judge is the

⁵³ Mc Bird (n 41) 89.

⁵⁴ *ibid* 90.

⁵⁵ Ofer Raban, 'Dworkin's 'Best Light' Requirement and the Proper Methodology Of Legal' (2003) 23 Oxford J Legal Stud 243. <https://law.uoregon.edu/images/uploads/entries/Ofer_Raban-dworkins.pdf> Accessed 3 March 2016.

⁵⁶ 'Dworkin Theory of Law as Integrity' (2015). <<http://www.ukessays.com/essays/philosophy/theory-of-law-as-integrity-philosophy-essay.php>> accessed 10 April 2018.

⁵⁷ *ibid*.

novelist and the novel is jurisprudence.⁵⁸ Dworkin therefore argues that law as integrity sees the law as being based on coherence requiring the judge before making an interpretation to go through the entire law.⁵⁹ He argues that were the judge is guided by law as integrity, he will regard as law what according to morality would give the best justification for decisions made in the past.⁶⁰

iii) **Decision stage-** In this stage, Hercules has to decide the case according to the understanding of what the law says he has developed in the interpretive stage.

In essence, Dworkin argues that in order for a person to understand the legal practices, he has to take into account the interpretive perspective as understood by the participant which constitutes the community. The judge has to clearly understand what amounts to justice and fairness as per the community and therefore to take an interpretive approach to law as a social practice and factor in morality.⁶¹

The theory of law as integrity has been criticized by various scholars. It has been argued that the process of interpretation according to integrity works where there exists precedence which has already been set.⁶² This raises the question of how law as integrity works for novel cases? Dworkin however seems to argue that in fresh cases where there exists no clear

⁵⁸ 'A Critical Report of Ronald Dworkin's Integrity in Law' (2011). <<http://izhaarbir.com/phil/junior-year/a-critical-report-of-ronald-dworkin%E2%80%99s-integrity-in-law/>> accessed 20 August 2017.

⁵⁹ Sari Kisilovisky, 'Legal Rules and Legal Reasoning: On the Nature of Legal Validity' (DPhil Thesis University of Toronto 2009)1.

⁶⁰ Maverick SM, 'Theory of Jurisprudence: Law As Integrity' (2007).<http://theoryofjurisprudence.blogspot.co.ke/2007_12_02_archive.html> Accessed 12 January 2016.

⁶¹ 'Dworkin Theory of Law as Integrity' (2015) <<http://www.ukessays.com/essays/philosophy/theory-of-law-as-integrity-philosophy-essay.php>> accessed 10 April 2018.

⁶² 'A Critical Report of Ronald Dworkin's Integrity in Law' (2011). <<http://izhaarbir.com/phil/junior-year/a-critical-report-of-ronald-dworkin%E2%80%99s-integrity-in-law/>> accessed 20 August 2017.

interpretation then the judge can apply principles of justice, fairness and procedural due process and the right answer will depend on his political and moral convictions.⁶³

Dworkin also presents a metaphor of an imaginary judge who he calls Hercules. Hercules is immensely wise and is omnipotent of legal knowledge.⁶⁴ Consequently Hercules is able to come down to one right answer. Although a judge through experience will possess a vast body of knowledge in law, it however cannot be omnipotent like Hercules.

Lastly, the chain novel concept suggests that law is a coherent whole and in order to interpret the law there is need to interpret the entire jurisprudence. Dworkin's theory therefore does not require abandoning the history of wicked legal system.⁶⁵ For example in the case of Nazis in Germany, how does the judge make racism the best it can be? Or where there is apparent discrimination in law by legislature and judicial courts and the public if a judge has an inclination towards discrimination then his concept of law as integrity would be different from a judge whose moral conduct is not discriminatory.⁶⁶

Although Dworkin's introduction of a model judge Hercules is fictitious, he does provide an interesting perspective on the interpretation of law. Judges in real life possess vast knowledge of law which can be applied in the development of the law. We can in fact see the courts in recent times applying the theory of law as integrity as espoused by Ronald Dworkin in making judicial decisions.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ Dworkin Ronald, 'Integrity in Law' *Philosophy of Law: Eighth Edition* Feinberg and Coleman <<http://izhaarbir.com/phil/junior-year/a-critical-report-of-ronald-dworkin%E2%80%99s-integrity-in-law>> accessed 7 March 2018.

⁶⁶ *ibid.*

Whereas judges and judicial officers have discretion in the grant of bail, Dworkin's theory of law as integrity provides a lens through which this discretion is to be exercised. In deciding whether or not to grant bail, judges and judicial officers have to weigh the various compelling reasons that may warrant the denial of bail. If no compelling reasons exist, the judges and judicial officers are then faced with the task of hinging the grant of bail on a condition. Just like judge Hercules, he has to try 'fit' and justify the bail decision granted in light of the case brought before him taking into account individual circumstances. At the same time, he has to find the right answer which in this case is the bail terms that are sufficient to guarantee the accused future turnout in court. In so doing the judge in line with the theory of law as integrity will have made the law on bail the best it can be.

2.2.2 Application of the Theoretical Framework to the Study

This study relies on the choice theory approach on human rights which has individual liberty and equality as its main concern. The universality of human rights implies that all people are equal and should be treated equally without discrimination. In making bail decisions, judges and judicial officers should not discriminate for example on the basis of wealth where accused persons with means are granted bail terms which they can easily and readily fulfill while indigent accused persons are granted bail terms which they cannot meet. Unable to meet the bail terms, they are left with no option but to await trial in jail.

This study also follows in the line of thinking of Ronald Dworkin in his theory of law as integrity. This study argues that in the making of bail decision the judge should take an interpretive approach to law. The judge should consider what the community concept of justice and fairness is based on the everyday lives of the people in the community.

Dworkin in his theory argues that judges in interpreting a statute must respect the intention of the legislatures. If the contextual meaning of the words in a legislative text is clear, the judges and judicial officers must assign those words that meaning unless it can be shown that the intention of the legislature was different. Article 49(2) of the Constitution of Kenya expressly provides that an accused person should not be remanded in custody where the offence is punishable by fine only or imprisonment for a term not exceeding 6 months. In practice however, accused persons falling within this bracket are subjected to pretrial detention.

When making bail decisions, law and integrity would require the judge to apply the principles of justice, fairness and procedural due process and like the model judge Hercules seek to get the right answer where in this case the right answer is ensuring that the bail granted to every accused person is fair and just according to the same standards. In order to do this the judge would be required to look at every accused person individually taking into account the unique circumstances of each individual and the case before pegging any bail conditions.

The essence of this study is to interrogate the effectiveness of the bail system in Kenya. In so doing, this study seeks to have reasonable bail terms granted to all accused persons as the essence of bail is to ensure they attend court on future occasions. The Constitution of Kenya calls on courts to adopt the interpretation that favors enforcement of rights and freedoms.⁶⁷ The courts in their decision should seek to have the accused right to bail protected rather than having it limited. Human rights discourse and the theory of law as integrity requires every

⁶⁷ Constitution of Kenya 2010, Art 20(3).

accused person's situation to be made just and fair according to the same standards without discrimination or differentiation.

CHAPTER 3

LEGAL AND INSTITUTIONAL FRAME WORK FOR BAIL AND BOND IN KENYA

3.0 Introduction

Due to the great atrocities and human rights violations experienced during World War I, there had been great concerns about the potential abuse of the rights of individuals by the state during enforcement of Penal laws by the law enforcement agents.⁶⁸ This led to legislative intervention at the international level through international legal instruments to protect the rights of the individuals. One of this rights recognized by the international legal instrument is the right to bail which falls under the general rubric of the right to personal liberty. The obligation on states to protect the accused person's right to bail is articulated not only in treaties, covenants and conventions, which bind the state that has ratified it but also in national laws such as in constitutions and other legislation.

It is however important to appreciate how international instruments touching on accused person's right to bail become applicable in the national laws of a particular country. This is determined by whether a country is a dualist or monist state. In a dualist system, international law and domestic laws are viewed as two separate entities of law.⁶⁹ Therefore a treaty that has been ratified does not have an immediate effect on the domestic law. The key distinguishing feature in dualist

⁶⁸ Samuel Kwesi Amoo, 'The Bail Jurisprudence of Ghana, Namibia, South Africa and Zambia' (2008) Forum of Public Policy. <<https://www.google.com/search?client=psy-ab&site=&source=hp&q=Samuel+Kwesi+Amoo%2C+%E2%80%98The+Bail+Jurisprudence+of+Ghana%2C+Namibia%2C+South+Africa+and+Zambia%E2%80%99+%28Forum+of+Public+Policy%2C+2008%29.+&btnK=Google+Search>> accessed 1 April 2016.

⁶⁹ David Sloss, 'Domestic Application of Treaties' (2011) Santa Clara Law Digital Commons <<http://digitalcommons.law.scu.edu/facpubs/635>> accessed 20 March 2018.

system is that in domestic legal system, a treaty does not possess the formal status of law unless a statute is enacted by the legislature which incorporates the treaty into domestic law.⁷⁰ International law therefore forms part of domestic law through new legislation or amending existing legislation. On the other hand in a monist system, ‘International and municipal law are part of the same system of norm’.⁷¹ This therefore means that there is no need to have the provisions of the treaty incorporated into domestic law since upon ratification the treaties become part of domestic law.

Whether Kenya is purely a dualist or a monist system by virtue of the provisions of the Constitution of Kenya 2010 and the enactment of the Treaty Making and Ratification Act, 2012⁷² which provides for the procedure for making and ratifying a treaty remains a subject of debate. The Constitution under Article 2(5) provides that ‘the general rule of international law shall form part of the law of Kenya’. The Constitution goes on to state that where any treaty or convention has been ratified by Kenya it constitutes part of the laws of Kenya.⁷³

It has therefore been argued that the provisions of Article 2(5) of the Constitution are ambiguous for failing to create a rank in instances where conflict arises between domestic and international laws leading to conflicting judicial decision on applicability of international and international treaties.⁷⁴

⁷⁰ *ibid.*

⁷¹ Ian Brownlie, *Principles of Public International Law* (7th edn OUP, Oxford 2008) 31.

⁷² Treaty Making and Ratification Act 2012.

⁷³ Constitution of Kenya 2010, Art 2(6).

⁷⁴ In *Pattni and Another v Republic*, the court held that international treaties were not applicable in Kenya unless made part of Kenyan Law while in the matter of *Re Zipporah Wambui Mathata* (2010) eKLR the judge stated that International Treaties and Conventions ratified by Kenya are imported as part of Kenyan Law by virtue of Section 2(6) of the Constitution.

This chapter examines the legislative framework in Kenya in order to determine to what extent they do or do not provide for the right liberty. This chapter begins by examining the international instruments touching on bail. It further examines the domestic instruments and the institution involved in the grant of bail in Kenya.

3.1 International Instruments

3.1.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights⁷⁵ was adopted as a non-binding resolution on 10th December, 1948 by the United Nations General Assembly.⁷⁶ In the words of Eleanor Roosevelt,⁷⁷ “It is not a treaty, it is not an international agreement, it is not and does not purport to be a statement of law or legal obligation”.⁷⁸ It was therefore not intended to be a binding resolution but was aimed to serve as a common standard of how people all over the world should be treated. Though not binding, it has served as a model both directly or indirectly for many Constitutions and laws touching on Human Rights.⁷⁹ Many African countries in the period following attaining their independence made reference to the UDHR⁸⁰ in their Constitution while some courts have also made reference to the UDHR while informing domestic law touching on human rights. However, some courts have rejected its relevance owing to the supremacy of domestic law. For example the court in Germany has held that the provision of the UDHR do not

⁷⁵ Hereinafter referred to as UDHR.

⁷⁶ <<http://www.un.org/en/sections/universal-declaration/history-document/>> accessed 4 July 2017.

⁷⁷ The chairman of the UN Commission of Human Rights during the drafting of the UDHR. She was also the U.S representative to the General Assembly.

⁷⁸ Hurst Hannum, ‘The UDHR in National and International Law’ 3:2 147. <<https://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2014/04/16-Hannum.pdf>> accessed 10 July 2017.

⁷⁹ *ibid* 145.

⁸⁰ Burundi (1962), Rwanda (1962) and Algeria (1963).

constitute the general rules of International law and therefore do not form part of the Federal law in terms of Article 25 of the Basic Law.⁸¹

The UDHR in its preamble recognizes the strong link between human rights and the rule of law. It also recognized the inherent dignity and equality of all human beings. The UDHR under Article 3 provides for individual right to life, liberty and security of persons. Article 9 prohibits arbitrary arrest, detention or exile of any person. The declaration further provides for full equality to a fair and public hearing in determining the rights and obligations of an accused person which is to be conducted by a tribunal that is Independent and Impartial. It also provides for the presumption of innocence of every accused person unless the contrary is proven in a public trial after the accused person has being accorded an opportunity to defend himself.⁸² The UDHR does recognize the importance of the right to liberty which is actualized by the grant of bail. Though not binding, the declaration has received wide recognition because it contains the idea that there exist certain common standards of decency that should be recognized by all people without discrimination and states should seek to protect them.

3.1.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights⁸³ was adopted by the United Nations General Assembly on 19th December, 1966 and it entered into force on 23rd March 1976. The ICCPR recognize the inherent dignity of all individuals and ensures protection of civil and

⁸¹ Judgment of June 29, 1957 B VerWG (High Admin. Ct), 5BVerwGE 153

Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' 25:287 GA J Int'L and Comp L 293.

Art 25 of the German Basic Law provides, 'The General rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory.'

⁸² UDHR Art 10, Art 11(1).

⁸³ Hereinafter referred to as the ICCPR.

political right. Article 2 of the ICCPR makes provision for the rights contained in the Covenant to be enjoyed by all persons without discrimination. Further Article 2(2) calls upon state parties to take the requisite steps in accordance with their Constitution or national law to give effect to the rights that have been recognized in the convention.

The ICCPR has addressed the right to liberty. Article 9(1) of the ICCPR provides for the right to liberty and security of person to everyone. It expressly prohibits arbitrary arrest and detention of any person. It goes on to prohibit the deprivation of liberty of any person except in accordance with procedures which have already been established by law. Article 9 of the ICCPR however recognizes that the right to liberty is not absolute and it can be fettered so long as it is within the confines of established law and within the respect of the rule of law.⁸⁴ Article 9 further requires the procedure for legally depriving the right to liberty to be prescribed by written law and to be properly defined with clarity to avoid broad interpretation or application.⁸⁵ Article 9(3) of the ICCPR further requires the arraignment of accused persons in court within reasonable time for the decision to be made on whether he should be released or remain in custody pending the conducting of his trial. It further provides that where there is no justification to keep the accused in custody, the court should order release of the accused person subject to guarantee of his future attendance in court.

3.1.3 The African (Banjul) Charter on Human and Peoples Rights

The African (Banjul) Charter on Human and Peoples Rights⁸⁶ was adopted on 27th June, 1981 and it entered into force on 21st October 1986. The ACHPR aims at promoting and protecting

⁸⁴ Refworld <www.refworld.org/docid/553eOf984.html> accessed 20 July 2017.

⁸⁵ *ibid.*

⁸⁶ Hereinafter referred to as ACHPR.

human and people's rights. It also recognizes the need to create and improve the lives of the African people through the protection of human rights.

Article 1 of the Charter mandates the state parties to the African Union who are signatories to the Charter to recognize the rights, freedoms and duties under the Charter. It expressly calls upon states to take any measures including but not limited to legislation so as to give effect to the said rights contained in the Charter. Article 1 therefore provides a window for state parties to take an active role in seeking the protection of the rights and freedoms contained in the Charter.

Article 2 further makes provision for enjoyment by all persons of rights and freedoms contained in the Charter without differentiation, prohibits distinction or any form of discrimination based on factors such as race, sex, ethnic groups, social or any other status. In essence Article 2 places every person on equal pedestal without distinction or discrimination. Article 3 further makes provision for equality of all persons before the law.

Article 6 of the ACHPR provides for the right to liberty and security of persons which freedom should not be deprived unless on conditions which have been previously set down by the law. The ACHPR seeks to give special protection to expectant mothers and mothers who have infants from pre-trial detention. It calls upon state parties to accord special treatment to expectant mothers and mothers with young or infant children by establishing and promoting 'measured alternative to institutional confinement' where they have been accused of committing a crime or where found guilty of infringing the Penal laws.⁸⁷

⁸⁷ ACHPR Art 30(1)(b).

The ACHPR not only calls upon state parties to take measures or steps necessary to protect people's rights without discrimination or differentiation but in case of expectant women or women with infants it goes a step further requiring state parties to seek alternative methods instead of resulting to institutional confinement.

The International community has therefore sought to protect human rights through international instruments which includes right to bail. The practice in the different jurisdiction has been incorporate provision on the fundamental rights and freedoms in their national Constitutions.⁸⁸ The substantive and procedural rules in respect to enforcement of the rights and freedoms have been left to the national legislature and the judiciary.

3.2 Domestic Instruments

3.2.1 The Constitution of Kenya, 2010

The Constitution is the Supreme law binding all people in the Republic of Kenya⁸⁹ 'Any law that contravenes the provision of the Constitution is considered null and void to the extent of its inconsistency'.⁹⁰ The Constitution further provides that the Bill of Rights applies to all persons which therefore mean that it should be enjoyed by every person.⁹¹

Article 10 of the Constitution provides for national values and principles to include the rule of law, human dignity, equal social justice, inclusiveness and human rights.⁹² While these values

⁸⁸ The Constitution of Kenya 2010, Chapter Four, the Constitution of the Federation of Nigeria (1999), Basic Law for the Federal Republic of Germany (23 May 1949) and The Constitution of The Republic of South Africa, Act No 108 of 1996 Chapter 2.

⁸⁹ The Constitution of Kenya 2010, Art 2(1).

⁹⁰ *ibid*, Art 2(4).

⁹¹ *ibid*, Art 20(1)(2).

⁹² *ibid*, Art 10(2)(a) and (b).

are not adhered to in entirety, their inclusion in the Constitution suggests that they resonate with the people of Kenya and that they are also an aspiration of what the people would like to have.

The Constitution expressly provides for the right to bail and bond irrespective of the nature of the offence committed. Article 49 (1) (h) provides for the right of an accused person to be granted bail pending trial subject to reasonable conditions except where there exist compelling reasons offering an explanation as to why the accused should not be released. The Constitution does not differentiate between bailable and non bailable offence as all accused persons can benefit from the grant of bail.

Article 49(2) provided that an accused person should not be remanded in custody where the offence is punishable by a fine only or where imprisonment term does not exceed 6 months. This Constitution provision therefore prohibits detention in case of minor offences which attract sentences not exceeding 6 months. Unlike Article 49 (1) (h) which allows denial of bail or bond due to compelling reasons, Article 49 (2) in its wording prohibits detention for persons arrested for minor offences.

Article 259 provides amongst other things that the provision of the Constitution should be considered according to the doctrine of the interpretation that the law is always speaking. Article 20(3) goes on to state that the court should adopt the interpretation that favors the enforcement of the rights and freedoms of the people of Kenya. For example in *Harun Mwau and 3 others v AG and 2 others*,⁹³ the court held that the Constitution shall be broadly and progressively interpreted so as to give effect to its spirit. This ruling resonated with Dworkin's theory of law as integrity

⁹³ (2011) Nairobi High Court Constitutional Petition No 65.

where he argues that judges in interpreting a statute must respect the intention of the legislature. If the contextual meaning of words in a legislative text is clear, the court must assign those words that meaning unless it can be shown they intended to give contrary results. Article 49 (2) of the Constitution makes provision prohibiting an accused person being remanded in custody where offence committed is punishable by the imposition of a fine only or imprisonment for a term that does not exceed six months. In such an instance law as integrity according to Dworkin calls upon the judges to fulfill the legislature's intention.

Article 49(1) (h) of the Constitution makes provision for the release of an accused person on bail and bond on reasonable conditions unless there exists compelling reason to fetter the right. In awarding bail, the theory of law as integrity would require the judge to not only consider the procedural due process but also identify those principles of justice and fairness that underpin the law on bail. The judge should then decide which interpretation would accord the accused person justice and fairness before making bail decisions.

Justice Kiage in his book states that persons in conflict with the law come from humble backgrounds and are unemployed. In the circumstances they are unable to raise the cash bail imposed by the court. As a result, the right to bail as granted by the Constitution is of little assistance to such accused persons.⁹⁴

3.2.2 The Criminal Procedure Code⁹⁵

The Criminal Procedure Code⁹⁶ was established to provide for procedure to be followed in criminal cases. The CPC expressly makes provision for bail. However, under the CPC not all

⁹⁴ Patrick O Kiage, *Essentials of Criminal Procedure in Kenya* (Law Africa Publishers 2010).

⁹⁵ The Criminal Procedure Code CAP 75 (CPC 1930).

offences are bailable such as the offence of murder, treason, robbery with violence, attempted robbery with violence.⁹⁷ The Constitution is the supreme law in Kenya and any law that is inconsistent with the provisions of the Constitution is void.⁹⁸ The Constitution therefore takes precedence over any other written law and all accused persons are therefore entitled to apply for and be granted bail. In *R v Jakton Manyendi*⁹⁹ it was stated that the Constitution pronounced all offences as bailable as opposed to the earlier position where capital offenders were not granted bail. Similarly in *R v Danson Mgunya and Another*¹⁰⁰ where the accused persons were charged with the offence of murder, the court stated that with the promulgation of the Constitution it was now possible for accused persons charged with the offence of murder to be granted bail. Also in *R v Stephen Robi Marwa and Another*¹⁰¹ the court stated that Article 49(1)(h) of the Constitution now places persons charged with capital offences and non-capital offences on the same footing as they are all entitled to bail unless there exist compelling reasons to fetter the right.

The CPC further provides for release on execution of a bond without sureties.¹⁰² Under the CPC the amount set as bail should take into account the circumstances of each case and should not be excessive.¹⁰³ The court is therefore tasked with the duty of considering each case brought before it depending on its own circumstances. It is therefore the discretion of the court to determine the amount to be awarded as bail.

⁹⁶ Hereinafter referred to as the CPC.

⁹⁷ CPC 1930, s 123(1).

⁹⁸ The Constitution of Kenya 2010, Art 2.

⁹⁹ *R v Jakton Manyendi and Others* (2012) eKLR.

¹⁰⁰ *R v Danson Mgunya and Kassim Sheebwana Mohamed* (2010) eKLR; Mombasa HC Criminal Case No 26 of 2008.

¹⁰¹ *R v Stephen Robi Marwa and Daniel Marwa Boke*; (2013) Kisii HC Criminal Case No 76 of 2013.

¹⁰² *ibid.*

¹⁰³ CPC 1930, s 123(2).

The CPC empowers the High Court to direct the release of an accused on bail or review the bail terms issued by a lower court or police officer.¹⁰⁴ In *R v Perry Muhindi Achega*¹⁰⁵ the accused persons were charged with the offence of theft of cheques amounting to Kshs 26 Million from Bank of India. The accused person was initially granted bail of Kshs 1 million were he applied for review. The magistrate reviewed the bail terms to a bond of Kshs 6 million with one surety. The accused person applied for review again and was granted bond of two sureties of Kshs 3 million each and he applied for review at the high court. The high court opined that the bond terms imposed by the trial court were harsh, excessive and not reasonable. The accused were granted bond of Kshs 400,000/= with a surety of the same amount. Similarly, in *R v Hassan Abdulhafedh Zubeidi and 3 Others*¹⁰⁶ the accused persons were charged with the offence of illegal activities involving Dubai Bank and were admitted to a bond of Kshs 50 million with a surety of similar amount or cash bail of Kshs 10 million. The high court termed the bail terms as excessive and proceeded to grant cash bail of Kshs 3 million to each of the accused persons with an alternative bond of 5 million with surety of the same amount.

Under the CPC in granting bail or bond, the court is to take into account the relevant circumstances existing in each case which include the nature or seriousness of the offence, whether the accused person has any community ties, the accused persons previous record in respect of honouring previous bail terms and the strength of the evidence the accused person has committed the offence.¹⁰⁷ The accused person can also be denied bail where he had been

¹⁰⁴ *ibid*, s 123(3).

¹⁰⁵ *Republic v Perry Muhindi Achega* (2007) eKLR; Nairobi HC Miscellaneous Application No 239 of 2007.

¹⁰⁶ *Republic v Hassan Abdulhafedh Zubeidi, Ali Bashir Sheikh and Prof. Wilson Hassan Nandwa* (2015) eKLR; Nairobi HC Miscellaneous Criminal Application No 453 of 2015.

¹⁰⁷ CPC 1930, s 123.

previously granted bail but he failed to appear in court when required or for purposes of his own protection.¹⁰⁸ In *R v Francis Kirima M'ikunyua*¹⁰⁹ the court made reference to the Articles 123 and 123A of the CPC on the considerations the court should take into account before granting bail. Also in *R v Danson Mgunya and Another*¹¹⁰ the court made reference to the Nigerian Supreme Court decision in *Alhaji Mujahid Dukubo-Asari v Federal Republic of Nigeria*¹¹¹ where the court listed the considerations that ought to guide the court in granting bail which include nature of the charge, strength of the evidence availed, likelihood of interference with witnesses and likelihood of the accused person failing to avail himself during trial.

The CPC further requires that the arrested person be released on bail except in instances where the accused has previously failed to attend court on bail or if granted bail he is likely to fail to honour the bail terms or for his own protection.¹¹² The court is also required to determine bail or bond that is sufficient to be executed by the accused.¹¹³ The CPC also provides for release on bail or on the accused own recognizance where a bond should be executed and the accused will be released on bail or with one or more sufficient sureties.¹¹⁴

3.2.3 National Police Service Act¹¹⁵

The National Police Service Act was enacted to give effect to Article 243, 244 and 245 of the Constitution and to make provision for the operation of the National Police Service. This Act

¹⁰⁸ *ibid*, 123A.

¹⁰⁹ *Republic v Francis Kirima M'ikunyua* (2016) eKLR; Machakos HC Criminal Case No 11 of 2016.

¹¹⁰ *Republic v Danson Mgunya and Kassim Sheebwana Mohamed* (2010) eKLR; Mombasa HC Criminal Case No 26 of 2008.

¹¹¹ *Alhaji Mujahid Dukubo-Asari v Federal Republic of Nigeria* (2016) S.C. 20A/2016.

¹¹² CPC 1930, s 123A(2).

¹¹³ *ibid*, s 124.

¹¹⁴ *ibid*, s 124.

¹¹⁵ National Police Service Act 2011 (NPSA 2011) CAP 84.

empowers a police officer in the course of investigating an alleged crime which does not constitute a disciplinary crime to allow individuals to execute a bond to guarantee their future turnout in court when required to do so.¹¹⁶ The National Police Service Act prohibits charging fees by police officers when granting bail or bond in criminal cases, in cases of recognizance or personal appearance in court.¹¹⁷

3.2.4 Prevention of Terrorism Act¹¹⁸

The prevention of Terrorism Act is an Act of Parliament which was enacted to detect and prevent the occurrence of terrorist activities. The Act provides for release of a person on execution of a bond for a reasonable sum by a police officer before the expiry of twenty four hours.¹¹⁹ This provision expressly requires that the sum executed as a bond be reasonable. This Act provides that were a police officer detains a person for a period exceeding 24 hours, the police officer has to produce the suspect in court where the suspect may be released unconditionally or upon imposing such conditions as the court deems necessary.¹²⁰ This Act also provides for the execution of a bond for a reasonable amount which the court may deem appropriate or the provision of one or more suitable securities for the bond for purposes of ensuring the attendance of a suspect.¹²¹

There are however circumstances where the accused persons right to bail or bond may be limited under the Prevention of Terrorism Act. This Act makes provision for limitation of the right to

¹¹⁶ NPSA 2011, s 53.

¹¹⁷ *ibid*, s 50(2).

¹¹⁸ Prevention of Terrorism Act 2012 (PTA 2012) CAP 30.

¹¹⁹ PTA 2012, s 32(2).

¹²⁰ *ibid*, s 33.

¹²¹ *ibid*, s 33 (6)(a)(b).

bail to ensure proper investigation of the terrorist act, proper detection and prevention of the terrorist act and to ensure that the accused person is enjoying his rights does not hinder the enjoyment of rights of other persons.¹²²

The practice is the investigating officer in most cases swears an affidavit or avails documents to support one or more of the compelling reasons raised by the prosecution in order to convince the court why the accused person should be denied bail. In *Republic v Mahadi Swaleh Mahadi*¹²³ the investigating officer swore an affidavit deponing to the fact that the accused had carried out several terrorist attacks in Lamu and therefore national security required that he be detained pending hearing and determination of the suit. The court proceeded to deny the accused bail. Similarly in *R v Hassan Mahati Omar*¹²⁴ the affidavit sworn by the investigating officer disclosed that there were documents indicating that the grenades launched in terrorist attacks was the possession of the accused person who if released on bail was likely to interfere with the prosecution witnesses. The court proceeded to deny the accused bail.

3.2.5 The Children Act¹²⁵

The Children Act was enacted to make provisions relating to the care and protection of children. The courts and other institutions both private and public are required to act in the best interest of the child.¹²⁶ The Children Act provides for the grant of bail where the offender is a child.¹²⁷ The Child Offender Rules provides that in instances where the arrested person is under the age of

¹²² *ibid*, s 35(2).

¹²³ *Republic v Mahadi Swaleh Mahadi* (2014) eKLR; Mombasa HC Criminal Case No 23 of 2014.

¹²⁴ *Republic v Hassan Mahati Omar & Fardosa Mohamed Abdi* (2014) eKLR; Nairobi HC Revision Case No 31 of 2014.

¹²⁵ The Children Act 2001 (CA 2001) CAP 141.

¹²⁶ CA 2001, s 185(4)(2).

¹²⁷ *ibid*, s 2 defines a child as, 'any human being below the age of eighteen years'.

eighteen, a recognizance should be entered by the parent or guardian of the minor or other persons deemed responsible, for a certain sum, in order to have the minor released.¹²⁸ This is however subject to limitations in that bail will not be granted to a child unless the charge is for murder, manslaughter or any other serious crime, where it is in the interest of the minor to keep them away from associating with persons deemed undesirable or unless the release of the minor is likely to interfere with effective administration of justice.¹²⁹

Section 146 of this Act provides that the provisions under the CPC in respect to bonds for good behavior and enforcement also apply to the bond provisions under the Children Act. This Act further provide that where a child is accused and arraigned in court, the child may be released on bail upon fixing conditions which the court will deem necessary. Where the court declines to grant bail, it should inform the child that he has a right to apply for bail in the High Court.¹³⁰ Where the court is of the opinion that the child offender should not be granted bail, the court may order him to be remanded in custody and where the child offender is remanded it should be in a children's remand home.¹³¹ The Act requires the case involving the child offender to be heard within 3 months from the date when plea is taken and if the case is not completed within the stipulated period, then the case should be dismissed and the minor should not be subjected to trial again in respect to the same offence. This Act is also keen to protect the child's rights by providing that in instances where the matter involves a child, whose case is heard before a court

¹²⁸ Child Offender Rules, Fifth Schedule, Children Act, No. 8 of 2001, r 5.

¹²⁹ *ibid*, r 5.

¹³⁰ *ibid*, r 9.

¹³¹ *ibid*, r 510(1).

which is higher in rank than the children's court, the child should not be remanded for a period longer than 6 months where thereafter the child should be released on bail.¹³²

Rule 5 of the Child Offender Rules¹³³ requires the Police officers to release accused persons who are children and vulnerable persons upon issuance of collateral by a parent or guardian for such an amount that the police officer is of the opinion is reasonable to ensure court attendance. If the detention cannot be avoided, the police officer should ensure that the child is not detained together with adult accused persons.¹³⁴ Further, the rules require the court to consider other alternatives to holding accused person who are minors or persons requiring special needs in custody such as issuing directions for close supervision by a person deemed fit by the court.¹³⁵

3.2.6 The Penal Code.¹³⁶

The Penal Code was established to provide a code of criminal law. The Penal Code provides for bail or bond in that an accused person detained on a warrant will be arraigned in court immediately where the court may choose to remand the accused pending hearing or grant him bail with a satisfactory surety to guarantee his future attendance in court when required.¹³⁷

3.2.7 Bail and Bond Policy Guidelines

The Bail and Bond Policy Guidelines are not binding but provide the framework within which discretion in granting bail by the courts is to be exercised. The policy guidelines seek to guide the police and the courts in bail decision making while balancing the right of the accused person

¹³² CA 2001, s 12.

¹³³ Child Offender Rules, Fifth Schedule, Children Act, No. 8 of 2001, r 5.

¹³⁴ *ibid*, r 6.

¹³⁵ *ibid*, r 10(6).

¹³⁶ The Penal Code 1930 (PC 1930) CAP 63.

¹³⁷ PC 1930, s 34(2).

with that of the public which includes the victims of crime. The guidelines also seek to streamline and address discrepancy that currently exist in decisions pertaining to grant of bail and ensure bail is administered fairly.¹³⁸

Policy directives in respect to police officers granting bail provide that the bail granted at the police station should be such that it will secure the attendance of the accused and the cash bail should be reasonable. The policy directives further provide that bail hearings should be conducted where the prosecution ought to satisfy the court that one or more of the compelling reasons exist to justify denial of bail. The guidelines provide that the courts should request for bail reports where the court is of the opinion that more information is required to make a fair bail decision.¹³⁹ The guidelines advocate for reasonable bail and bond terms being granted by the police and the courts. In addition to title deeds and motor vehicle log books, the policy guidelines provide that pay slips, bank drafts and insurance bonds may be used as security documents.¹⁴⁰

Courts in Kenya have constantly made reference to the Bail and Bond Policy Guidelines. *In R v Boniface Mutwiri Cheme*,¹⁴¹ the judge stated that, ‘the Bail and Bond Policy Guidelines now call for the court to balance the rights of the accused person and the rights of the victims of crime and the society at large and to grant bond terms which are reasonable in the circumstances of each case’. Similarly in *Hassan Abdul Hafedh Zubeidi, Ali Bashir Sheikh and Prof. Wilson Hassan Nandwa v Republic*,¹⁴² the judge noted that, ‘the guidelines were developed to give guidance in making decisions on bail in line with the Constitutional provisions’. Although the bail and bond

¹³⁸ Bail and Bond Policy Guidelines, 2015.

¹³⁹ *ibid* 24.

¹⁴⁰ *ibid* 30.

¹⁴¹ *R v Boniface Mutwiri Cheme*, (015) Nairobi HC Criminal Case No 74 of 2015.

¹⁴² *Hassan Abdul Hafedh Zubeidi, Ali Bashir Sheikh and Prof. Wilson Hassan Nandwa v R* (2015) Nairobi HC Miscellaneous Application No 453 Of 2015.

policy guidelines in Kenya provide for the rules which the judges and judicial officers and the police should use as a guide in granting bail, the rules do not expressly provide for the amount of bail that should be granted. They further do not provide for what amounts to reasonable bail or bond. Law as integrity in applying the principles of justice, fairness and procedural due process seek to have each accused persons situation made fair and just according to the same standards. This therefore means that in the award of bail principles of justice, fairness and procedural due process should be applied to ensure accused persons are placed on the same pedestal when bail is granted and should not be a notion that only economically advantaged accused persons can benefit from pretrial liberty.

3.3 Institutions involved in the grant of bail or bond.

The judges, judicial officers and police officers have discretion to determine whether or not to grant bail. The state interest on pretrial detention is to ensure public safety from the point where the accused is arrested to his trial, preserve the integrity of the criminal justice system, the safety of the witnesses, victims and ensure that crime once proved is punished.¹⁴³ The primary consideration by the court and the police officers in granting bail is whether the accused person will avail himself in court when required. Further, that the accused will not make attempts to obstruct justice by interfere with witnesses who will testify on behalf of the state or any evidence to be produced in Court. Once satisfied, the police officer or the court determines the bail or bond terms to secure his or her release.

3.3.1 The Police.

¹⁴³ Migai Akech and Sarah Kinyanjui, 'Pretrial Detention in Kenya; Balancing the Rights of Criminal Defendants and the Interest of Justice (East African Journey of Peace & Human Rights Vol 19, 2013) 7.

The Constitution, CPC and The National Police Service Act empower police officers to grant bail and bond. The CPC for example provides that the officer or court may release an accused person on execution of a bond instead of bail.¹⁴⁴ Further, the CPC provides for release of an accused person by the court or the police officer on bail terms that they deem fit or reasonable.¹⁴⁵ The Police Act prohibits attaching any fee to the grant of bail.¹⁴⁶

Once a suspect is arrested, he or she is initially taken to the Police Station where he or she is kept in a cell. Depending on the nature of the offence the suspect can be released on bail or held in custody to be arraigned in Court. The Constitution provides that an accused person should be arraigned in court to answer to charges made against him as soon as reasonably possible but it should be within 24 hours after being arrested.¹⁴⁷

The practice is where accused persons are charged with minor offences they are granted bail unless there is the likelihood of the accused failing to appear in court. The accused person is therefore required to deposit a certain sum of money with the Police and a receipt is issued. After conclusion of the case, the amount paid as bail is refunded. However, there are instances where the accused persons are charged with petty offences such as petty theft and they are not released on bail by the police for fear of absconding.¹⁴⁸ The accused thereafter has to await trial while in custody. For offences classified as serious such as murder or robbery with violence, the police officers do not grant bail and the accused has to await arraignment in Court. This is

¹⁴⁴ CPC 1930, s 123(1).

¹⁴⁵ *ibid*, s 124.

¹⁴⁶ Police Act, Chapter 84 Laws of Kenya s 24.

¹⁴⁷ The Constitution of Kenya 2010, Art 49 (1)(f).

¹⁴⁸ Jamie Feller, 'The Price of Freedom: Bail and Pre Trial Detention of Low Income Non Felon Defendants In New York City' (2010) <<https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new-york>> accessed 4 July 2017.

mainly due to the seriousness of the offence coupled with the likelihood of absconding. The Police are reluctant to release suspect on bail if the alleged offence has an impact on the community such as murder. The suspect is therefore held in custody for his own protection. In *Republic v Gilbert Kipkorir Koech*¹⁴⁹ the pre bail report revealed that release of the accused charged with murder on bond was not favorable because of the likelihood of retaliation by members of the public.

Where an accused is released on bail at the police station and is arraigned in Court, the Court may either maintain the bail granted at the police station or the amount may be enhanced or reduced. An accused person may also be released on free bond. The accused is therefore released on his own recognizance provided that the suspect avails a surety. In *Leonard Archibala Muyonga v Republic*¹⁵⁰ the accused was released on his execution of a free bond of Kshs 300,000/=. Similarly in *JMK and 9 others v R*¹⁵¹ the court made reference to *AMK and MK* where the court granted free bond to accused persons who were sixteen years old noting that the Constitution required favorable treatment of children.

3.3.2 Courts.

The Constitution and the CPC empowers the courts to grant an accused person bail or release him on the execution of a bond with or without sureties.¹⁵² The Constitution guarantees the accused persons right to bail and bond unless there are compelling reasons for the bail or bond to be

¹⁴⁹ *Republic v Gilbert Kipkorir Koech* (2017) eKLR; Kabarnet HC Criminal Case No. 58 of 2017.

¹⁵⁰ *Leonard Archibala Muyonga v Republic* (2007) eKLR; Nairobi HC Miscellaneous Criminal Application No. 535 of 2007.

¹⁵¹ *JMK and 9 others v Republic* (2015) eKLR; Garissa HC Criminal Case No. 24 of 2014.

¹⁵² Bail and Bond Policy Guidelines (2015).

denied.¹⁵³ The Constitution, further in its mandatory terms requires that where an accused person is charged with an offence which is punishable by imposition of a fine only or imprisonment whose term does not exceed 6 months then he should not be detained.¹⁵⁴

The grant of bail is hinged on the accused person's presumption of innocence until the contrary is proved as the case is yet to be heard and the veracity of the evidence tested. Bail is thus granted as a condition to motivate the accused to turn up in court whenever required to do so. In *Republic v Godfrey Madewa and 6 others*,¹⁵⁵ the court made reference to the case of *Nganga v Republic*,¹⁵⁶ where the court stated that the main objective of bail is to secure the accused persons future attendance in court to answer to the charges made against him at a specific time. The primary consideration remains whether or not the accused will attend trial if released on bail in making the bail decision. The courts are therefore tasked to determine whether or not to grant bail, determine the amount to grant as bail and also attach suitable conditions where bail is granted if need be to ensure the accused future turnout in court.¹⁵⁷ The practice is that an accused person is arraigned in Court and a charge sheet is read where he accepts or denies having committed the offence. The Court then has to make a decision whether the accused will be granted or denied bail.

Of paramount importance is whether the accused will voluntarily avail himself in court when required to do so. If the Court is satisfied that the accused will turn up, he is then released on

¹⁵³ The Constitution of Kenya 2010, Art 49(1)(h).

¹⁵⁴ *ibid*, Art 49(2).

¹⁵⁵ *R v Godfrey Madewa & 6 others* (2016) eKLR.

¹⁵⁶ *Nganga v Republic* (1985) KLR 451.

¹⁵⁷ *ibid* 15.

terms set by the Court.¹⁵⁸ The burden of proof is normally on the prosecution to show why the accused person should not be released on bail. In *R v Fredrick Ole Leilman and 4 others*¹⁵⁹ the advocate acting for the interested party made reference to the Bail and Bond Policy Guidelines urging court to evaluate the presence of compelling reasons based on the criterion set out. The court noted that it has a duty to balance the accused person's right to liberty and at the same time take into account the public interest thus balancing the rights of an accused person and the interest of justice.

The court is therefore tasked to determine whether the prosecution has substantiated one or more of the compelling reasons why the accused person should be remanded pending trial. In *R v Abraham Irungu Mwangi*¹⁶⁰ the court stated that, 'what amounts to compelling reasons must be clearly stated, properly described and explained'. However where the compelling reason is based on belief there has to be justification or a basis for the belief and should not be a mere allegation. In *R v Jakton Mayende*¹⁶¹ the court stated that compelling reasons are, 'reasons that are forceful and convincing in such a magnitude as to make the court to strongly believe that the accused person should be kept in custody as opposed to being released on bail'. Similarly in *R v Kokonya Muhssin*¹⁶² the court adopted the meaning of the phrase compelling reasons as stated in *R v Jakton Mayende*.

¹⁵⁸ Akech (n 42).

¹⁵⁹ *Republic v Fredrick Ole Leilman & 4 Others* (2016) eKLR; Nairobi HC Criminal Case No. 57 of 2016.

¹⁶⁰ *Republic v Abraham Irungu Mwangi* (2014) eKLR; Nairobi HC Criminal Case No. 68 of 2014.

¹⁶¹ *R v Jakton Manyende and 3 Others* (2012) eKLR; Bungoma HC Criminal Case No. 55 of 2009.

¹⁶² *R v Kokonya Muhssin* (2013) eKLR; Busia HC Criminal Case No. 2 of 2013.

In determining whether to release a suspect on bail or not, the Court takes into account the factors such as how serious the offence committed is which may influence the accused decisions to abscond. In *R v Danson Mgunya and Another*¹⁶³ the accused persons a chief and an administrative police officer were both charged with the offence of murder. They had however continued working uninterrupted for two and a half years from the time of commitment of the offence and their arrest. The court in granting bail noted that there was no attempt by the accused persons to move away from court's jurisdiction from the time of commission of the offence and their arrest. Similarly in *R v David Ochieng Ajwang alias Dudi and 11 others*¹⁶⁴ the court noted that self-preservation of an accused person may occur where the accused ensures that 'critical evidence is suppressed forever or the applicant himself takes flight'. In *R v Fredrick Ole Leilman and 4 others*¹⁶⁵ the 1st and 2nd deceased were leaving court after the hearing of the case involving the 2nd deceased and the 1st accused. The court noted that it appeared that the attack on the deceased was intended to interfere with the trial before the court. The court therefore declined the application for bail on the ground that there was the likelihood of interference with witnesses by the accused persons.

The Court also considers whether the release of an accused would be a danger to the society and whether it would be in the interest of the accused to remain in custody pending hearing for his own protection. Depending on the circumstances of each case, the Court also determines whether to release the accused on bail subject to conditions such as reporting to the Officer Commanding

¹⁶³ *R v Danson Mgunya and Kassim Sheebwana Mohammed* (2010) eKLR; Mombasa HC Criminal Case No. 26 of 2008.

¹⁶⁴ *R v David Ochieng Ajwang alias Daudi and 11 Others* (2013) eKLR.

¹⁶⁵ *R v Fredrick Ole Leilman & 4 Others* (2016) eKLR; Nairobi HC Criminal Case No. 57 of 2016.

Station in the jurisdiction or the area chief where the offence was allegedly committed.¹⁶⁶ In *Republic v Richard David Alden*¹⁶⁷ the accused was required to report to the Officer Commanding Station Karen or to provide a convenient station to report to. Similarly in *Republic v Diana Salim Suleiman*¹⁶⁸ the accused was required to attend to the investigating officer every 7 days. In *Republic v Nzaro Chai Karisa and 3 others*¹⁶⁹ the accused was placed under the supervision of the chief until the case was heard and determined by the court. The Court may also require the accused to provide one or two sureties for a certain sum. If the accused fails to attend Court the sum guaranteed by the surety is forfeited.

Article 22(1) of the Constitution creates a window for persons to institute court proceedings in instances where there is likelihood of infringement of his rights. The Court can therefore grant ‘anticipatory bail’ that is bail granted before a person is arrested when he is able to persuade the Court that his liberty is at stake. The apprehension must however, be real and not speculative.¹⁷⁰

Police Officers may require to hold the accused for a number of days on the basis that investigations have not been concluded. Thereafter the accused can be released on bail if there is no compelling reason to keep him or her in custody. In *Ali Mcheni Ali v R*¹⁷¹ the trial court declined to grant the accused bail on the strength of an affidavit sworn by the police to allow further investigations. The court made orders to the effect that the accused person should be held

¹⁶⁶ *Republic v Diana Salim Suleiman* (2014) eKLR; Mombasa HC Criminal Case No. 23 of 2014.

¹⁶⁷ *Republic v Richard David Alden* (2016) eKLR; Nairobi HC Criminal Case No. 48 of 2016.

¹⁶⁸ *Republic v Diana Salim Suleiman* (2014) eKLR; Mombasa HC Criminal Case No. 23 of 2014.

¹⁶⁹ *Republic v Nzaro Chai Karisa and 3 Others* (2011)eKLR; Mombasa HC Criminal Case No. 5 of 2011.

¹⁷⁰ *Republic v Eric Mailu, Commissioner of Police and Director of Public Prosecutions* (2013) eKLR; Nairobi Miscellaneous CR Application No 24 of 2013.

¹⁷¹ *Ali Mcheni Ali alias Shee lako v R* (2011) eKLR; Mombasa HC Miscellaneous Application No 7 of 2011.

in custody indefinitely. On review, the high court noted that the prosecution had not demonstrated any compelling reason and proceeded to grant bail to the applicant.

Where the prosecution is able to prove on a balance of probability that the accused once released is unlikely to appear on future dates, the accused may be detained. The accused for example will not be released on bail if it is shown that he has not honoured bail terms on previous occasions. This however must be proved and should not be a mere allegation. In *R v Beth Wanjiru Mwarangu*¹⁷² the accused had absconded from trial and was in hiding for twenty years. The court declined to grant bail on the ground that there was likelihood that the accused would not attend court if granted bail. Similarly in *R v Beth Wanjiru Mwarangu*¹⁷³, the court made reference to *Nganga v R*¹⁷⁴ where in deciding an application for bail, the court stated that the accused had failed to adhere to bail terms on previous occasion which in itself was a good ground for refusal by the court to grant bail.

3.4 Conclusion

Although the courts and the police officers grant bail and bond whether in court or at the police station, where no compelling reasons are proved by the prosecution, the accused persons are in many instances not able to furnish the amount thus leading to pre-trial detention. At this juncture where the court grants bail, it is satisfied that the accused is not a flight risk, is not likely to interfere with witnesses and is not a threat to the society. What is left is to attach a condition which is intended to motivate the accused person to appear in court on a future date. It is not

¹⁷² *Republic v Beth Wanjiru Mwarangu* (2017) eKLR; Nanyuki HC Miscellaneous Application No 7 of 2017.

¹⁷³ *ibid.*

¹⁷⁴ *Nganga v Republic* (1985) KLR 451.

meant to be a punishment for being accused of having committed an offence. Inability to meet the bail and bond terms leads to pre-trial detention and also defeats realization of the accused Constitutional right to liberty.

CHAPTER FOUR:

REALIZATION OF THE RIGHT TO LIBERTY IN KENYA

4.0 Introduction

The concept of bail emerged during the Middle Ages in England. It was more emancipatory as opposed to a mechanism of locking people up.¹⁷⁵ In 1689, the English Bill of Rights declared that, excessive bail shall not be required nor excessive fines imposed.¹⁷⁶ Its aim was to outlaw widespread pre-trial detentions by setting deliberately unaffordable bail. In light of its historical meaning, bail represents a set of conditions to secure an accused persons future appearance in court.¹⁷⁷ A century later, the Eight Amendment to the United States Constitution adopted the same language word for word that, “excessive Bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted”.¹⁷⁸

In Kenya, the Constitution makes provision for the release of an accused person on bond or bail subject to reasonable conditions.¹⁷⁹ Similarly, the Criminal Procedure Code provides that bail should not be excessive.¹⁸⁰ The Constitution and the Criminal Procedure Code require that the

¹⁷⁵ Nick Pinto, ‘The Bail Trap’ *New York Times Magazine* (New York, 2015).
<http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=0> accessed 1 April 2016.

¹⁷⁶ *ibid.*

¹⁷⁷ Michael S. Woodruff, ‘The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation,’ (2013) 66(1) *Rutgers Law Review* <<http://www.rutgerslawreview.com/wp-content/uploads/archive/vol66/issue1/66-1%20WOODRUFF.pdf>> accessed 5 July 2017.

¹⁷⁸ Mary Sigler, ‘The Political Morality of the Eighth Amendment’ (2011) 8:403 *Ohio State Journal of Criminal Law* 403. <http://moritzlaw.osu.edu/osjcl/Articles/Volume8_2/Sigler.pdf> accessed 5 July 2017.

¹⁷⁹ The Constitution of Kenya, Art 49(1)(h).

¹⁸⁰ CPC 1930, s 123.

chosen means of securing the accused persons future attendance should not be more burdensome than necessary.

The cornerstone of the criminal justice system is that no accused person should be subjected to any form of punishment. Accused persons have the right to liberty. This may however be limited, but even then, it has to be within the framework of the law. Pre-trial detentions when the case is yet to be heard therefore, in principle, goes against this rule.¹⁸¹ This chapter examines the right to liberty in Kenya. It further examines the extent to which the right has been protected and violated in Kenya.

4.1 Realization of the right to liberty in Kenya

The drafters of the 2010 Constitution understood the importance of the right to liberty hence providing that an accused person should be granted bail unless compelling reasons exist which may fetter the right. In the wake of the promulgation of the Constitution, 2010 the courts in Kenya have sought to protect the right to liberty in view of its importance. As correctly stated in *Republic v Danson Mgunya and Another*,¹⁸² ‘Liberty is precious and no one’s liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted...’ Similarly, the Supreme Court in United States has ruled that Liberty is the norm and

¹⁸¹ Ken Strutin, ‘Pretrial Detention Bail and Due Process’ (2011)
<<http://www.llrx.com/features/pretrialdetention.htm>> accessed 15 April 2016.

¹⁸² *R v Danson Mgunya and Kassim Sheebwana Mohammed* (2010) eKLR; Mombasa HC Criminal Case No 26 of 2008.

detention prior to an accused person undergoing trial should be exercised carefully in limited exceptional cases.¹⁸³

Granting of bail entails balancing of rights in considering the rights of an accused person who is presumed innocent upon arrest and the public interest on the other. In *Republic v Daniel Ndegwa Wachira*¹⁸⁴ the court in its judgment noted that the court is tasked to try and strike a balance between creating a tie to the jurisdiction and an accused person's right to freedom from unnecessary pretrial detention before his conviction while bearing in mind the circumstances surrounding each case. The court further held that the rights of the accused and the public good should be kept in mind when determining bail applications.

In theory, during bail hearing the court should tailor the bail amount to the accused's financial status setting it only as high as reasonably necessary to ensure that the accused will return to Court.¹⁸⁵ An amount that would act as an incentive for an accused who lives on Kshs. 10,000/= a month is not the same as one who lives off Kshs. 100,000/= a month. In practice however, courts lack the time or even the inclination to determine the bail amounts individually. The whole affair is normally a rushed process taking only a few minutes. Revisiting the interviews carried out during the field survey, one Respondent (D) earning an income of Kshs. 500/= per day from selling vegetables was granted Kshs. 50,000/= as bail or bond of Kshs. 100,000/=. Although she was of the opinion that the bail terms granted were reasonable considering the bail terms granted

¹⁸³Shaila Dewan, 'When Bail is Out of Defendants Reach, Other Costs Mount' *The New York Times* (New York 2015) <http://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html?_r=0> accessed 14 April 2016.

¹⁸⁴*R v Daniel Ndegwa Wachira* (2015) Nyeri HC Criminal Case No. 12 of 2015.

¹⁸⁵ Andrew Garn, 'The Price of Freedom' (2010) Human Rights Watch.

to other accused persons who had committed similar offences, she was still in custody for one year and two months unable to raise the bail amount.¹⁸⁶

In Kenya, the Bail system is primarily money based where by the court awards the bail amount based on the seriousness of the offence and accused person's ability to pay is totally ignored.¹⁸⁷ The courts almost invariably require the accused persons to deposit some form of collateral in order to act as an incentive for their future return in Court. The bail is set in the form of cash or secured bond.¹⁸⁸ When the bail amount as granted by the court is high, the accused person is unable to meet the bail terms and thus has to await trial in jail.

4.2 The extent to which right to liberty in Kenya is protected.

The courts in Kenya have discretion to grant or refuse bail provided that the discretion is exercised judicially. The Constitution guarantees every accused person the right to be presumed innocent until the contrary is proven. The main and primary consideration in the court exercising its discretion to grant or deny bail is whether the accused will voluntarily and readily attend trial and that he will not abscond.¹⁸⁹ In exercising their discretion to award or deny bail, courts not only consider the provisions of the Constitution, legislation in Kenya pertaining to bail and the Bail and Bond Policy Guidelines but also pertinent laws from other common law jurisdictions such as Bail Act of England¹⁹⁰ and Section 60(4) of the Criminal Procedure Code of South

¹⁸⁶ Interview with accused person (D) (Milimani, Nairobi 5 October 2016).

¹⁸⁷ 'Bail and its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform' (1974) 9:1 Valparaiso University Law Review 175.

¹⁸⁸ Bond secured by a deposit of money and lien upon property.

¹⁸⁹ *R v Job Kenyana Musoni* (2012) Nairobi HC Criminal Application No. 399 of 2012.

¹⁹⁰ Bail Act of England 1976 Ch 63.

Africa.¹⁹¹ Jurisprudence from other jurisdiction is however, only persuasive and not binding on the courts. In the wake of the promulgation of the 2010 Constitution, the courts have sought to protect the accused constitutional right to liberty while at the same time seeking to protect the interests of the society. The prosecution has thus been tasked to show the existence of one or more compelling reasons which upon consideration, the accused ought not to be released on bail. Courts have been quick to state that mere listing of compelling reasons by the prosecution is not enough.¹⁹² The compelling reasons have to be clearly outlined and explained to persuade the court.

For example where the accused is charged with capital offences such as murder and robbery with violence which offences carry the mandatory death sentence, the prosecution has been quick to state that since the accused has been furnished with witness statements and is well aware of who is to testify then there is likelihood of interference with witnesses. Further, the prosecution has often argued that because the offence committed by the accused is serious, he or she is likely to abscond when released on bail.¹⁹³

In a bid to protect accused persons right to liberty, the courts have required the prosecution to prove one or more of the compelling reasons. For example in *Republic v Peter Muia Mawia*¹⁹⁴ the court held as follows;

¹⁹¹ South Africa Criminal Procedure Code Act No 51 of 1977.

¹⁹² *Republic v Peter Muia Mawia* (2015) Machakos HC Criminal Case No 48 of 2015.

¹⁹³ *Republic v Francis Kiri Mikunywa* (2016) Machakos HC Criminal Case No 11 of 2016.

¹⁹⁴ *Republic v Peter Muia Mawia* (2015) Machakos HC Criminal Case No 48 of 2015.

The grant of the witness statements pursuant to the Constitutional right cannot in my view be used as a ground to deny bail by suggesting likely interference with witnesses because the accused now knows who the persons to testify against him are. If the supply of witness statements were coupled with a likelihood as a result, to interfere with the witness were accepted as a compelling criteria for refusal of bail, no accused person who had taken his Constitutional benefit to the prosecution's evidence would ever make bail...For the ground of likelihood to interfere with witnesses to amount to a compelling reason, there must be such evidence to support a real likelihood of interference in the nature of relationship or circumstances between the accused and the said witness as would indicate possibility of that accused exerting influence, direction or control over the said witnesses so as to demonstrate a real danger of interference and thereby affect the DPP's capability to successfully prosecute the offence charged.

This decision resonates with Dworkin's theory of law as integrity where in the right answer thesis he argues that in every case that comes before the judge, he has to seek to find the right answer befitting the case before him. In this case, the question arising is whether to grant bail to an accused person bearing in mind that the witness statements have been furnished and he is well aware of who is intended to testify against him. In seeking to find the right answer, the judge considers the grant of witness statements as a Constitutional right on the one hand and the accused right to bail and the states duty to protect the integrity of the criminal justice system on the other hand. Bearing in mind that the Constitution provides for the right of every accused person to have access to any evidence or statements that are intended to be used against him, this

therefore cannot be used as a ground to justify the denial of bail as correctly held in the above cited decision.

In *Republic v Francis Kirima Mikunyua*¹⁹⁵ the Judge noted that the Constitution provides for bail in all offences including capital offences which would include serious offences such as murder. The learned judge was therefore of the opinion that mere seriousness of the offence and severity of sentence will not suffice as compelling reasons. There has to be something more in relation to the two factors that make the accused flight risk more likely.

In *Republic v Peter Muia Mawia*¹⁹⁶ the accused, a 21 year old was accused of murder.¹⁹⁷ In an application for bail, the court noted that no evidence had been adduced to show that there was likelihood of interference with witnesses by the accused person. The court further took note of the fact that there was no evidence that the accused person had previously failed to adhere to the bail terms or that there was need for him to be held in custody for his own protection. The court therefore ordered the accused to execute a bond to attend court for his trial, secure two sureties in the sum of Kshs. 500,000/= and to make no contact whatsoever either personally or in proxy with the witnesses. The court thus took into consideration that the accused was 21 years old having finished high school and awaiting admission at the university hence no cash bail was required. This bail decision also resonates with Dworkin's theory of law as integrity which requires the judge to look at every accused person individually taking into account the special circumstances that are unique before making the bail decision. The court took into account that

¹⁹⁵*R v Francis Kirimi Mikunywa* Machakos (2016) HC Criminal Case No 11 of 2016.

¹⁹⁶*R v Peter Muia Mawia* (2015) Machakos HC Criminal Case No 48 of 2015.

¹⁹⁷ Contrary to Section 203 as read with Section 204 of the Penal Code.

the accused person had finished high school and therefore having no source of income capable of being deposited as cash bail.

In *R v Daniel Ndegwa* accused was charged with murder.¹⁹⁸ One of the compelling reasons adduced by the prosecution to deny the accused bail was that the accused may be hurt by the public who may be inclined to revenge because of the nature of offence committed. The Judge stated as follows,

Allegations are premised on mere apprehension and no cogent proof has been offered. The alleged act of burning the accused house illegal as it may have been a reaction by the public acting at the heat of the moment and ought not to be a ground to justify continual incarceration of the accused against his constitutional right to be granted bail.

The accused person was released on a bond of Kshs 300,000/= plus one surety of Kshs 500,000/= or cash bail of Kshs 250,000/= and one surety of Kshs 500,000/=. The accused was further required to attend to the Deputy Registrar once every month.

From the above court decisions, it is clear that the courts have required the prosecution to adduce evidence in support of one or more of the compelling reasons in a bid to ensure that the accused person's right to bail is not unreasonably denied. This has therefore been a positive step in ensuring that the accused person's right to bail is protected.

¹⁹⁸ *R v Peter Muia Mawia* (2015) Machakos HC Criminal Case No. 48 of 2015.

In the field survey carried out one of the Respondents a Magistrate from Kibera Law courts stated that Magistrates in Kibera have taken measures to visit prisons and review bond and bail terms where the terms granted are excessive. They go a step further to ask accused persons why they are in custody despite reduced bail terms. The Respondent also stated that attempts are made to expedite cases for accused persons who have been in custody for too long.¹⁹⁹ These steps taken by the courts for example in Kibera are positive steps towards ensuring that accused persons are not subjected to pretrial detention because of their inability to meet the bail terms.

In essence the prosecution is requirement by the court to substantiate one or more of the compelling reasons existing before award or denial of bail. This is a positive step towards ensuring that accused persons right to liberty is not unnecessarily limited. Human rights call for equal treatment of accused persons without discrimination or differentiation. It requires the judges and judicial officer to accord the same treatment to all accused persons. Law and integrity calls for equal treatment of accused persons based on the same standards taking into account every accused person's individual circumstances that make his case or situation different before a bail decision can be made by the judges and judicial officer.

4.3 The extent in which right to liberty has been undermined in Kenya

The term 'reasonable conditions' as enshrined under Article 49(1)(h) of the Constitution are not defined. The Bail and Bond Policy Guidelines also do not define what amounts to reasonable

¹⁹⁹ Interview with the Magistrate (Kibera Law Courts, Nairobi 11 November 2016).

conditions. The Criminal Procedure Code provides that the bail terms should not be excessive.²⁰⁰

What is reasonable or not excessive is therefore left to the discretion of the court.

The Kenyan courts have sought to uphold the accused Constitutional right to liberty where no compelling reasons exist to fetter the right. However, the challenge has been determining what form of security is sufficient to guarantee the accused persons future appearance in court. The focus has been a monetary bail system where the accused in most instances is required to deposit cash bail or surety bonds²⁰¹ or security bonds²⁰² all quantified in monetary terms. In such a monetary bail system, the accused economic status is the distinguishing factor determining those who are able to meet the bail terms and those who await trial in jail.

Sureties enter into an agreement with the court such that in the event that an accused person fails to appear in court, a certain sum of money is forfeited. First, the Court has to determine the suitability of the surety in terms of knowing where the accused resides for tracing purposes in case he absconds. In addition, the surety must sign the documents binding themselves to have a certain sum of money forfeited should the accused abscond. The Court also reserves the power to reject a surety.

In essence the surety has to be a person financially capable of depositing the surety bond amount should the accused fail to appear in Court. Persons standing as sureties are normally the accused

²⁰⁰ CPC 1930, s 123(2).

²⁰¹ The surety bonds himself to ensure the accused attends court. If the accused absconds the amount of money the surety bond himself is forfeited.

²⁰² Security documents such as title deeds and logbooks are deposited in court. Their validity is ascertained and valued. Should the accused fail to appear the security is sold to recover the amount.

person's family members or friends. Inability to meet the financial burden is another disqualifying factor in gaining pre-trial liberty. However, due to the financial burden, many people do not want to stand surety and take the risk. Finding someone to stand surety proves difficult since the accused's family, relatives and friends in most instances are not better placed financially as is the accused. Sometimes, though willing and ready to stand as surety they cannot qualify on monetary grounds. In the field survey carried out, 90% of the respondents indicated that the relatives were not able to assist due to financial constraints and even were financially able, they were not willing to stand as surety.²⁰³

Security Bonds on the other hand require the accused to furnish title documents or logbooks. The security documents have to undergo verification process for authenticity purposes. Thereafter the security is valued to determine whether it is of the value alleged and whether it is sufficient for the security bond. In the field survey carried out, 90% of the respondents indicated that they have no title deed or log book to give as security.²⁰⁴

A car or a title document though highly desirable remains a luxury far within the reach of many accused persons. The accused family and friends also struggle to meet their basic needs and therefore a car or title document is out of reach. Indigent accused persons if required to furnish security bonds are therefore unable to. Respondent G who was interviewed in the field study

²⁰³ Interview with accused persons (Milimani, Nairobi 4 October 2016 and 5 October 2016).

²⁰⁴ Interview with accused persons (Milimani, Nairobi 4 October 2016 and 5 October 2016).

indicated that a friend had asked for Kshs 20,000/= to give his log book as security. Respondent G paid the money but his friend disappeared with the money and no log book was availed.²⁰⁵

The presence of cash bail, surety bond or security bonds valued in monetary terms means that accused persons with means are able to secure pre-trial release while indigent accused persons have to await trial in jail. For example a lawyer charged with stealing Kshs 10 million from Barclays Bank was released on a cash bail of Kshs 200,000/= by a Nairobi court.²⁰⁶ On the other hand, in the field study carried out, Respondent K was charged with fraudulently obtaining Kshs 1 million and was granted bail of Kshs 300,000/= and bond of Kshs 1 million.²⁰⁷ Unable to meet the bail terms the respondent awaits trial in jail. In a country where people struggle to find and keep employment living paycheck to paycheck to meet their family needs, money to pay as bail or bond may not be available.

Further, in the field survey carried out of the ten respondents interviewed only 10% were of the opinion that the bail granted was reasonable although unable to raise the bail amount or post the bond granted. 90% of the respondents were of the opinion that the bail granted was too high and therefore not reasonable.²⁰⁸ Analysis of the research instruments issued to the probation officers revealed that 66% opined that bail terms granted by the courts were excessive considering the social status and background of the accused persons.²⁰⁹ Although the prosecution counsels interviewed on the other hand opined that bail granted by the court was not excessive, they cited

²⁰⁵ Interview with accused person (G) (Milimani, Nairobi 4 October 2016).

²⁰⁶ Paul Waweru, 'Lawyer denies theft charges' *Daily Nation* (Nairobi 16 December 2016).

²⁰⁷ Interview with accused person (K) (Milimani, Nairobi 4 October 2016).

²⁰⁸ Interview with accused persons (Milimani, Nairobi 4 October 2016 and 5 October 2016).

²⁰⁹ Interview with probation officers (Milimani and Kibera, Nairobi 22 November 2016 and 24 November 2016).

corruption as one of the major challenges undermining the right to bail and bond in Kenya.²¹⁰

The advocates interviewed opined that bail granted by the court in most instances is excessive and accused persons are therefore forced to seek review of the bail and bond terms which may or may not be reduced.²¹¹

The amount set as bail is determined arbitrarily with little or no regard to the accused person's financial ability to meet the bail terms. Consequently, the accused persons without assets cannot obtain bail. The money bail and the high pre-trial detention rates therefore impose high burdens on the accused family's society. In a country like Kenya where approximately 46% of the population lives below the poverty line, the reality is that at least a large number of people, if arrested, would have difficulties posting bail.²¹² For people struggling to buy food or meet their monthly rent obligations, bail of Kshs. 100,000/= or even Kshs. 50,000/= can be impossible to provide just as one of Kshs. 1,000,000/=. The survey interviews carried out also disclosed that although some respondents had their bail reviewed to as low as Kshs. 100,000/= based on the accused monthly earning and taking into account that a majority of the accused persons had minors depending on them, the sum remained to be substantially high and unable to meet the bail terms they have to await trial in jail.²¹³

Although pre-trial detention may be suitable for accused persons charged with violent crimes, accused charged with low level offenses such as petty theft, sending them to jail for lack of bail

²¹⁰ Interview with Prosecution Counsels (Milimani, Nairobi 17 October 2016).

²¹¹ Interview with Defence Advocates (Nairobi, 6 October 2016).

²¹² UNICEF 'Overview-Kenya at a glance' (2009) <http://www.unicef.org/kenya/overview_4616.html> accessed 22 November 2016.

²¹³ Interview with accused persons (K) (Milimani, Nairobi 4 October 2016).

money cannot be equated with basic understanding of the principles of justice and fairness.²¹⁴ Further, Article 49(2) of the Constitution expressly states that where offences committed attract punishment by imposition of fines only or imprisonment term that does not exceeding 6 months, the accused person should not be remanded in custody. In Kenya, persons charged with having committed offences within the brackets of Article 49(2) are still held in custody if bail is set and the accused person is unable to meet the bail terms.

In Kenya, in some instances, the bail system assumes accused persons are guilty thereby deferring the presumption of innocence. The bail or bond amounts are thus set to keep accused persons in custody, not as a guarantee for future court attendance. Sometimes the courts set bail or bond terms at high amounts for the fear of being seen as soft on crime by the public to the detriment of the accused persons. Conditions for grant of bail are therefore greater than reasonably necessary to ensure that the accused person attends court.²¹⁵

Lessons can be learnt from other jurisdictions on modes of securing of bonds. For instance, the New York Criminal Procedure Law²¹⁶ provides for partially secured appearance bond and partially secured surety bond. In case of partially secured appearance bond, the bond is secured by deposit of money that does not exceed 10% of the total amount of bond the accused person is supposed to pay.²¹⁷ The accused person therefore enters into an agreement to pay the whole

²¹⁴ Andrew Garn, 'The Price of Freedom' (2010) Human Rights Watch.

²¹⁵ *ibid.*

²¹⁶ New York State Criminal Procedure Law 2016 s 520.10(1) (a)-(i).

²¹⁷ John Snape, *New York State Criminal Procedure and Penal Code* (Snape Legal Publishing 2016) 241.

<https://books.google.co.ke/books?id=4by7CgAAQBAJ&pg=PA244&lpg=PA244&dq=The+New+York+Criminal+Procedure+Law++provides+for+partially+secured+appearance+bond+and+partially+secured+surety+bond&source=>

amount of the bond in the event that he fails to appear during the trial. In case of a partially secured surety bond, the bond is secured by a deposit of money that does not exceed 10% of the total amount to be deposited as bond.²¹⁸ This is normally paid by the accused person's relatives, family or friends who enter into an agreement with the court to be responsible for the payment of the whole bond amount in the event that the accused person fails to attend court when required.

In case of all offences the court has discretion to direct in which form bail will be deposited and may further direct different amounts varying with the form. The court normally conducts an inquiry in order to determine the reliability of the person depositing bail, the value and whether the security deposited is sufficient.²¹⁹

Although the courts do give reasons why bail was granted or declined, the Bail and Bond Policy Guidelines require that the courts give reasons for denying accused person bail and reasons for attaching conditions before granting bail.²²⁰ In practice, although courts give reasons for denying or granting bail they do not give reasons why bail was granted this much. The result is that the amounts granted as bail or bond in a given case is determined arbitrarily with little or no regard to the accused's financial ability to meet the bail terms.

Courts also can and do make profoundly different bail and bond terms for accused persons charged with the same offence. One court may set bail at Kshs. 10,000/= and another at Kshs. 40,000/=. For example, in the field survey carried out respondents D and E were charged with

[e=bl&ots=T6HtPEUjcV&sig=-aBK0SOgdRGst_PdC_XulHbrEgs&hl=en&sa=X&redir_esc=y#v=onepage&q=The New York Criminal Procedure Law provides for partially secured appearance bond and partially secured surety bond&f=false](https://www.legis.state.ny.us/bills/2016/2016_0000/2016_0000_bill_000000_0000.html)> accessed 20 July 2017.

²¹⁸ *ibid* 244.

²¹⁹ New York State Criminal Procedure Law 2016 s 520.30.

²²⁰ Bail and Bond Policy Guidelines (2015) 28.

murder. Respondent D was granted bail of Kshs 50,000/= and bond of Kshs 100,000/= while Respondent E was granted bail of 1 million and surety bond of the same amount noting that both Respondents are not persons of means.²²¹

Bail terms imposed are not supposed to be prohibitive but are supposed to act as an incentive to ensure that the accused person voluntarily avails himself in court. Although the courts in Kenya seek to protect the accused right to liberty, the court in awarding bail often quantified in monetary terms do not have regard to the accused financial status.

In *Hassan Mahati Omar and Fardosa Mohamed Abdi v R*²²² the accused persons were denied bail in the trial court²²³ on grounds that the prevailing state of security required accused persons to be held in custody pending trial. The 2nd applicant had not been charged with any offence on previous occasions and was thus released on bail. The 1st applicant on the other hand had been charged on prior occasions on terrorism related wrongs. Though acquitted on the previous charges, the court proceeded to deny bail and grant bond to the 2nd applicant of Kshs 1,000,000/= and one surety of the same amount.

Likewise in *Job Kenyanya Musoni v Republic*²²⁴, the accused was charged with the offence of Robbery with Violence²²⁵ and breaking into a building and committing a felony,²²⁶ the court,

²²¹ Interview with the Accused persons (A) and (D) Milimani, Nairobi 4 October 2016 and 5 October 2016).

²²² *Hassan Mahati Omar and Fardosa Mohamed Abdi v R* (2014) eKLR; Nairobi HC Criminal Revision No. 31 of 2014.

²²³ (2014) Nairobi Chief Magistrates Criminal Case Number. 490 of 2014.

²²⁴ *Job Kenyanya Musoni v Republic* (2012) Nairobi HC Criminal Case No. 399 of 2012.

²²⁵ Contrary to Section 295 as read with Section 296(2) Penal Code.

having found that the prosecution had failed to discharge its burden of proving compelling reasons, proceeded to grant cash bail of Kshs 1,000,000/= together with one surety of Kshs 2,000,000/=.

In the above cases, although the court granted bail, no regard was had to the accused financial status or accused person's ability to pay. Whereas a person who is gainfully employed or carries out profitable business may be able to raise the amount with ease, accused persons who may not have permanent employment will find the amount impossible to raise. Finding someone to stand as surety for the sum of Kshs 1 million or 2 million may also be difficult as many people do not want to stand as surety because of the risk involved.

In *Cosmas Mututa Muvia v Republic*,²²⁷ the accused was charged with murder.²²⁸ The accused applied for bail and there being no compelling reason to deny him bail, he was granted bail in the sum of Kshs 150,000/= with a surety of similar amount. The learned judge considered an affidavit sworn by the accused who deponed that he is employed as a *shamba boy* (grounds man) earning Kshs 6,000/= per month, the sole bread winner and had two minor children. Although the sum of Kshs 150,000/= as bail is reasonable on the face of it, the accused earning Kshs 6,000/= a month would mean that to raise the bail amount he would have to work for 25 months. Unable to raise the bail amount, the consequence is pre-trial detention.

²²⁶ Contrary to Section 306(a) as read with section 306(b) Penal Code.

²²⁷ *Cosmas Mutua Muvia v Republic* (2015) Embu HC Criminal Case No. 33 of 2015.

²²⁸ Charge of murder contrary to Section 204 as read with Section 203 of the Penal Code.

In the survey carried out, respondent A was denied bail on grounds that there was likelihood that she would threaten witnesses. However, at the time of conducting the interview 35 out of 45 witnesses had already testified the respondent having been in custody for 2 years.

The Bail and Bond Policy Guidelines seek to guide the courts in bail and bond decision making while balancing the right of the accused person with that of the public which includes the victims of crime.. In the survey carried out, the two judicial officers interviewed stated that they do individually make reference to the Bail and Bond Policy Guidelines in making bail decisions. Two out of the three prosecutors interviewed however disclosed that courts rarely make reference to the Policy Guidelines. One of the prosecutor interviewed revealed that some judicial officers and even defence advocates were not very familiar with the provisions of the Guidelines alluding to lack of proper dissemination and sensitization of the Guidelines.²²⁹ This therefore offers some explanation as why the impact of the Guidelines has not been optimal in guiding the courts in making bail decisions.

The Bail and Bond policy Guidelines propose the preparation of pre bail reports to guide the court in granting bail and bond. Although advocating for pre bail reports to guide the court, only few cases are being referred for preparation of the report. The total number of probation officers is few compared to the number of accused persons. In instances where cases are referred for preparation of the pre bail report there is delay in submitting the report resulting to accused

²²⁹ Interview with probation officers (Milmani and Kibera, Nairobi 22 November 2016 and 24 November 2016).

persons remaining in custody. In other instances the court's decision on bail and bond is dependent on the seriousness of the offence.

In the field study carried out, only 10% of the respondents had been interviewed by a probation officer and even though interviewed, the pre bail report was yet to be availed.²³⁰ The probation officers interviewed were of the opinion that the pre bail report had not met its objective as most cases were not referred to the probation officers to prepare the pre bail report.²³¹ The prosecutors interviewed were also of the view that the pre bail report has not met its objectives as it is an avenue of corruption where the probation officer is compromised and the report prepared is not truthful.²³² The advocates interviewed were also of the opinion that pre bail report has not met its objective as very few cases are referred and even when referred, the reports take too long forcing the accused persons to stay in custody much longer.²³³

In essence, the bail process in Kenya is a hurried exercise where the bail and bond terms granted are determined arbitrarily with no regard to the accused financial status. Unable to meet the bail and bond terms, the accused court attendance is assured through pretrial detention.

4.4 Conclusion

The Constitution guarantees every accused person's the right to liberty by the grant of bail on reasonable conditions except where compelling reasons exist to fetter the right. The courts in

²³⁰ Interview with accused persons (Milimani, Nairobi 4 October 2016 and 5 October 2016).

²³¹ Interview with probation officers (Milimani and Kibera, Nairobi 22 November 2016 and 24 November 2016).

²³² Interview with Prosecution Counsels (Milimani, Nairobi 17 October 2016).

²³³ Interview with Defence Advocates (Nairobi, 6 October 2016).

exercising their discretion judiciously have to weigh the different factors before granting bail or bond. However, the emphasis on a monetary bail system has led to widespread pretrial detention. 30-40% of the prison population consists of pre-trial detainees.²³⁴ A large number of the pretrial detainees are young, come from poor economic backgrounds, have no stable source of income and have little or no education. Many accused persons lose their jobs once jailed even for relatively short periods. This leads to lost income, inability to meet basic needs, they cannot take care of their children and ultimately there is threat of disintegration of the family.

The court correctly ought to weigh the accused persons right to bail against the interest of the justice system to safeguard the society from lawlessness. However, each case before the court is unique presenting individual factors which the court ought to take into consideration. Bail as granted in Kenya is not tailored to every accused person. The decision to grant bail should therefore be made solely with the intention of ensuring that an accused person attends court when required.

²³⁴ Migai Akech and Sarah Kinyanjui, 'Pretrial Detention in Kenya; Balancing the Rights of Criminal Defendants and the Interest of Justice (2013) 19 East African Journey of Peace and Human Rights 2.

CHAPTER FIVE:

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This chapter presents the conclusions on the findings of the research, makes recommendations based on the findings and the conclusions arrived at from the study.

5.1 Conclusions

The study was guided by four research questions namely, what is the scope of the right to liberty in Kenya, secondly the extent to which courts are protecting or undermining the right to liberty by awarding or denying bail and bond, thirdly whether excessive bail and bond terms are imposed hence undermining the right to liberty and last but not list how effective the bail and bond policy guidelines are in guiding the courts to exercise their discretion properly. Additionally the study sought to test the hypothesis whether excessive bail terms are granted by the courts thus undermining the accused right to liberty.

Chapter two examines the theoretical and conceptual framework underpinning the study which is founded on the human rights discourse and the theory of law as integrity as espoused by Ronald Dworkin.

Proponents of the choice theory approach on human rights have individual liberty and equality as their main concern. They propound that all human beings possess certain rights such as the right to liberty which includes the right to bail which cannot be taken away arbitrarily unless where it

is provided by law. It advocates for equality in the application of the right to bail without discrimination or any form of differentiation. Human rights discourse therefore establishes the requirement for the protection of accused person's right to bail by ensuring that every accused person's situation is made just and fair according to the same standards.

Dworkin in law as integrity argues that the government should apply the principles of justice, fairness and procedural due process in the same standards to all its citizens. In his right answer thesis, he advocates for the judge to seek to find the right answer in every case that comes before him. Therefore in making any bail decision the judge should try as much as possible to consider other circumstances surrounding every accused person not limited to nature and seriousness of offence but also whether the accused person is gainfully employed, attends school or any training institution or has a source of income before making the bail decision in order to make every accused persons situation just and fair according to the same standards. Dworkin's theory therefore establishes that no accused person should be unfairly advantaged or disadvantaged in the grant or denial of bail.

Chapter three examines the international Instruments governing right to liberty. They include the UDHR, ICCPR and the ACHPR. It also examines the domestic instruments touching on bail such as the Constitution and the CPC. From the analysis of the above international, regional and domestic instruments it is my argument that there exists a comprehensive and cogent framework on right to liberty which Kenya should comply with to ensure that accused persons right to liberty is protected.

In seeking to answer the first research question, chapter 3 also discusses the domestic legislation governing the grant of bail. It discusses the conditions the prosecution must meet before denial or grant of bail. It also discusses the institutions involved in granting bail and the procedure leading to the grant of bail.

This chapter established that the Constitution, the Criminal Procedure Code and the Bail and Bond Policy Guidelines strive to promote the accused persons right to liberty while at the same time ensuring that the public interest is also protected to safeguard the sanctity of the criminal justice system. This chapter also established that although the courts have made positive steps to protect the accused right to liberty, the grant of bail and bond terms which accused persons are not able to meet has led to pre-trial detention which undermines the right to liberty.

Chapter four seeks to answer the second, third and fourth research questions. It discusses the extent to which the right to liberty has been protected and undermined. This chapter discusses the practice of granting bail in Kenya and analyzed the weaknesses and strengths of the said practice. It also analyzed the case law with a view of establishing how effective the practice of granting bail in Kenya is.

This chapter argued that granting of excessive bail terms by the courts results to the accused persons being unable to meet the bail terms resulting to pretrial detention. This ultimately leads to undermining of the accused persons right to liberty. This chapter further argues that granting of bail based on factors such as the seriousness of the offence and the likely period of sentence if convicted while ignoring the accused financial ability has led to the imposition of bail terms

which many accused persons are unable to meet while others having committed the same or similar offences are put in a relatively easy position.

The courts have wide discretion in awarding bail and bond. The amount is granted mainly after considering the nature of the offence, the likely sentence in the event of conviction and whether or not the accused is likely to abscond if released. Consequently, the practice has been to award relatively similar amounts to all persons in case of similar offences in a particular court district. As a result, accused persons with means are granted bail terms which they can easily meet while accused persons of lower financial standing are completely unable to meet the bail and bond terms. As correctly stated by Justice Kiage, ‘bail though granted becomes an empty shell devoid of succor to the accused persons’.²³⁵

The Bail and Bond Policy Guidelines resonate with the right to liberty and if fully implemented would enhance the realization of this right. However the survey revealed that the Guidelines are not implemented to the letter. One area of concern for instance is that although the guidelines propose the use of pre bail reports to guide the courts in making bail decisions not all cases are referred to the probation officers for preparation of the pre bail reports. Even when the cases are referred for preparation of the pre bail reports, a lot of time is taken before the reports can be availed in court as the number of accused persons is large compared to the number of probation officers. The accused person is therefore required to stay in custody pending the presentation of the pre bail report by the probation officer.

²³⁵ Patrick O Kiage, *Essentials of Criminal Procedure in Kenya* (Law Africa Publishers 2010).

5.2 Recommendations

Based on the forgoing conclusions, this study makes the following recommendations:

5.2.1 Courts

5.2.1.1 Bail Hearings

The courts ought to implement the Bail and Bond Policy directives by carrying out bail hearings.

For the bail hearings to have meaning there is need for the introduction of standard forms that will set out the accused income, assets, financial obligations, place of residence, employment status, whether attending school or any training program, or other information that may be relevant to gauge the accused financial status at the bail hearing. The accused should also provide his actual place of residence, his immediate family residence and his rural home for tracing purposes in the event that the accused fails to turn up in court.

The courts can thereafter make efforts to tie the bail amounts more directly to an accused persons financial resources and should not grant amounts which they know or believe the accused is unlikely to pay. More accurate information relating to the accused financial ability will be important to determine appropriate bail amount or bond amounts in those instances when a financial bond may be necessary.

5.2.1.2 Unsecured bond and personal recognizance.

This study recommends the implementation of the Bail and Bond Policy Guidelines which direct that the court should use its discretionary authority granted under the Constitution to set bail in forms and amounts that accused persons can afford. The courts should first consider releasing petty offenders on unsecured bond or personal recognizance. If this is not deemed sufficient to guarantee accused person's future turn out in court, bail should be set in the lowest level

necessary to ensure appearance in court and should not impose amounts that result to pre-trial detention of non-felony offenders.

In cases of offences which are punishable by fines only or where imprisonment term does not exceed six months, where unsecured bond or personal recognizance is not considered sufficient to ensure future turn out in court, the court should set bail at the lowest level necessary.

5.2.1.3 Partially secured appearance bail.

This study recommends the introduction of the partially secured appearance bail where the accused deposit a fraction of the bail amount but not less than 10 % where the accused is not able to deposit the whole lump sum in court.²³⁶ For example if the bail amount is set at Kshs. 100,000/= the accused would be required to pay Kshs. 10,000/=. In the event that he does not appear in court when required without any justifiable cause, the accused will be liable to pay the remainder of 90%. If however the accused attends trial to its conclusion the 10% deposit paid is refunded.

5.2.2 Police

5.2.2.1 Personal Recognizance

The responsibility of releasing accused persons on bail is shared by the judges, judicial officers and the police officers according to the Criminal Procedure Code. This study recommends that the police should therefore exercise their discretion in granting bail pending arraignment in court in case of petty offences. The police officers should also make efforts to ensure that accused persons are arraigned in court as soon as reasonable possible but not later than 24 hours after their arrest.

²³⁶New York State Criminal Procedure Law 2016 s 520.10(1) (a)-(i).

5.2.3 Defence Counsels

5.2.3.1 Unsecured Surety Bonds

This study recommends that defence counsels acting for accused persons should before the accused is arraigned in court gather as much information as possible about the accused financial status and should vigorously advocate for bail to be set in a form and amount that accused can afford which should include use of unsecured surety bonds. For petty offenders or where the accused is not at flight risk for example, the accused parents or close relatives can appear in court and promise to pay a specified sum of money should the accused fail to appear in court.

5.2.4 Public

5.2.4.1 Public Education

This study recommends sensitization and continuous engagement for judges and other judicial system stakeholders including prosecutors, defence counsels, law enforcement, jail staff and government officials about the need and opportunity for sufficient improvements in pre-trial justice policies and practices.

There is also need to expand community education programs that inform people in the community about the right to bail. There is need to educate the members of the public on what it means for an accused to be granted bail, the bail process, their legal rights and what is expected which could help people navigate the part of the bail process more successfully. This would also aid in making the public aware that release on bail itself does not amount to an acquittal.

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