

**RIGHT TO BAIL IN KENYA: EXPLORING ALTERNATIVE NON-
FINANCIAL BAIL TERMS**

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DECLARATION

I, **NDURU LOUIS TARCIUS M**, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

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This thesis has been submitted with my approval as the University Supervisor.

Signature _____

PROF. WINIFRED KAMAU

DEDICATION

This research project is dedicated to all my family members and friends for the unconditional support and encouragement throughout this period. God bless them all.

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Ali Medjnoune v. Algeria, Communication No. 1297/2004, U.N. Doc.

CCPR/C/87/D/1297/2004 [2006]

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para, 7

Michael and Brian Hill v. Spain, Communication No. 526/1993, U. Doc. CCPR/C/59/

D/526/1993 [2 April 1997]

Regina v Harrow exp. Morris [1972] W.L.R. 607

ABBREVIATIONS

AG	Attorney General
CJ	Chief Justice
DPP	Director of Public Prosecution
ICC	International Criminal Court
CPC	Criminal Procedure Code
CPA	Criminal Procedure Act
NPTSA	National Police Service Act
UDHR	Universal Declaration on Human Rights
ICCPR	International Covenant on Civil and Political Rights

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CHAPTER 1

INTRODUCTION

1.1 Background to the Problem

The right to bail is a fundamental safeguard that ensures accused persons are protected from unlawful detention or arbitrary deprivation of their fundamental rights and freedoms. The Bill of Rights under Chapter four of the Constitution¹ has focused attention on certain individual rights which are now accepted widely as being of fundamental nature, but some like right to bail are subject to the demands of the state in certain restricted circumstances. Therefore, Article 49 (1) (h) of the Constitution recognizes this right to bail and provides the means by which restrictions are to be imposed and monitored to balance the interest of the victims, protection of the accused and demands of the state.

Article 49 (1) (h) of the Constitution states that any arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. From the Content of Article 49 (1) of the Constitution, court can either impose financial or non-financial bail condition. However, Lumumba defines bail as an agreement between the accused and his sureties as the case may be and the court that the accused will pay a certain sum of money fixed by the court should he fail to attend his trial.”² Therefore, due to an inadequate legislative provision and different interpretations of what constitute reasonable bail conditions, bail has mainly been predominantly granted based on financial bail

¹ The Constitution of Kenya, 2010.

² Patrick L.O. Lumumba, *Criminal Procedure in Kenya* (LawAfrica Publishing (K) Ltd 2008) P. 23.

conditions. Indeed, Mutunga noted that in 2015, the country had 20,544 people remanded in prison due to inability to post bail and a total of 53, 789 inmates, which was beyond the capacity of the correctional facilities.³ Further, he stated that “there has been exorbitant, unjustifiable and unaffordable bail conditions imposed on accused persons who are at all times presumed innocent until proof of guilty.”⁴

More so, according to the information of the Ministry of Interior & Coordination of National Government, Kenya Prison Services the present number of prison population in Kenya stands at 54,000 of whom 48 % are pre-trial detainees while 52% are sentenced prisoners as at 2018.⁵ Contrary to Article 49 (2) of the Constitution providing that petty offenders should not remanded in custody, courts have not embraced alternative non-financial bail conditions, to ensure petty offenders enjoy their constitutional right to bail.

In light of the above, it is important to evaluate various regulations on the right to bail at international level, regional level, domestic and institutional level with the aim of identifying the legal, policy and institutional challenges that threaten the very existence of alternative non-financial bail conditions. The following instruments were examined, namely: the Universal Declaration of Human Rights (UDHR),⁶ the International Covenant on Civil and Political Rights (ICCPR),⁷ the Convention on the Rights of the Child⁸ and the African Commission on Human

³ Willy Mutunga, ‘Bail and Bond Policy Guidelines’ <www.judiciary.go.ke> accessed 10th August 2016.

⁴ Ibid.

⁵ Kenya Prison Brief, <<http://www.prisonstudies.org/country/Kenya>> accessed 16th August 2018.

⁶ Universal Declaration of Human Rights (1948).

⁷ International Covenant on Civil and Political Rights (1966). Adopted by United Nations General Assembly Resolution 2200 (XXI) of 16th December 1966. Entered into force on 23rd March 1976.

⁸ The convention on the Rights of the Child.

and Peoples' Rights (ACHPR)⁹. All these guarantee the right to liberty and security of an arrested person. Further, at the domestic level, the Constitution of Kenya, 2010, Criminal Procedure Code, Children Act, Bail and Bond Policy Guideline were examined.

There will also be a comparative study on the right to bail of New Zealand, South Africa and New South Wales in Australia because these countries have an established alternative non-financial bail conditions in their criminal justice system and Kenya can learn great from their experiences. Further, a survey was conducted with pre-trial detainees and key informants to explore whether alternative non-financial bail conditions were granted by courts in Machakos County.

1.2 Statement of the Problem

The right to bail is a fundamental right protected under the Constitution of Kenya, 2010. Once an accused person has been arrested and detained for committing an offence, the Constitution provides that such a person should be released temporarily on conditions pending the charge. However, the Kenyan courts predominantly impose financial bail conditions under which accused persons are to be released from remand upon payment of a certain sum to the court as an assurance of next appearance.

There is therefore the need for review of Kenya's legal framework governing bail with a view of exploring alternative non-financial bail conditions which will ensure that the constitutional right to bail is accessible to all persons and not just those who can afford.

⁹ The African Commission on Human and Peoples' Rights was adopted by the African Union formerly Organization of African Unity on 27th June 1981 and came into force on 21 October 1986.

1.3 Theoretical Framework

This research study draws from the natural law theory, social contract theory, human right theory and procedural law theory.

1.3.1 The Natural Law Theory

Natural law theory derive from the nature of humanity postulate true law must only reflect the nature of humanity and answer to a ‘higher law’ (the divine law), but it must derive from and respect absolute fundamentals inherent in humanity.¹⁰ Natural theories identify natural law as permanent, universal, eternal and unchanging.¹¹

Thomas Aquinas distinguishes four different kinds of natural law: eternal law that comprises of laws that govern nature of an eternal universe, divine law concerned with those standards that must be satisfied by a human being to achieve eternal salvation, natural law comprises of those precepts that govern behavior of beings possessing reason and free will and human law which is a dictate of reason from the ruler to the community he rules.¹² According to Aquinas, therefore human law (positive law) is derived from natural law. This derivation has different aspects which natural law dictates what the positive law should be. Further, according to Aquinas positive laws, they have powers of binding in conscience.¹³ The right to liberty at present is codified in international, regional, domestic and institutional legislation, therefore qualifying it to human positive law. Indeed, the right to liberty is recognized as a fundamental right inherent in human

¹⁰ O.J Paul, *Key Essentials in jurisprudence: An In-depth Discourse on Jurisprudence* problems (1st ed, LawAfrica 2006).

¹¹ Ibid.

¹² B Brix, *Jurisprudence, Theory and Context* (4th ed, Sweet and Maxwell 2006) p.67.

¹³ Ibid.

beings¹⁴ and it is fortified in the Constitution.¹⁵

John Finnis work was an explication and application of Aquinas views, but with special attention to problems of social theory in general and analytical jurisprudence in particular.¹⁶ According to Finnis, the basic questions were ethical and meta-ethical. At the core of natural theory which he advanced in responding to these questions, was the proposition that there are a number of separate but equal valuable intrinsic goods which he referred to as “basic human goods”.¹⁷ Finnis lists these goods as; life (health), knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness and religion.¹⁸ Further, Finnis argued that in doing legal theory, one should not take the perspective of those who merely accept law as valid, but theory should assume the perspective of those who accept law as binding because they correctly believe that valid legal rules create moral obligations.

Finnis views the law as involving rules made by ‘a determinate and effective authority’ for a ‘complete community’, strengthened by appropriate sanctions, and directed at the reasonable resolution of the community’s problems of co-ordination. Law is a means to an end, its end is community’s good,’ and it’s manner and form should be adopted to that good by specificity, minimization of arbitrariness and ‘maintenance of a quality reciprocity between the subject of the law’ among themselves and in their relations with the authorities.¹⁹

ICCPR recognizes the right to liberty which has also been enacted under the Constitution of

¹⁴ Article 3 of ICCPR.

¹⁵ Article 49 (1) (h).

¹⁶ Supra note 12 p.71.

¹⁷ Supra note 12 p 73.

¹⁸ Ibid.

¹⁹ B Brix, *Jurisprudence, Theory and Context* (4th ed, Sweet and Maxwell 2006) p.67.

Kenya, 2010. It is a constitutional procedural right which requires every state to put adequate measures to realize and protect accused person from arbitrary arrest. According to Finnis, the function of the positive law on the right to liberty only adds value to our set of moral obligation, when the rules enacted are consistent with moral principles and promulgated by a State Party within its Authority. The fact that the right to bail/liberty has been legalized in international, regional and domestic legislation does not mean that states will automatically implement it. Political will and the adoption of natural law principles and reasoning is important.

Rawls under the Theory of Basic Liberties holds that a central part of social justice is a requirement that a “fully adequate” system of basic liberties be protected and given priority over social goods.²⁰ Rawls refers to this requirement of social goods as his “first principle of justice,” however, he does not prescribe liberty in the abstract, but rather requires for a select list of basic liberties derived from the Bill of Rights tradition.²¹ The list includes freedom of conscience, association, to engage in political activity and from arbitrary arrest.²² According to Rawls, this first principle highlights equality of liberty to all meaning nobody is entitled to more or less liberty. A predominant use of financial bail conditions, accord less liberty to accused persons, who could attend court if an alternative non-financial condition was granted.

Rawls second principle is about equal distribution of primary goods to everyone and inequalities are arbitrary but incentives should be provided to the least advantaged without sacrificing the interest of the rest. However, the second principle of primary goods has undergone substantial

²⁰ Rawls John, *A Theory of Justice*, (Harvard University Press 1971).

²¹ Ibid.

²² Ibid .

modification since the publication of ‘A Theory of Justice’.²³ This conception which is derived from Rawls idea on social co-operation between free and equal beings, suggests that all persons need to develop and exercise two moral capacities,²⁴ namely, the “first moral power” which is the capacity for sense of justice, the capacity to accept and live by fair sense of social co-operation and the “second moral power” is the ability to form, revise, and pursue conception of the good of what values are worthy of one’s commitment and pursuit.²⁵

Therefore, without freedom of movement, an accused person would be greatly handicapped in forming, revising, exercising and pursuing sense of justice. Further, being denied liberty due to predominant financial bail conditions would be a severe blow to one’s self-respect and humanity which in itself is a primary good. In regard to right to bail, the state has the obligation to protect, respect and fulfill all human rights.²⁶

The right to bail is therefore based on the human rights approach for its effective and realization. This right theory will be important in the study as it will explain the states obligation to protect, respect and provide adequate right to bail. The human rights theory will also explain the historical development of right to bail from Anglo-Saxon era to present Kenya and also right to liberty under international human rights law.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

1.3.2 Social Contract Theory

According to Hobbes, the state of nature in which man lived before the social contract theory was “a war of every man against every man”²⁷ a condition of internecine strife in which the life of man was “solitary, poor, nasty, brutish and short”. Hobbes justification of authoritarian government became necessary as a means of promoting order and security. Further, he stated that citizens should infer the characteristic of political obligation from “the intention of him that submitteth himself to his power, which is to be understood by the end for which he or so submitteth”.²⁸ In addition, he suggested that man by nature is rough and for him to escape from these natural conditions are to make a social contract with the government. His theory of political obligation is thus derived from a consideration of “the end of the institution of sovereignty, namely, the peace of the subjects within themselves, and defence against a common enemy.”²⁹ Therefore, Hobbes asserts that there is the germ of a concept of natural rights, the idea that man can make certain legitimate demands on his fellow men.³⁰

John Locke articulated the use of social contract theory to construct a natural rights doctrine. Thus, according to Locke, man renounced his idyllic natural condition and by contract gave part of his liberty to a sovereign.³¹ The purpose of government was to safeguard and protect human entitlements. Further, Locke argues that the social contract theory was a conditional trade by those who voluntarily became subjects, granting the sovereign the right to rule on the condition

²⁷Foucault Michael, *Power/Knowledge and Epistemological Prescriptions* (2004), Honors Theses Paper 534.

²⁸ B Brix, *Jurisprudence, Theory and Context* (4th ed, Sweet and Maxwell 2006) p.67.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid pp. 112.

that they administer justice efficiently, as well as simply enforce peace.³²

John Locke in *Two Treatises of Government*, who is the major proponent of state of nature, suggested that it is through exercising reason that man can and should know what God expects them to do. Further, these reasons supplies the answers where God's will are not clear and that all human being apart from children and mentally ill who have reasons, are equal and they confront one another in a "state of nature".³³ According to Locke in a state of nature, man's duties under natural law are matched by his rights under the same law. The most important of these is the right to hold other men responsible for breaches of this law. Any man could do this, but by joining civil society, he abandoned these powers to the sovereign.³⁴ Further, Locke in his *Second Treatise of Government* claimed that everyone had natural rights to life, liberty and property and the government was a trust established to protect these rights through the rule of the law.³⁵

1.3.3 Procedural Law Theory

Lon Fuller in *Morality of Law*, who is the major proponent of social practices and procedural law theory, asserted that when a system violates the idea of procedural law, it can no longer claim to be a law.³⁶ According to Fuller, legal positivism's analyses law based on power, orders and obedience rather than on "internal morality" of law. Like a traditional natural law theorists, he wrote of there being a threshold that must be met before something could be properly called

³² John Locke, *Second Treatise on Civil Government*, (1st ed. C.B MacPherson 1980) P. 95- 96, 99-100.

³³ B Brix, *Jurisprudence, Theory and Context* (4th ed, Sweet and Maxwell 2006) P.113.

³⁴ Ibid.

³⁵ Manfred Nowak, *Introduction to the International Human Rights Regime* (Brill Academic Publishers 2003).

³⁶ Lon Fuller, *Morality of Law* (Oxford University Press 2002).

“law”.³⁷ Thus, the test Fuller applies is one of function and procedure rather than one of primarily of moral context.

According to Fuller, internal morality of law consists of eight requirements, namely: laws should be general, laws should be promulgated that citizens might know the standards to which to be held, retroactive rule-making (application should be minimized), law should be understandable, law should not be contradictory, laws should not require conduct beyond those affected, laws should remain relatively constant through time and that there should be congruence between the laws announced and as applied.³⁸ However, Mathew Kramer took a middle position, arguing that these procedural ideals are part of justice, but carry no intrinsic moral weight: that is, it is not even presumptively immoral to act contrary to the rules already laid down.³⁹

The right to bail is a constitutional right, which is realized when a government with a just and good legal system follows proper procedures to arraign accused in court and bail is granted. In Kenya, as much as bail is granted, the courts have not adequately imposed alternative non-financial bail conditions. Thus, following Fullers principles of legality, it itself a moral good and commitment of the courts to procedurally grant accused persons bail. However, it itself a wicked law for the courts to predominantly rely on financial bail conditions.

³⁷ Brian Nix, *Jurisprudence Theory and Context* (Sweet and Maxwell, London 2006).

³⁸ Lon Fuller, *The Morality of Law* (Oxford University Press 2002) pp. 122-123.

³⁹ Mathew H. Kramer, *In Defence of Legal Positivism: Law Without Trimmings* (OUP, Oxford, 1999) P. 23-32.

1.3 Literature Review

Whereas the topic on the right to bail has been widely written about by many scholars, this has only been on general right to bail and has not laid much emphasis on alternative non-financial bail conditions. This has left many gaps in relation to alternative non-financial bail condition as a mechanism of ensuring that the state protects and promotes accused persons' rights to liberty and security. The study seeks to fill this gap of knowledge.

Lumumba discusses the issue of bail in light of the need for reformation in the pre-trial process.⁴⁰

He argues that for there to be a just and effective system governing bail and bond in Kenya, there has to be an effective system in place to control pre-trial decisions by judges and magistrates.⁴¹

Lumumba's argument supports arguments by Ayume who argues that there is a need for reformation in the area of pre-trial procedures to do away with unwarranted pre-trial technicalities which impact negatively on the criminal justice system.⁴²

The author presents a good preposition that the right to bail needs reformation in the pre-trial process to effectively control pre-trial decisions by judges and magistrates so as to do away with unwarranted technicalities. However, the author does not envisage circumstances where predominant financial bail based conditions have led to length remand periods and infringing on accused persons' rights to bail. Therefore, the author should have clearly identified what are the factors that cause lengthy detention and provide an alternative to remedy them. This study identified that predominant financial bail condition have infringed on accused person's right to

⁴⁰Patrick Lumumba, *A handbook on Criminal Procedure in Kenya* (University of Nairobi Press, Nairobi, Kenya 1998).

⁴¹*ibid.*

⁴²Francis J. Ayume, *Criminal Procedure and Law in Uganda* (LawAfrica Publishers, Nairobi 1968).

bail and an alternative non-financial bail condition will promote and protect these human rights.

Kiage⁴³ argues that a person is presumed innocent of a criminal charge until he is proven guilty. To refuse bail to an accused person, might involve depriving him of his liberty, who may subsequently not be found guilty, or, even if convicted may be awarded a non- custodial sentence. Further, the author notes that to allow liberty to an accused person pending trial might also allow him an opportunity to abscond, to interfere with witnesses, to tamper with the evidence, to commit more crimes or engage in other conducts which might be prejudicial to the cause of justice.

The author presents a good position in which to promote and protect the rights of accused persons. However, he does not clearly explain or give examples of circumstances that courts should consider while imposing bail conditions and ensure appropriate bail conditions are necessarily to secure the liberty of an accused person. Therefore, the state should not predominantly grant only financial bail conditions, but also provide for alternative non- financial bail conditions such as releasing accused persons on their own recognizance, electronic monitoring or other non-custodial release mechanisms.

Akech and Kinyanjui have also discussed the issue of bail and bond.⁴⁴ They note that in Kenya, criminal justice system largely focuses on monetary terms when sentencing or giving terms of release to accused persons.⁴⁵ They also observe that Kenya lacks a bail supervision system that can ensure accused persons granted bail are properly monitored and that they adhere to the bail

⁴³Patrick Kiage, *Essentials of Criminal Procedure in Kenya* (LawAfrica Publishers, Nairobi, Kenya 2008).

⁴⁴Migai Akech & Sarah Kinyanjui 'Pre-trial detention in Kenya: Balancing the Rights of Criminal Defendants and Interests of Justice,' 19 (1) East African Journal of Peace and Human Rights 1 (2013)

⁴⁵*ibid.*

terms. They argue that it is the lack of these supervision systems which has led to the large number of bail absconders in our criminal justice system. However, the authors do not extensively explore alternative non-financial bail conditions and mechanisms to implementation them.

South African author Robyn Leslie argues that bail in most jurisdictions is usually misunderstood. Leslie argues that bail should be seen as a method to guarantee an accused person's reappearance in court when their trial comes up on the roll.⁴⁶ But anecdotal evidence shows that the general public appears to equate bail with a trial, and links bail with a judgment on someone's presumed guilt or innocence.⁴⁷ It is common parlance to state that someone 'got off' on a certain amount of money posted as bail. This means that accused persons' rights are infringed regardless of the presumption of innocence. This underscores the need to embrace alternative non-financial bail conditions in order to promote and protect accused persons' human rights.

Amoo⁴⁸ posits there are mainly three models of approaches to the right to bail namely, the human right aspect, balancing the right of the individual to liberty and securing the community. According to Amoo, the first model is premised on a policy and constitutional position that makes the Legislative the repository of the determination of the right to bail and leaves the judiciary with the broad legislative directives. The legislative directive invariably includes

⁴⁶Robyn Leslie, '*Bail and Remand Detention*' (2010) University of the Witwatersrand, Johannesburg, South Africa www.canoncollins.org.uk accessed 27 July 2017.

⁴⁷*ibid.*

⁴⁸Amoo, Sk "The bail jurisprudence of Ghana, Namibia, South Africa and Zambia". Forum on Public Policy: A Journal of the Oxford Round Table, summer p 1, 2, 6. Available at <http://forumonpublicpolicy.com/summer08paper/archivessummer08/amoo.pdf>; accessed on 27/11/2018

mandatory refusal in certain offences and the judiciary is left with the discretion to determine the grant or refusal of bail in other cases with the primary objection of promoting due process of law and securing the presence of the accused person before the jurisdiction and judgment of the case. This first approach which prescribes bailable and non-bailable offences is adopted under Section 123 (1) of Criminal Procedure Code.

The second model is premised on constitutional position that grants the sole determination of the right to bail to the judiciary subject a minimum degree of legislative intervention. The approach does not prescribe to bailable or non-bailable offence which is adopted under Article 49 (1) (h) of the Constitution of Kenya, 2010. The accused person has a constitutional right to apply for bail, irrespective of the seriousness of the alleged offence. The third model is an amalgam of the first two models. The power over determining of matters relating to bail or bond is generally vested with the judiciary. There is no legislation mandatory denying bail, the law does not draw a distinction between bailable and non-bailable offences. However, there is a legislative intervention in form of legislation guidelines that courts must follow in their exercise of granting or denying bail in serious or scheduled offences. According to Amoo, South Africa has adopted this model.

Countries such as New Zealand and Australia have effectively managed to provide for a non-financial bail in their criminal systems. F.E Devine⁴⁹ observes that New Zealand has removed the possibility of imposing financial bail conditions from lower courts which usually handle majority of bail applications so that they can only impose alternative non-financial bail conditions, release

⁴⁹ F. E Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (Pager Publishers, New York, USA 1991).

without any conditions or deny bail completely. In Australia, courts are required to consider two levels of non-financial bail conditions before considering financial bail conditions,⁵⁰ namely: his conduct which can convince the court beyond reasonable doubt that he cannot abscond and two that a person who was acceptable to the court and who knows the accused person well considered a surety.⁵¹

The publication by F. E. Devine, “Commercial Bail Bonding, A Comparison of Common Law Alternatives” is a rich relating to alternative non-financial bail conditions and has helped in informing my argument in the later chapters. Devine however does not clearly explain how alternative non-financial bail conditions promote and protect accused person’s fundamental rights and freedoms. He only envisages that non-financial bail conditions minimizes the number of detainee’s.

Timothy Schnacke⁵² traced the history of bail and pre-trial release from Statute of Westminster in 1275. He argues that during that period accused persons facing criminal charges were separated out as either “bailable” or “unbailable” based on custom because the Statute of Westminster codified that tradition, and expressly articulated that those defendants deemed “bailable” had to be released, just as those defendants deemed “unbailable” had to be detained. Further, he asserts that the reasons for release during those times were not necessarily the reasons we cite today. For example, release to personal sureties was often desirable in thirteenth century England due to the lack of adequate jails, and the process of suretyship was designed to continue

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² Timothy R Schnacke, “The history of bail and pre-trial release in 2010 Pretrial Justice Institute” <http://www.pdf.org/cjr/addedarticles/the-history-and-pre-trial-release-timothy-r-schanacke-et-al-2010-pretrial-justice-institute> accessed 27/11/2018.

to exert control over a defendant beyond incarceration. It was later in America that the right to release began finding its foundation on concepts of liberty and freedom.

Further, in his publication “Model Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention,” he argues that in the centuries between 1275 and the 1700s, any efforts on the part of government officials to detain otherwise bailable defendants led to reform. For example, a stated purpose for the creation of habeas corpus in 1679 often called the “Great Writ” in America to reflect its importance was to provide a remedy to defendants who were “detained in Prison, in such cases where by Law they were bailable.” The Excessive Bail Clause, when enacted in England, was in response to judicial officials setting the financial condition in amounts leading to the de facto denial of bail, or release, as a way of avoiding the provisions of habeas corpus.

Arthur Goldberg⁵³ a U.S Supreme Court Justice stated that: “After arrest, the accused who cannot afford the monetary and property terms of the bail and bond poor must often wait of his case in jail because of his inability to raise bail monetary terms, while the accused who can afford bail is free to return to his family and job. According to Goldberg this is an example of justice denied, a man imprisoned for nor reason other than his incapability to meet the property and monetary of bail terms.

1.4 Justification

The right to bail is both a constitutional right and procedural right that an accused person encounters in pursuit of criminal justice process. In Kenya, the right to bail is one of the fundamental rights and freedoms recognised in the Bill of Rights under Article 49 (1) (h) of the

⁵³ Arthur Goldberg, “Equality and Governmental Action,” *New York University Law Review*, Vol. 39 (1964), 218-222.

Constitution Kenya, 2010. However, this right to bail can be limited under Article 24. Nevertheless, financial bail conditions are not amongst the limitations factors outlined under that Article 24. Therefore, predominant financial bail conditions should not be a stumbling block to the protection and enjoyment to the fundamental rights and freedoms of accused persons. Indeed, the primary objective of bail is to assure accused person presence at trial, while giving him his liberty before decision on his/her innocence is delivered. Therefore, courts can either impose financial bail conditions or alternative non-financial condition as guarantee by an accused person.

In Kenya, the police and the court have predominantly imposed financial bail conditions which have infringed on the accused person's rights. Predominant financial bail conditions by the courts continue to be the greatest impediment towards realizing the right to bail.

1.5 Research Objectives

1.5.1 General Objective

The general objective of this study is to explore measures that can be put in place to ensure that the right to bail under the Kenya Constitution, 2010 is realized and fully enjoyed by all persons regardless of their financial status.

1.5.2 Specific Objectives

The specific objectives of the study are:

1. To trace historical background and development of the right to bail both internationally and in Kenya, understand bail terms and conditions with a view of exploring non-financial bail conditions.

2. To examine to what extent international, regional, domestic and institutional legal framework have regulated on alternative non-financial bail conditions so has to identify challenges facing regulations to the right to bail in Kenya.
3. To undertake a comparative analysis of New Zealand, New South Wales, Australia and South Africa with a view of identifying best practices that Kenya can apply in tackling the challenges it faces in adopting alternative non-financial bail conditions.
4. A field study to explore whether courts in Machakos County granted accused person's alternative non-financial bail conditions.
5. To make conclusion and recommendations relating to alternative non-financial bail conditions.

1.6 Research Questions

1. What is the historical, development, categories and forms of bail conditions in Kenya?
2. Does the international, regional, domestic and institutional legal framework governing right to bail in Kenya provide for an alternative non-financial bail conditions?
3. What is the legal framework of countries that have alternative non-financial bail conditions such as New Zealand, New South Wales and South Africa?
4. Were alternative non-financial bail conditions granted by courts in Machakos County?
5. Conclusion and recommendations

1.7 Hypothesis

The current legal framework on the right to bail has not adequately provided for alternative non-financial bail conditions. Predominant financial bail conditions have infringed the constitutional right to bail of accused persons.

1.8 Scope and Limitation of the Study

One of the limitations of the study was the dearth of scholarly literature on non-financial bail terms. The study was limited to Machakos Count

1.9 Research Methodology

The research was both desk and a field based study. The study relied on both primary and secondary sources of data. Primary data include interviews with both pre-trial detainees and Key informants. Interviews were conducted at Machakos Main Prison and Athi River Remand Prison where pre-trial detainees were selected as suitable respondents for study. The field study was to establish accused persons were granted non-financial bail. This study was conducted between February and April 2018 through a purposive sampling technique, 269 respondents who were included the detainees were issued each with a questionnaire to answer and return it within three days while interviews were also conducted with 12 key informants who included; magistrates, police and prison wardens.

Secondary data included books, articles, journals, conference papers and information from the internet on the right to bail with specific focus on alternative non-financial bail conditions, predominant use of financial bail conditions and on comparative analysis of the right to bail in New Zealand, New South Wales Australia and South Africa.

1.10 Chapter Breakdown

This study has five chapters.

Chapter 1 introduces the topic under study. It sets up the agenda of the study, the research background to the problem being, the problem statement investigated, objectives, methodology, theoretical framework, and hypothesis, justification of the study and research methodology of the study.

Chapter 2 discusses the origin of the right to bail, its development from Anglo-Saxon times to the present Kenya today. It also discusses both police and court bail and different bail types and conditions available in Kenya.

Chapter 3 examines the international, regional, domestic and institutional legal framework legislation on the right to bail. It also discusses some key cases and decisions on issues concerning the right to bail and analysis of judicial interpretations

Chapter 4 is a comparative analysis of the right to bail in New Zealand, New South Wales Australia and South Africa to the extent alternative non-financial bail condition has been incorporated in their legislation with a view of identifying best practices that Kenya can apply.

Chapter 5 is field study conducted an in-depth interview with detainees and with key informants to establish whether courts granted accused person's alternative non-financial bail conditions.

CHAPTER 2

HISTORICAL, DEVELOPMENT, CATEGORIES AND FORMS OF BAIL CONDITIONS IN KENYA

2.1. Introduction

Before discussing the current state of the right to bail in Kenya, it is of great importance to first determine how the system evolved to its present state. It is believed that the Anglo-Saxon invented the bail system as a pre-trial complement to a system of money fines designed to compensate private grievances and later to secure a court appearance of an accused person. Therefore, this chapter will seek to briefly examine history, development, categories and forms of bail conditions from Anglo-Saxon times to the present day in Kenya.

2.1.1 History and Development of Bail System in the United Kingdom

The history and development of the bail system can be traced back to the common law of England.⁵⁴ Bail traces its roots from the ancient Anglo-Saxon period in England (410-1066) as a means of settling dispute peacefully.⁵⁵ Bail emerged from early Anglo-Saxon⁵⁶ practices of 'bot' or price, hostage ship and blood feuds to avenge wrongs, which often led to wars and a third person would guarantee the aggrieved parties that a debt would be paid.⁵⁷ Therefore, relatives and friends of the accused person offered themselves as security for the appearance of the accused person and were made personally responsible for his/her appearance.

⁵⁴ Jacqueline Martin, *The English Legal System* (7th Ed, Holder Education Publishers, United Kingdom 2007).

⁵⁵ William Duker, 'William, *The Right to Bail: A Historical Inquiry*' (1977) 42 Albany Law Review 33

⁵⁶ June Carbone, 'In Turn, Cites To E. De Haas, *Antiquities Of Bail (1940), As Well As To Pollock & Maitland For Additional "Thorough Studies On The Origins Of Bail."* [Http:// www.Pretrial.Org/](http://www.Pretrial.Org/) Accessed 14/05/2017.

⁵⁷ Brian Harries K Donovan, *The Law of Bail: Practice, Procedure and Principles* (Legal Books, sydney1981) 23.

According to Anglo-Saxon practices the third parties and sureties were required to surrender themselves to custody should the accused abscond.⁵⁸ Thus, in the 13th century a system was created in which the accused person was required to find a surety who would provide a pledge to guarantee both the appearance at the trial of the accused person and payment of ‘bot’ upon conviction.⁵⁹

Gradually, Anglo-Saxon turned away from criminal justice law which was largely a private, brutal family affair that avenged for their murdered kin or summarily executed one caught committing a crime,⁶⁰ towards a system of financial compensation paid by the offenders to their victims. These payments, known as “bot” “wregeled,” were equal to the injured parties’ value, which was assigned depending on, amongst other things, the Person’s social status.⁶¹

During the Norman Conquest of 1066 A.D,⁶² the Anglo-Saxon bail practices began to disappear, due to over reliance on corporal punishment, economic difficulties and criminal justice becoming a state affair.⁶³ As a result, criminal justices becoming a state affair, offences were categorized asailable and non-ailable, which was not the case during the Anglo-Saxon regime. Due to this categorization of billable and non-ailable, bail was granted or denied on the grounds of the seriousness of the offence. Non-ailable offences included murder, forest offences and were beyond scope of bail.⁶⁴ Most other offences, however, remainedailable and the Sheriffs would

⁵⁸ Larkin Paul J, ‘*The Lost Process Doctrines*’ (2016) Catholic University Law Review Vol. 66.

⁵⁹ Willis D. Morgan, ‘*History and Economics of Surety ship*’ (1972) 12 Cornell Law Review. 153.

⁶⁰ Larkin Paul J, ‘*The Lost Process Doctrines*’ (2016) Catholic University Law Review Vol. 66.

⁶¹ *Encyclopedia Britannica*, <http://www.britannica.com/topic/wregeled#ref31625> (accessed on Nov, 10, 2017).

⁶² R Shurma, *Human Rights and Bail* (A.P.H Publishing Corporation, New Delhi, 2002).

⁶³ *Ibid.*

⁶⁴ *Ibid.*

grant bail due to difficulties involved in detaining individuals for years before judges riding a circuit would arrive in a given county.⁶⁵

Norman Conquest empowered Sheriffs with a wide discretionary power to set out the amount of bail or to choose whether to remand an accused person. Due to this wide discretion and excess powers bestowed onto the hands of Sheriffs, it invited corruption and wrongful detentions as Sherriff's tried to extort payments from accused persons, as well as the accused persons trying to bribes to secure their release while they were supposed to be held without bail. This corruption by sheriffs led to the parliament legislating the first statutory regulation of granting or refusing bail in England by way of the Statute of West Minister 1 1275.⁶⁶

The Statute of West Minister 1, specified which offences wereailable and which were not; with considerations on the account of seriousness of the offence, likelihood of the accused person's guilt and the status of the offender.⁶⁷ A further, subsequent amendment to the Statute 1 in 1444 outlined grounds under which bail could be refused for certain offences or only be granted with an order from a higher authority. Indeed, this further amendment curtailed the powers of the sheriffs and normalized the process of bail and pre-trial release and reduced unlawful detention.⁶⁸

During the 17th century, struggles between the barons of Parliament and the King on the concept of bail as a right emerged. As a result, the Petition of Right was enacted in 1628, which curtailed

⁶⁵ Timothy Schnacke, *The History and Pre-trial Release, Pretrial Justice Institute* < <http://bit.ly/2u5kH4D>> accessed Nov 18, 2017.

⁶⁶ W Holds worth, *A History of English Law* (3rd ed, Sweet and Maxwell, 1945) vol 4, 526.

⁶⁷ Ibid.

⁶⁸ R Simpson, *Bail in New South Wales* (NSW Parliamentary Library Research Briefing Paper No. 25/97 1997) 2.

the practice of imprisoning an accused person without charges.⁶⁹ Further, the Habeas Corpus Act of 1679⁷⁰ expedited the process of setting bail and releasing an accused persons pending trial under certain circumstances. Consequently, an enactment of the Bill of Rights 1689⁷¹ which declared that: “Excessive bail ought not to be required, nor did excessive fines impose, no excessive fines imposed, nor cruel and unusual punishment inflicted.”⁷² The Bill of Rights provided for human rights including those of persons who were in conflict with the law and ensured that accused person are accorded humane dignity before a conviction is entered.⁷³

The Statute of West Minster 1275 remained the authority regarding which offences were bailable, and no major change was made in that regard for some five centuries until the enactment of the Bail Act of 1898 (United Kingdom),⁷⁴ which amended the Indictable Offences Act⁷⁵ that empowered the courts to give bail on sureties.

2.2 Development of Bail in Kenya

2.2.2 Post Independence Era

At independence in 1963, Kenya embraced the common law system and the inclusivity for a Bill of Rights in respect to the constitutional right to individual liberty. Section 72 (1) ⁷⁶ of the Constitution, 1969 (now repealed) stated that:

⁶⁹ Petition of Right 1627 (3 Car 1, c 1 (a).

⁷⁰ Habeas Corpus Act 1769 (31 Car 11, c 2).

⁷¹ Bill of Rights 1688 (1 win & M sess 2, c 2).

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Bail Act of the United Kingdom, 1898.

⁷⁵ Indictable Offences Act 1848.

⁷⁶ Ibid .

“No person shall be deprived of his personal liberty save as may be authorized by law.”⁷⁷ Further, Section 72 (5) dealt with pre-trial liberty by and stating that: “if any person arrested or detained as mentioned in subsection (3) (b) of this section is not tried within a reasonable time, then without prejudice to any further proceedings that he may be brought against him, he shall be released...that he appears at a later date for trial or for proceedings preliminary to trial.”⁷⁸

Section 72 (5) of the Constitution implied that bail should be granted if the trial does not occur within a reasonable time. Further, this provision made no distinction between bailable and non-bailable offences. However, Section 123 (1)⁷⁹ of the Criminal Procedure Code prohibited the High Court from releasing on bail an accused person charged with capital offences. Thus, Section 123 (1) of the CPC was inconsistent with Section 72 (5) of the Constitution because it invoked the right to bail at any stage of the proceedings while the Section 72 (5) of the Constitution provided that any person could be admitted to bail whether conditionally or unconditionally so long as his subsequent attendance was assured. The first amendment affecting Section 123 (3) of the CPC came to force in 1978.⁸⁰ Section 123 (3) of the CPC that allowed the High Court to grant bail in any case if circumstances deemed necessary were amended to read as follows:

“The High Court may in any case save where a person is accused of murder or treason, direct that a person be admitted to bail or the bail required by a subordinate court or Police Officer be reduced.”⁸¹

Therefore, the subsection as amendment to Section 123 (3) created contradictions as it meant that whereas 123 (1) of the CPC four offences, namely; murder, treason, robbery with violence and

⁷⁷ Section 72 of the Constitution of Kenya 1963 (now repealed).

⁷⁸ The Constitution of Kenya Act 1963/1969.

⁷⁹ Section 123 (3) Criminal Procedure Code, Chapter 75.

⁸⁰ Constitution of Kenya (Amendment) Act No. 20 of 1987.

⁸¹ Statute Law (Miscellaneous Amendments) Act No. 13 of 1978.

attempted robbery with violence were non-bailable, under Section 123 (3) only two offences namely, murder and treason were non-bailable. Hence, it was possible for a person charged with robbery with violence or attempted robbery with violence to be denied bail under 123 (1) but obtain it under 123 (3) because 123 (3) allowed bail in any case apart from murder and treason.

The lacuna created in the 1978 amendment was filled in 1984 when Section 123 (3) of the CPC was amended to make it tally with 123 (1).⁸² This further amendment made robbery with violence and attempted robbery with violence non-bailable offences. In *Margaret Magiri Ngui v, R*,⁸³ the appellant had applied for bail for murder, which was refused. An application was made in the High Court under section 84 (1),⁸⁴ challenging the constitutionality of Section 123 (3). It was argued that by denying bail to persons charged with capital offences, the section was inconsistent with Section 72 (5) of the Constitution which allowed bail to persons for all offences. The Constitutional court held that Section 123 of the CPC was inconsistent with the Constitution and declared it null and void. However, the court declined to release the applicant on bail on the ground that bail should not be granted where the offence charged carried a mandatory death penalty because the temptation to abscond in such cases is very high.

Further, amendments to Section 123 of CPC gave effect to the ruling of the constitutional court.

Thus, the amendment Act repealed the words:

“Save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence” in Section 123 (3) and replaced them with “In any case whether or not an accused has been committed to trial”. This erased the classification of offences into bailable and non-bailable. Section 123 (3) of the

⁸² (Miscellaneous Amendments) (No 2) Act, 1984 (No 19 Of 1984).

⁸³ Criminal Application 59 of 1985.

⁸⁴ Section 84 (1) of the Constitution of Kenya, 1969 (now repealed).

CPC was amended by deleting Section 123 (3) of the Amendment Act. No. 5/03 of 1985 to read as follows “The High Court may in any case direct that an accused person be admitted to bail or that bail be required by a subordinate court or police officer be reduced.”⁸⁵

Kiagi of the view that apparently, due to the weight of the practice in refusing bail to persons accused of offences carrying the death penalty, the Constitution was amended to deprive the High Court the power to release persons accused of offences carrying the death penalty.⁸⁶ This was done by the introduction of Act No 20 of 1987 which amended Section 72 (5) of the Constitution, in effect to deny bail to persons charged with offences punishable by death. Thus, courts started considering the punishment meted out as opposed to the merits of the case in deciding whether to grant or deny bail.

“... He shall be released either conditionally, or upon reasonable conditions...” and replaced with “... he shall. Unless he is charged with an offence punishable by death, be released either conditionally, or non-conditionally.”⁸⁷

This constitutional amendment not only re-introduced the pre-1985 distinction between bailable and non bailable offences, but also greatly worked to defeat the original jurisdiction of the High Court under Section 60 (1).⁸⁸ It therefore meant that the criterion for granting or refusing bail was not the merits of each particular case, but the punishment to be meted out to the accused upon conviction. In *Eliud Mwaura v R*,⁸⁹ the applicant was denied bail for murder, although he had been incarcerated for more than 11 months before trial. Nevertheless, the position regarding bailable and non bailable offences continued to stand until the promulgation of the Constitution

⁸⁵ The amendment Act No. 19 of 1985.

⁸⁶ Momanyi Bwonwong'a, *Procedures in Criminal Law in Kenya* (East African Educational Publishers, Nairobi Kenya 1994).

⁸⁷ Patrick Kiagi, *Essentials of Criminal Procedure in Kenya* (Law Africa 2014).

⁸⁸ The Constitution of Kenya, 1969 (repealed).

⁸⁹ *Eliud Mwaura v Republic*, Criminal Application No. 446 of 1996.

of Kenya, 2010⁹⁰ which, under article 49 (1) (h) states that:

“Any person arrested has the right to be released on bail or bond on reasonable conditions, pending a charge or trial, unless there are compelling reasons that may make such an accused person to be denied bail or bond.”⁹¹

Article 49 (1) (h) of the Constitution neither categorize offences as bailable or non-bailable. However, the provision does not set out what court should consider while determining what constitute “compelling reasons”. As a result, an amendment of 2014⁹² was made to Section 123 the CPC,⁹³ by inserting a new provision Section 123A⁹⁴ which established what factors court should set out in determining what constitute compelling reasons. Therefore, the insertion Section 123A to the CPC gave the courts additional powers to refuse bail in that while determining what constitute compelling reasons they have also to rely on the Section. Meanwhile, Section 123 A of the CPC which states “joinder of two or more accused in one charge or information” has been wrongly drafted even if the Section sets out clearly the factors courts should consider while determining what constitute compelling reasons.

On the other hand, Section 123 (1) of the CPC which provides that accused persons of murder, treason, robbery with violence, attempted robbery with violence and any drug related offences shall not be granted bail contradicts with Article 49 (1) (h). Both, Section 123 (1) & 123A of CPC need to be amended to be harmonize it with the Article 49 (1) (h) of the Constitution.

⁹⁰ The Constitution of Kenya, 2010.

⁹¹ *Ibid.* Article 49(1) (h).

⁹² The Statutory Law Miscellaneous Amendment of 2014.

⁹³ Section 123 of CPC.

⁹⁴ *Ibid* Section 123 A.

2.3 Categories of bail

2.3.1 Police

The purpose of a police bail is to ensure that an accused person granted bail will attend court when requested before twenty four hours. Therefore, Article 49 (1) (f) of the Constitution provides that “An arrested person has a right to be brought before a court as soon as reasonably possible, but not later than twenty four hours after being arrested or in case the twenty four-hours end outside court hours, or on a day that is the ordinary court day, the end of the next day.”⁹⁵ However, Article 49 (1) (f) has an exception to the and limits it in order to ensure the protection of the suspects or any witness, to ensure that suspect avails himself for examination or trial or does not interfere with investigations, to prevent the commission of an offence under this Act, or ensure the preservation of national security.⁹⁶ Further, bail can be granted for prevention of offences⁹⁷ as well as security for securing the community.⁹⁸ Therefore, the 24 hour rule to be brought before a court is not an absolute right to bail for terrorist related offences.

2.3.2 Bail by the Courts

Courts have power and discretion to grant or not to grant bail to an accused person brought before them in pursuant to an arrest or when such person is attending trial. This means that so long as the trial is going on, that is before the accused is finally convicted or acquitted he can apply to court for either pre-trial bail or bail pending appeal. But even before arrest he can apply for an anticipatory bail.

⁹⁵ Article 49 (1) (F) (I) & (ii) of the Constitution of Kenya, 2010.

⁹⁶ Ibid Article 49 (1) (F).

⁹⁷ Section 43 of the Criminal Procedure Code.

⁹⁸ Ibid Section 44 and 45.

2.4 Forms of Bail in Kenya

Bail may sometimes mean the conditions upon which an accused person is released pending his/her trial or appeal.⁹⁹ In Kenya, bail takes mainly four forms namely, bond, recognizance, financial bail condition (cash bail) and deposit of security. However, Article 49 (1) (h)¹⁰⁰ of the Constitution does not specifically categorize on the forms of bail. Due to this court have discretion to impose several conditions while granting bail. It is these bail conditions of bail that have created what appears to be different kinds of bail.

2.4.1 Bond

A bond is a written contract which an accused person or his surety enters with the court has an assurance the accused will appear in court and in case the accused fails to appear the party to the contract that contract should be required to fulfill a certain condition or forfeit a certain sum of money to the state. A standard bond is in two parts, one part of being the accused person to fill and the other for his surety. A surety in such a bond promises in writing to ensure that the accused shall appear on the day and time he/she is required and further in case of default such surety shall forfeit a certain amount of money to the courts.

The Constitution¹⁰¹ is silent as to who may be a surety. However, Section 127 of the Criminal Procedure Code¹⁰² empowers court to cancel bail and require sufficient sureties if the sureties in the existing bond become insufficient. Therefore, a surety is a condition attached to a bail

⁹⁹ J.M. Itemba, *The Law Relating to Bail in Tanzania* (Dar es salaam University Press 1991).

¹⁰⁰ Article 49 (1) (h) of the Constitution of Kenya, 2010.

¹⁰¹ The Constitution of Kenya, 2010.

¹⁰² Section 126 Criminal Procedure Code, Chapter 75.

condition. In *Regina v Harrow exp. Morris*,¹⁰³ it was held that the court must satisfy itself in the circumstances of the case and taking into account the condition of bail, the sureties to be are likely to abide by their promise and ensure that the accused will attend court and the ability of the sureties to discharge their obligation. Therefore, Bond is an important document in matters of bail as it is in fact the record of contract, stipulating clearly the terms of such contract.

2.4.2 Recognizance

A recognizance is a form of a bond only that differs from the other by the fact that it is signed by the accused alone or where a surety is required by the surety only. Recognizance is recognized under Section 124 of CPC stipulates that court may release an accused person on own recognizance.

2.4.3 Deposit of Money

Court may require an accused person to deposit money with it, with a promise that in the event of the accused person failing to appear as required such money be forfeited. Section 124 of CPC state that “The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.” This form of bail is the most predominant in our criminal justice system and is popularly known to as cash bail.

2.4.4 Security

Court may require accused person deposit with them property as security for his/her appearance with the necessary condition that incase of default such security is forfeited. In practice title deeds, log books and pay slips are deposited as security. Where a thing is deposited as security

¹⁰³ [1972] W.L.R. 607.

its apparent value be recorded in the bond so that in the event of such a thing getting lost or when it is returned, the court should be in a position to know what exactly the accused deposited.

2.4.5 Refusal for bail

Under, Article 49 (1) (h) of the Constitution an accused person can be denied bail in circumstances where there are compelling reasons. In *Aboud Rogo Mohamed & Another*,¹⁰⁴ the court affirmed that the primary consideration is whether an accused will readily and voluntarily present him to the trial court and each case is to be determined *sui generis*.¹⁰⁵ The meaning of ‘compelling reason’ has been interpreted by the courts to entail different issues, including public interest, national security¹⁰⁶ and the security of the arrested person. The state has the burden of proving what constitute compelling reasons. Therefore, under Article 49 (1) (h) of the Constitution compelling reasons vary from case to case and each case has its own merit. In addition, the court will also put into consideration the possibility of the accused person interfering with the witness, absconding, security of person, reviewing bail terms and interests of the community.

2.5 Conclusion

Bail has a history that spans centuries which developed has a means of giving freedom to person’s accused of crime between apprehension and long-delayed trial which were so prevalent

¹⁰⁴ [2011] eklr.

¹⁰⁵ The High Court in the case of *Aboud Rogo Mohamed & Another v Republic* [2011] eklr referred to the earlier case of *Danson Mgunya & Another v Republic* [2011] eklr where justice M Ibrahim while releasing two murder suspects on bond, gave an observation that the Constitution was to be interpreted in a manner that enhances rather than curtailing the fundamental rights of the individual and that each case is to be decided on its own facts.

¹⁰⁶ The court in the aforementioned case of *Aboud Rogo*, noted that if the applicants had been proved to be connected with the suicide bomber or to Al-Shabaab, then it would have been undesirable to release them on bail since that amounted to a threat to national security.

during Anglo-Saxon era. It was considered better to release an accused person with some assurance of his return rather than have an accused person obtain his/her freedom through escape. During the Anglo-Saxon times the sheriffs had discretionary power to either grant or deny bail. However, release was into the custody of a friend or relative who was considered to be the accused person surety. Referred to as mainprise, the Anglo-Saxon procedure required the sureties to produce the accused for trial or suffer imprisonment themselves. Later, during the Norman's Conquest the sheriff would accept a sum of money in place of surrender of the surety. Following the reception date Kenya adopted the Indian Criminal Procedure Code which later in 1930 was amendment to Criminal Procedure Code Cap 75. Although the right to bail has undergone several amendments continues in Kenya today as it was during the Anglo-Saxon era with the primary function of assuring the presence of the accused person at trial while giving him/her liberty before conviction or acquittal.

The next Chapter will examine the legal and institutional legal framework governing the right to bail and bond in Kenya.

CHAPTER 3

LEGAL AND POLICY FRAMEWORK GOVERNING THE RIGHT TO BAIL IN KENYA

3.0 Introduction

Kenya has taken a positive step in terms of ratifying a significant number of international human rights instrument. Article 2 (5) of the Kenyan Constitution states that international law shall form part of law of Kenya, while, Article 2 (6) further provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.¹⁰⁷

Since the rights to bail and liberty are closely related to each other, this chapter will present an analysis of the basic international legal standards governing pre-trial detention based on the right to liberty and right to bail. At the international level, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Right (ICCPR) will be discussed while at the regional level the African Charter on Human and People's Rights (AFCHPR)¹⁰⁸ will be expounded on. More so, at domestic level, the Constitution of Kenya 2010, Criminal Procedure Code¹⁰⁹, Bail and the Bond Policy framework¹¹⁰ will also be examined.

This chapter will therefore examine the legal framework that governs the right to bail at international, regional and domestic level with an aim establish as to what extent the legal framework has provided for alternative non-financial bail terms in Kenya.

¹⁰⁷Article 2 (5) & (6) of the Constitution, 2010.

¹⁰⁸ The African Charter on Human and People's Rights (also known as the Banjul Charter).

¹⁰⁹ Criminal Procedure Code, Chapter 75.

¹¹⁰ Bail and Bond Policy framework.

3.1 International Instruments

3.1.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is a very important international document in the realm of Human Rights as it recognizes that the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world¹¹¹.

The UDHR further provides that every human being has the right to life, liberty and security of persons¹¹² but with regard to the right to bail, it should be noted that the UDHR does not expressly provide for the right to bail but the presumption of innocence of an accused person which is enshrined in the Declaration that everyone charged with a penal offence has the right to be presumed innocent until proven guilty.¹¹³

Presumption of innocence is vital to an accused person's right to bail and subsequently the inalienable right to fair trial. It is important that an accused person is provided the best environment to prove their innocence according to the law in a public trial at which he has all the guarantees necessary for his defence¹¹⁴. Further, UDHR provides that an accused person should also not be subjected to similar treatment to people already convicted after trial. This then trickles down to the accessibility of bail options. However, UDHR is non-binding and merely declares laws to be implemented by countries that ratify.

¹¹¹Preamble of the Universal Declaration of Human Rights.

¹¹²Article 3 of the Universal Declaration of Human Rights.

¹¹³Ibid Article 11(1).

¹¹⁴Ibid Article 11(1).

3.1.2 International Covenant on Civil and Political Rights

Unlike the UDHR, the International Covenant on Civil and Political Rights (ICCPR)¹¹⁵ on the other hand, is a binding instrument that does not only recognize the inherent dignity of each individual and undertaking to promote conditions within states to allow the enjoyment of civil and political rights but also seeks to protect and preserve basic human rights and compels countries that have ratified the convention to take administrative, judicial, and legislative measures in order to protect the rights enshrined in the treaty and to provide an effective remedy¹¹⁶.

The ICCPR sets out the rights of an accused person in more detail by providing that everyone has the right to liberty and security of person and that no one shall be subjected to arbitrary arrest or detention¹¹⁷. Article 9 (1) continues to provide that no one shall be deprived of his liberty except on grounds in accordance with procedure as are established by law further cementing the need for an accused person to be provided reasonable bail terms to avoid limiting their right to liberty while they prove their innocence. Further, Article 9 (3) of the ICCPR envisions a situation where the accused person is released with conditions in the course of their trial and states that:-

“...It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.”¹¹⁸

Thus, the right under Article 9 (3) ensures judicial control over the detention of the person

¹¹⁵International Covenant on Civil and Political Rights Kenya ratified on 1st May 1972 is part of the Kenyan law.

¹¹⁶Article 1 & 2 of the International Covenant on Civil and Political Rights.

¹¹⁷Ibid Article 9 (1).

¹¹⁸Article 9 (3) of the International Covenant on Civil and Political Rights.

charged with a criminal offence and also enables the court to determine whether legal reasons exist for infringement of the right to liberty of an accused person. In *Ali Medjnoune v Algeria*¹¹⁹ the applicant had been detained for more than five years, during which time he had requested provisional release from the Algerian Indictments Division. These requests were repeatedly denied. The Committee held that in the absence of satisfactory explanations from the State party or any other justification the pre-trial detention constituted a violation of article 9(3) of the ICCPR. Further, the Human Rights Committee stated that states parties should take action to ensure that detention by police custody never lasts longer than 48 hours and those detainees have access to lawyers from the moment of detention.¹²⁰

In *Hill & Hill v Spain*¹²¹ the applicants, citizens of the United Kingdom were detained in Spain for three years before being granted bail after numerous applications for release. The Spanish authorities had denied the applicants bail on the basis that there was a real concern that they would leave Spanish territory if released on bail. The Committee found that although bail need not be granted “where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party,” in this matter, the authorities had not provided any factual information to substantiate this claim or why it could not be addressed by setting an appropriate sum of bail and other conditions of release. Furthermore, the mere conjecture of a state party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in Article 9 (3).

¹¹⁹ *Ali Medjnoune v. Algeria*, Communication No. 1297/2004, U.N. Doc. CCPR/C/87/D/1297/2004 (2006).

¹²⁰ Concluding Observation (2000), UN Doc. CCPR/CO/70/GAB.

¹²¹ *Michael and Brian Hill v. Spain*, Communication No. 526/1993, U. Doc. CCPR/C/59/D/526/1993 (2 April 1997).

Consequentially, in a case where the state party provided for information to substantiate its concerns that the accused would leave the country and as to “why it could not be addressed by securing appropriate sum of bail and other conditions of release.” The Human Rights Committee also found that “the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial.”¹²² Therefore, the Human Rights Committee concluded that detaining accused was contrary Article 9 (3) of the Convention..

Further, in case a person is wrongly arrested and detained leading to the violation of their right to liberty and security of person under ICCPR Article 9 (3), Article 9 (4) of the ICCPR provides for a remedy which requires them to challenge the lawfulness of the loss of his personal liberty before the court in the nature of ‘habeas corpus’ which gives anyone who has been the victim of unlawful arrest or detention an enforceable right to compensation.¹²³ In *De Wilde, Ooms and Versyp v Belgium*,¹²⁴ the Human Rights Committee held that: “The principle of Judicial control over detention stems from, and is analogous to the English remedy of habeas corpus, enabling a person arrested or detained to challenge the validity of his detention before the court and obtain release if the detention is unlawful. Therefore, Article 9 (4) is important for upholding the rule of law as it ensures legal control over those public officials who violate the rights to personal liberty and security of persons. As a result, the right to habeas corpus is exercised by accused persons who are detained as a direct challenge to the lawfulness of their detention.

Article 9 (5) envisages that anyone who has been a victim of unlawful arrest or detention shall

¹²²*Wemhoff v. The Federal Republic of Germany App No 2122/64, A/7, [1968] ECHR2, IHRL 3(ECHR1968).*

¹²³Article 9 (4) of the ICCPR.

¹²⁴(2932/66) {1970} ECHR 2 (18th November 1970), para, 76.

have an enforceable right to compensation.¹²⁵ In *A v Australia*,¹²⁶ it was held by the Human Rights Committee that: "compensation will be payable even when detention is 'lawful' under domestic law, but contrary to ICCPR, for example when it is 'arbitrary.'" Thus, Article 9 (4) of ICCPR recognizes that every arrested person has the right to take proceedings before a court to decide without delay on the lawfulness of the arrest or detention, where that court has the power to order release if that detention is not lawful. Indeed, States parties have the obligation to take effective measures to remedy the violation suffered by the victim as a result of unlawful deprivation of liberty and grant him compensation under Article 9 (5). Further, Article 10 (1) of the ICCPR requires state parties to treat persons deprived of their liberty with humanity and respect for their inherent dignity of the human person.¹²⁷ Indeed, courts ought to provide lenient bail terms for accused persons to ensure that they are not subjected to similar treatment as those of convicted persons and that the use of non-financial bails terms is a viable option.

3.1.3 Convention on the Rights of the Child

The rights of children in conflict with the law have been a central subject of juvenile justice. In this respect, the United Nations Conventions on the Rights of the Child (CRC)¹²⁸ has laid down international standards and legal framework for the rights of children in the juvenile justice system.¹²⁹ Indeed, Kenya is duty bound to strive towards full implementation of the requirements

¹²⁵Article 9 (4) of the ICCPR.

¹²⁶CCPR/C/59/D/560/1993.

¹²⁷Article 10 (1) of the ICCPR.

¹²⁸Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20th November 1989, entry into force 2 September 1990.

¹²⁹Article 37 of the CRC.

of CRC which as a country it ratified in 1990.¹³⁰ The term ‘child’ is defined under CRC as a person who is below the age of eighteen unless, under the law applicable to the child, the age of majority is attained earlier.¹³¹ While in Kenya a child is defined as any human being under the age of eighteen years.¹³²

Further, Article 3 of the CRC requires the best interests of children to be the primary consideration in all actions concerning children undertaken by public or private social institutions, courts, administrative authorities or legislative bodies. The term “best interests” is defined as the well-being of a child, which is determined by various factors such as age, environment, and level of maturity, experiences and surrounding circumstances.¹³³ Therefore, in the context of juvenile justice, the principle of the best interests of children requires due consideration to be given to the fact that children are different in terms of physical, psychological, emotional and educational needs. This therefore has implication in determining the appropriate treatment for the children in conflict with the law.¹³⁴

As far as the pre-trial process is concerned, the CRC contains guiding standards regarding the treatment of children who are in conflict with the law.¹³⁵ Article 37 (a) prohibits subjecting children to any kind of torture, inhumane or degrading cruel treatment or punishment, unlawful arrest or deprivation of liberty.¹³⁶ Article 37 (a) lays down principles governing procedural rights

¹³⁰Kenya ratified the CRC on 30th July 1990.

¹³¹Article 2 of the CRC.

¹³²Section 2 of the Children Act, 2001.

¹³³UNHCR, ‘UNHCR Guidelines on Determining the Best Interest of the Child Geneva’ (2008)

¹³⁴Committee on the Rights of the Child, General Comment No 10: Children Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 10.

¹³⁵Ibid.

¹³⁶Article 37 (a) of the CRC.

as well as treatment of their liberty. Additionally, Article 37 (b) emphasizes that any arrest, detention or imprisonment of a child shall not only be made strictly in accordance with the law and shall only be used as a measure of last resort and for the shortest appropriate period of time.¹³⁷ Thus, any arrest must pass a specific double test, namely as a measure of last resort and for the shortest appropriate period of time, in order to be legally implied. This imposes a burden on the enforcement authorities to firstly prove whether the intended arrest is really a measure of last resort without alternatives which interfere less with the child's right. If the answer is affirmative, the next test to be applied what is the appropriate time frame, with the implicit duty to regularly assess the situation and consider continued justification of the detention.¹³⁸ Further, Article 37 (c) CRC envisages that an arrested child must be detained separately from adults unless it is considered in the child's best interests not to do so.¹³⁹

Therefore, where pre-trial detention is inevitable, Article 37 (b) should be implemented in accordance with Article 40 (1) which requires States Parties to recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.¹⁴⁰

¹³⁷ Article 37 (b) of the CRC.

¹³⁸ Schabas, W. and Sax, H, *Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty. In: Alen, A. et al., A Commentary on the United Nations Conventions on the Rights of the Child* (Martinus Nijhoff Publishers 2006) P 85.

¹³⁹ Article 37 (c) of CRC.

¹⁴⁰ Article 40 (1) of the CRC.

3.2 Regional Instruments

3.2.1 Introduction

The African Charter (also known as the Banjul Charter)¹⁴¹ is the basic document from the African Union (AU) that enumerates the rights and duties of member states of the Organization of African Unity (OAU) as well as promotes and protect human rights and basic freedoms. It also establishes safeguard mechanisms, such as the African Commission on Human and Peoples' Rights whose mandate is to promote human and peoples' rights¹⁴² and the African Court on Human and Peoples' Rights.¹⁴³

3.2.2 The African Charter on Human and People's Rights

The African Charter on Human and People's Rights is the core human rights treaty of the African Union. Article 6 of the African Charter on Human and People's Rights (ACHPR)¹⁴⁴ provide for the right to liberty and the security of person arrested.¹⁴⁵ Further, Article 6 prohibits deprivation of freedom except for reasons and previously established by the laid down law and emphasis that no one may be arbitrary arrested or detained.¹⁴⁶

Article 7 (1) of the ACHPR has also been firm in interpreting the fair trial rights which include right to have a cause heard, right to appeal, right to be presumed innocent until proved guilty by a competent court and the right to be tried within a reasonable time by an impartial court.¹⁴⁷ In

¹⁴¹ African Union. 198, African Charter on Human and Peoples' Rights. Banjul: African Union.

¹⁴² Article 45 of the African Charter on Human and Peoples' Rights.

¹⁴³ African Court on Human and Peoples' Rights.

¹⁴⁴ African Charter on Human and People's Rights established in 1981.

¹⁴⁵ Ibid Article 7.

¹⁴⁶ Fatshah Ouguergouz, *the African Charter on Human and Peoples' Rights; A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Brill/Nijhoff Publishers, 2003), 2003 p-119.

¹⁴⁷ Article 7 of the ACHPR.

Huri-Laws v Nigeria,¹⁴⁸ the ACHPR ruled that detaining two suspect's one for five months and the other for almost a month before bringing them to court violated their right to appear before a judge and be tried within a reasonable time while in *Alhassan Abu-Bakr vs. Ghana*, the commission found that detaining a person for seven years without trial violated the reasonable standards set in Article 7 (d) of the charter.¹⁴⁹

Therefore, from this perspective the obligation rests firmly with the state to justify continued lengthy pre-trial detention. Thus, lengthy pre-trial detention is not legally justifiable under regional human rights and states must takes measures to ensure that accused persons are afforded alternative non-custodial measures.

3.2.3 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC)¹⁵⁰ is a comprehensive instrument that sets out rights and defines universal principles and norms for the status of children on the African continent.¹⁵¹ Article 17(2) (c) (i) provides that a child accused of infringing penal law is to be presumed innocent until duly recognized guilty. Further, the ACRWC requires that:

“A child accused or found guilty of infringing a penal law...of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.”¹⁵²

¹⁴⁸Schoteich M, *pre-trial detention and human rights in Africa in Human Rights in African Prison* (Cape Town HSRC Press 2008), p. 95.

¹⁴⁹Ibid, P. 96.

¹⁵⁰African Charter on the Rights and Welfare of the Child.

¹⁵¹*Claiming Human Rights website*, at http://www.claiminghumanrights.org/childrens_charter.html (accessed 11/10/2017).

¹⁵²Article 17 (1) the African Charter on the Welfare of the Child.

With the adaption of the Protocol on the African Court and Peoples' Rights (PACPR), there is a future indication of more expansive protection and recognition of the right to liberty and could rectify the current weaknesses of Commission. For example, in the case of *Aminu v Nigeria*¹⁵³, the complaint asserts that the following Article 3 (2), (4) (6) and 10 (1) of the ACHPR and that the complainant was arbitrary arrested and detained on several occasions and he has fled to Sudan for fear of being detained. It was held that the Federal Republic of Nigeria was in violation of Articles 3 (2), 4, 5, 6 and 10 (1) of the ACHPR.

3.2.4 The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa

The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines) ¹⁵⁴provide a framework for member states of the OAU to implement their obligations in the specific context of arrest, police custody and pre-trial detention. These guidelines were adopted by the African Commission on Human and Peoples' Rights as part of its mandate.¹⁵⁵

The Luanda guidelines while acknowledging specific criminal justice-related human rights concerns across Africa, namely, arbitrary arrest and detention, and poor conditions of police custody and pre-trial detention, places emphasis on the arrest and detention of accused persons who are referred to as pre-trial detainees in the guidelines. The Guidelines emphasize that Pre-trial detainees often exist in the shadows of the criminal justice system because their detention and treatment are not subject to the same levels of oversight as sentenced prisoners. Pre-trial

¹⁵³Communication 205/97.

¹⁵⁴ Adopted by the African Commission on Human and Peoples' Rights during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014.

¹⁵⁵ Article 45(1) (b) of the African Charter on Human and Peoples' Rights.

detainees experience conditions of detention that do not accord with the right to life and dignity, and are vulnerable to human rights violations.”¹⁵⁶

Article 6 (a) on police custody provides that the detention of an accused person in police custody shall be an exceptional measure and encourages that legislation, policy, training and standard operating procedures that will be put in place by member states must promote the use of alternatives to police custody, including court summons or police bail or bond. The use of non-financial bail terms can also be included as part of the alternative to pre-trial detention. Article 7 continues further and provides for the safeguards to be adhered to regarding police custody. Article 7 (a) expressly states that all persons detained in police custody shall have a presumptive right to police bail or bond.

Part 3 of the Luanda guidelines specifically deals with pre-trial detention and goes deeper to provide for general guidelines on pre-trial detention¹⁵⁷, Safeguards on pre-trial detention orders, reviews of pre-trial detention orders, provision for delays in investigations and judicial proceedings¹⁵⁸ and safeguards for persons subject to pre-trial detention orders¹⁵⁹.

In this part of the convention, emphasis is further placed on the fact that pre-trial detention should be a measure of last resort and should only be used where necessary or where no other alternatives are available.¹⁶⁰ If at all pre-trial detention becomes the only available alternative, the guidelines further provide safeguards requiring that the least restrictive conditions be

¹⁵⁶Foreword of the Luanda Guidelines.

¹⁵⁷Article 10 of the Luanda Guidelines.

¹⁵⁸Ibid Article 13.

¹⁵⁹Ibid Article 14.

¹⁶⁰Ibid Article 10 (b).

imposed that will reasonably ensure the appearance of the accused in all court proceedings and protect victims, witnesses, the community and any other person.¹⁶¹

3.3 Domestic Legislation

3.3.1 Introduction

The right to bail is guaranteed under domestic legislation such as; the Constitution, Criminal Procedure Code, Children Act and the Police Act. Thus, the law acknowledges that accused persons are entitled to the right to bail. Notwithstanding, the law also acknowledges that under certain circumstances deprivations of one's liberty before trial may be justified in order to protect public safety. In fact, entitlement to the right to bail or deprivations of one's liberty is a mechanism that ensures there is a balance between individual rights and public safety in order to restore peace and security in the society. Therefore, it is important to establish to whether there is a robust legislation on the right to bail at domestic level and to what extent it provides alternative non-financial release terms to individuals who have violated the law.

3.3.2 Constitution of Kenya, 2010

Under, Article 49 (1) (h) of the Constitution provides that an arrested person the right to be released on bail/bond, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.¹⁶² Further, Article 49 (2) of the Constitution provides that "A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months"¹⁶³

¹⁶¹Ibid Article 11(b).

¹⁶²Article 49 (1) (h) of the Constitution, 2010.

¹⁶³Ibid Article 49 (2).

Indeed, both Article 49 (1) (h) and 49 (2) of the Constitution seek to regulate administration of the right to bail, pre-trial detention, balancing the rights of suspects, accused persons rights to liberty, presumption of innocent and public interest and at the same time attain the much needed administration of bail and bond to ensure an accused person appear in court.

In *R V Danson Mgunya and Sheebwana Mohammed*,¹⁶⁴ were charged with the offence of murder, contrary to Section 203,¹⁶⁵ as read with Section 204,¹⁶⁶ of the Penal Code. However, the two denied the charge and pleas of not guilty. During this time, the capital offences were non-bailable according Section 123 (1) of the (CPC)¹⁶⁷. As a consequence, they were denied bail in 2008 under the Constitution of 1969 (now repealed). However, on a review of their bail condition under the Constitution of, 2010 they were granted bail with conditions. Ibrahim J. stated that Article 49 of the 2010 Constitution overrides the provisions of section 123 (1) of the Criminal Code citing the supremacy of the Constitution as set out under Article 2 which explicitly states that any law that is inconsistent with the Constitution is void to the extent of the said inconsistency. Section 123 of the Criminal Procedure Code¹⁶⁸ being inconsistent with the Constitution exposes accused person and infringe on accused persons rights to bail..

Further, *In Republic vs. Ahmed Mohamed Omar & 6 others*,¹⁶⁹ Ochieng J held that an inalienable right is a sacrosanct right, an absolute, unassailable and inherent right and not transferable. It is a non-negotiable right. Like the right to life, a fundamental inviolable

¹⁶⁴[2010] eKLR.

¹⁶⁵Section 203 of the Penal code.

¹⁶⁶Ibid Section 204

¹⁶⁷Section 123 of the CPC (amended).

¹⁶⁸Cap 75, Laws of Kenya.

¹⁶⁹[210]eKLR.

right. Compelling reasons is a qualification to the right to bail. Thus, the right to bail is not an absolute right, the only right of an automatic bond or bail entitled to an accused person, are those charged with offences which may be referred to as "petty offences" the punishment of which if found guilty and convicted is either a fine only, or imprisonment for a term of less than six months.¹⁷⁰

Such offences are spread throughout the Penal Code, and other statutes containing penalty for breach thereof. Therefore, under Article 49(2) of the Constitution the right to bond or bail is automatic or cannot be taken away *alienated* in respect of what I have referred to as petty offences within the Constitution. Despite, Article 49 (2) of the Constitution stipulating that the right to bail is automatic to petty offenders, I argue that the right to bond or bail is, like all rights, limited. It would not therefore be either correct or accurate as a matter of constitutional law, for me to state that the right to bond or bail is "*inalienable*" in the sense that it cannot be denied, because it can be denied under the Constitution.

Article 53 (1) (f) (i) & (ii) of the Constitution,¹⁷¹ accord alternative non-custodial measures to children who come into contact with criminal justice special protection by providing every child the right not to be detained, except as a measure of last resort, and when detained, to be held, for the shortest appropriate period of time; and separate from adults and in conditions that take account of the child's sex and age. Further, Article 53 (2) stipulates that a child's best interests are paramount in every matter concerning the child.¹⁷² Therefore, both Article 53 (1) and (2) entrench the need for alternative non-custodial protection of children and emphasizes that the

¹⁷⁰Article 49 (2) of the Constitution of Kenya, 2010.

¹⁷¹ Ibid Article 53 (2).

¹⁷² Ibid.

best interest of a child is paramount in dealing with any matter concerning children.

The detainee has a right to challenge the lawfulness of detention in person before a court and be released if detention is unlawful under Article 22 (1)¹⁷³ which grants any person the right to institute court proceedings if such person is of the view that a right or fundamental freedom in the Bill of Rights is denied, violated or infringed, or is threatened. In *Masoud Salim & Another – Vs. - Director of Public Prosecutions & 3 Others*,¹⁷⁴ Mureithi J recognition of the importance which the Constitution places on the right of habeas corpus states that.

“The right to an order of Habeas Corpus is one of the rights in the Bill of Rights which cannot be limited. The other rights that cannot be limited are set out in Article 25 of the Constitution of Kenya 2010 are the right to freedom from torture, and cruel, inhuman or degrading treatment, freedom from slavery or servitude and the right to fair trial.”¹⁷⁵

3.3.3 The Criminal Procedure Code

Section 123 of the CPC empowers an officer in charge of a police station or a court to admit a person accused of other than murder, treason, robbery with violence, or attempted robbery with violence and any drug related offence to be released on executing bail with sureties for his/her appearance.¹⁷⁶ Alternatively, such as the police officer or the court may, instead of taking bail from the accused person, release him upon executing bond without sureties.¹⁷⁷ Further, Section 123 (2) of the CPC provides that “the amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive”¹⁷⁸ it also under Section 123 (3) mandate

¹⁷³ Article 22 (1) of the Constitution of Kenya 2010.

¹⁷⁴ [2014] eKLR.

¹⁷⁵ Ibid.

¹⁷⁶ Section 123 (1) of the Criminal Procedure Code.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid Section 123 (2).

the High Court the power “to direct that an accused person be admitted on bail or that bail required by sub-ordinate or police be reduced”.¹⁷⁹ Article 124 provides that “Before a person is released on bail or his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and by one or more sureties.”¹⁸⁰ A further amendment of 2014¹⁸¹ was made to the CPC,¹⁸² by inserting a new provision Section 123A¹⁸³ which outlines factors to be considered while denying granting bail.

Section 123A was aimed at filling the lacuna created by the Article 49 (1) (h) of the by requiring guidance on compelling reasons. Notwithstanding, that the subheading under Section 123 A is wrongly stated “joinder of two or more accused in one charge or information” the dictum of the clause is to provide a guideline towards which court should consider in circumstances where an accused person has to be denied bail such; as nature or seriousness of the offence, character, antecedents, defendant record, obligations under previous grant of bail, own protection and strength of evidence.

However, there was contradiction between the amendment under Section 123 (1) and the insertion of Section 123 A in that it would be quite possible for a person charged with capital offences to be denied bail under Section 123 (1) and get it through Section 123A (1).¹⁸⁴ This is so because Section 123A (1) states that, “subject to Article 49 (1)¹⁸⁵ notwithstanding Section 123, the Court

¹⁷⁹Ibid Section 123 (3).

¹⁸⁰Ibid Section 124.

¹⁸¹The Statutory Law Miscellaneous Amendment of, 2014.

¹⁸²Section 123 of the CPC.

¹⁸³Ibid Section 123 A.

¹⁸⁴Supra note 186.

¹⁸⁵Article 49 1(h) of the Constitution of, 2010.

would decline to grant bail to a person whom that Section applies.”¹⁸⁶ Therefore, Section 123A (1) would allow all offences under Section 123 to be bailable unless where the court or the police had reasons to believe that if the accused person is granted bail will fail to surrender to custody, commit another offence, interfere with the witness, detained for his own protection and the person has previously been released on bail in connection with present proceedings and has been arrested pursuant to Section 87.¹⁸⁷ Thus, the effect of this amendment was to harmonize Section 123 (1) of the CPC with the Article 49 (1) (h) Constitution of Kenya, 2010.

In this regard, The Statute Law¹⁸⁸ was intended to harmonize the Criminal Procedure Code with the Constitution of Kenya, 2010 in respect to bailable and non-bailable offences. However, the drafters of Section 123 A of the CPC did not foresee the underlying implications caused under Section 123 (1) of the CPC. Therefore, Section 123 (1) of the CPC contradicts Section 123A of the CPC and Article 49 (1) (h) of Constitution therefore inconsistent with the Constitution according to Article 2 (4) of the Constitution requires that: “Any law...that is inconsistent with this Constitution is void to the extent of the inconsistency...of this constitution is invalid.”¹⁸⁹

Section 123 (2) of the CPC envisages that bail is a financial condition and states that “The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive”¹⁹⁰ However, Section 123 (2) of the CPC does not provide for a schedule of how the amount of bail shall be fixed for particular case although, Section 123 (3) requires the financial

¹⁸⁶Section 123 A of the CPC.

¹⁸⁷Section 87 of the C P C.

¹⁸⁸Supra note 186.

¹⁸⁹Article 2 (4).

¹⁹⁰Ibid Section 123 (2).

condition fixed not to be excess. More importantly, Section 124 of the CPC¹⁹¹ expressly provides for alternative non-financial condition by stating that “an accused person may be released on bail or on his own recognizance by a court of law or police officer”¹⁹² Therefore, there is need to also explore non-financial bail condition and attain to the intention of bail that require an accused person appear in court for his or her hearing.

Under Section 125 (1) of the CPC as soon as the bond has been executed by the accused person for whose appearance has been executed shall be released on the receipt of the order.”¹⁹³ Thus, Section 125 (1) requires that an accused person shall not continue to be unlawfully detained after he/she has executed the bail.

The amendment under Section 123 (1) of the CPC and the insertion of Section 123A of the CPC could have had a far reaching implications by harmonizing Section 123 (1) of the CPC with Article 49 1 (h) of the Constitution by providing that all offences are bailable unless there are compelling reasons.

3.3.4 National Police Service Act

At police station, an accused person may be released on cash bail. With or without sureties, or personal free bond or recognizance. The Police Standing Orders¹⁹⁴ require the police officer in charge of a police station to release any arrested person on a minor charge on the security of cash bail, as a general rule, unless the officer has good grounds for believing that the arrested person

¹⁹¹Ibid Section 124.

¹⁹²Ibid.

¹⁹³Ibid Section 125.

¹⁹⁴Police Service Standing Orders 9 (i).

will not attend court when required to do so.¹⁹⁵ Further, Order 9 (iii) of the Police Service Standing Order requires that cash bail to be handed into court by the date on which the arrested person should appear in court and a receipt obtained.¹⁹⁶

However, under Order 9 (x) of the Police Service Standing Order a person who has been released on a police bail either non-financial or financial and fails to appear in court, the officer in charge of a police station applies to the magistrate for a warrant of arrest, at this point the magistrate may either order the cash bail be forfeited in case of a cash bail.¹⁹⁷

On the other hand, the National Police Service Act (NPSA)¹⁹⁸ safeguards against police abuse of their arresting powers as well as the pre-trial treatment of accused persons, these safeguards are entrenched in the 5th Schedule of the National Police Service Officers and are “Arrest and Detention Rules”.¹⁹⁹ Schedule 5, paragraph 1-2 provides that the police should conduct arrest and detention in accordance with Articles 49-51 of the Constitution. In addition, Schedule 5 paragraph 10-12 requires that an arrested persons to be held in a designated police lock-up facilities that are open to inspection by relevant authorities and nowhere else.²⁰⁰

Further, the fifth Schedule paragraph 4-5, however, provides that each Police Station should have lock-up facilities which have hygienic conditions conducive for human habitation, adequate light, women and men are kept separately, juveniles be kept separately from adults and that police detainee be kept separately from convicted detainees. The fifth Schedule Paragraph 7-8

¹⁹⁵ Police Service Standing Order 9 (ii).

¹⁹⁶ Ibid Order 9 (iii).

¹⁹⁷ Ibid Order 9 (x).

¹⁹⁸ The National Police Service Act, No 11A of 2011.

¹⁹⁹ Schedule 5, Paras.1-2 of the Kenya National Police Act.

²⁰⁰ Ibid paras 10-12.

further states that detained persons are entitled to enjoy all the rights that do not relate to the restriction of their liberty, which include communicating with and having visits from family members, access to doctors as well as the right to lodge a complaint against mistreatment and ask for compensation.²⁰¹ Indeed, these safeguards have been put in place to enhance the respect and protection of human rights and fundamental freedoms of accused persons who come into contact with the Criminal Justice System through the police.

Despite these provisions of the fifth schedule, not all the police stations have lock-up facilities in the country and pre-trial detainees are still detained in prisons as per Section 32 of the Prison Act requiring every person arrested in pursuance of any warrant or order of any Court, if such Court is not sitting, be delivered to any officer in charge of custody and such officer in charge shall cause such person to be brought before the Court at its next sitting.²⁰²

These observations therefore show that the Act and its subsidiary legislations are yet to conform to the Constitution of Kenya, 2010 and most of the provisions on handling of pre-trial detainees specifically on provision of bail and bond were not at par with the other international and regional legal framework.

3.3.5 Children Act

The Children Act²⁰³ is the main legislation governing children's matters in Kenya. Section 2 of the Children Act draws its definition of a child from Article 2 of the CRC²⁰⁴ which stipulates that a "child" is any person under the age of eighteen years. Special protection is accorded to

²⁰¹Ibid pares 7 & 9.

²⁰²Section 32 of the Prison Act.

²⁰³Children Act No. 8 of 2001.

²⁰⁴CRC's.

children, who come into contact with criminal justice. In this regard, Part VI of the Children's Act establishes the Children's Courts, which are special courts to hear cases against child offenders other of charges of murder or cases where child are charged together with an adult.²⁰⁵

Further, Clause 1 of the Fifth Schedule Rule 4 of the Children Act provides for where a child is apprehended with or without a warrant on suspicion of having committed a criminal offence. The rule states that the child offender shall be brought before the Court as soon as practicable and emphasizes that no child shall be held in custody for a period exceeding twenty-four hours from the time of his apprehension without the leave of the Court.²⁰⁶

Criminal proceedings of children who are in conflict with the law are conducted in accordance with the Child Offenders Rules contained in the Schedule Five of the Children Act. These rules are safeguards that require that child offenders be taken to court as soon as practicable and not to be held in custody for a period exceeding 24 hours without leave of court.²⁰⁷

Rule 9 of the Child Offenders Rules²⁰⁸ deals with provision of bail to child offenders. It provides that where a child is brought before a court and charged with an offence, the Court shall inquire into the case and may release the child on bail on such terms as the Court may deem appropriate but where bail is not granted the Court shall record the reasons for such refusal and shall inform the child of his right to apply for bail to the High Court.²⁰⁹ Rule 10 (6) provides the use of alternatives to remand custody where possible, such as close supervision or placement of a child

²⁰⁵Ibid Section 73 (b).

²⁰⁶Ibid Fifth Schedule Section 1.

²⁰⁷ Ibid Fifth Schedule rules 4 (1).

²⁰⁸Ibid

²⁰⁹Ibid Fifth Schedule Rule 9(1) and (2).

to a counselor or a fit person determined by the Court on the recommendation of a Probation Officer or Children's Officer.²¹⁰

Rule 12 provides that children matters should be handled expeditiously and without unnecessary delay.²¹¹ Therefore, Rule 12 (2) requires that if a case is not completed within 3 months after the child takes plea, the case stands to be dismissed and the child will no longer be liable to any further proceedings for the same offence.²¹²

Further, Rule 12 (3) (4) requires that serious offences be heard by a Court superior to the Children's Court but if still not completed within twelve months after taking a plea, the case will stand dismissed and the child will not be liable for any further proceedings on the same offence.²¹³ In *C.J.W Guardian ad litem for D.W v Republic*,²¹⁴ the High Court did not refer to the child rights clause under Article 53 of the Constitution,²¹⁵ which restricts the use of detention for children (as a last resort and for the shortest period of time) in keeping with the provisions of Article 37 of the CRC. In this case, a 16-year-old boy who had been charged with defilement petitioned the High Court as his case had been pending before the trial court for over 12 months.

He argued that the 12-month lapse from the time he took plea was in violation of Rule 12 (2) of the Child Offender Rules which requires criminal trials of non-capital offenses to be disposed of within 3 months from the date of the child taking a plea. The Court however did not agree with this argument and dismissed the child's request for a dismissal of the case on the basis of the

²¹⁰Ibid Rule 10 (6).

²¹¹Ibid Rule 12 (1).

²¹²Ibid Rule 12 (2).

²¹³Ibid Rule 12 (3) & (4).

²¹⁴[2011] elk.

²¹⁵Article 53 of the Constitution 2010.

delay, asserting that the Rule 12 (2) was rather instructive than mandatory. The court pointed out that case delays are usually caused by various reasons, including heavy court schedules and requests for adjournments by lawyers defending accused children.

3.4 Bail and Bond Policy Guidelines Framework

3.4.1 Bail and Bond Policy Guidelines

Clause 34 of the Judicial Service Act²¹⁶ provides for a provision of the establishment of a National Council on the Administration of Justice (NCAJ)²¹⁷. Further, Clause 35 (2) of the Judicial Service Act mandates NCAJ to formulate policies relating to the administration of justice and implement, monitor and review strategies for the administration of justice.

Under Article 48 of the Constitution, the State shall ensure access to justice for all persons, and if any fee is required, it shall be reasonable and shall not impede access to justice. Further, Article 49 (h) (1) emphasizes on an accused person to be released on bond or bail on reasonable conditions pending a charge or trial and not to be denied bail unless there are compelling reasons not to be released. On the other hand, Bail and Bond Policy Guidelines were implemented to guide police and the judicial officers in the application of laws that provide for bail and bond.

The Guidelines have for the first time provided for the definition of various concepts such as what are bail, bail hearing, bail report, bond, personal recognizance, pre-trial detention, pre-trial detainees, remand, security, and surety.²¹⁸ Further, the guidelines seek to ensure that bail and

²¹⁶Judicial Act, No. 1 of 2011.

²¹⁷Clause 34 of the Judicial Service Act.

²¹⁸Ibid.

bond decision-making process complies with the requirement of the Constitution,²¹⁹ address the over-use of pre-trial detention, facilitate effective supervision of persons granted bail, safeguard the interests of victims of crimes, streamline and address disparities in bail and bond decision-making, with a few to enabling fair administration of bail and bond measures.

The guideline provide that bail and bond decision-making shall be derived from international best practices such the right of an accused person to be presumed innocent, accused person's right to liberty, accused's obligation to attend court, the right to reasonable bail and bond terms, balance the rights of an accused person and interest of justice and the consideration of the rights of victims.

Clause 3 of the Guidelines²²⁰ provide that bail and bond decision making shall be guided and derived from international best practices and the Constitution. Various provision of the Constitution envisage pre-trial rights such as; Article 50 (2) on the presumption of innocence, Article 49 (2) on not remanding petty offenders and Article 49 on production of an accused person in court within twenty hours of arrest.

Clause 4.4 of the Policy Guideline regulates police decisions with respect to bail and bond providing that a police officer shall inform suspects of the reasons for their arrest and offences for which they have been arrested, inform them of their right to be released on bail on reasonable terms and provide the accused person an official receipt upon paying cash bail. Further, clause 4.4 provides that police officers should ensure that the amount given as bail is such that it will

²¹⁹The Constitution of Kenya, 2010.

²²⁰Ibid Section 4.4 (a, b & c).

secure the attendance of the suspect to his or her trial.²²¹

Consequently, where a suspect has committed a petty offence and police officer determines that he or she is not a flight risk; the police officer should give the suspect a bond of the least amount possible. Further, where the suspects are children or vulnerable persons then they should be subjected to the least disruptive option including being released with other alternatives.²²² Clause 4.5 of the Policy Guidelines provide that courts have power under the Constitution and the CPC to admit an accused person to bail or release him or her upon executing a bond with sureties for his appearance.²²³

In addition, Clause 4.5 of the Policy Guidelines provide that it is the courts to determine whether or not an accused should be granted bail, amount of bail, conditions of bail, sureties, committing accused persons who are granted bail to custody and reviewing bail terms and conditions. Though this is the case, in my view, the Policy Guidelines still do not provide progressive or adequate alternatives to detention hence proving inadequate in promoting the rights to bail of indigent accused person who, regardless of their status, cannot afford the financial bail conditions. However, the Guidelines lack the uniformity on how the courts determine whether or not to grant accused person bail, both in terms of procedure and substance. Uniformity will be reached where accused persons get similar treatment in terms of the bail set or the pre requisite bail conditions set. As a result, it is difficult for an accused person to predict how their bail applications will be determined.

²²¹ Section 4.4 The Judicial Service Act (No. 1 of 2011) Bail and Bond Policy Guidelines.

²²² Ibid Section 4.4 (I & f).

²²³ Ibid Section 4.5.

Clause 6 of the Guidelines on inter-agency coordination, oversight of places of detention, and public awareness is concerned with the supervision of bail and bond terms. However, Kenya does not have this oversight system which has led to the ineffective enforcement of alternative supervision of bail conditions in Kenya because the policy guideline do not provide for them.

3.5 Conclusion

This Chapter has highlighted the legal and policy framework governing the right to bail in the country at the international, regional and domestic level. It clearly emerges that existing laws and policies in Kenya borrow largely from international laws, conventions and charters in matters of arbitrary arrest and detention. Under international law, the right to liberty requires that deprivation of liberty should always be the exception, and imposed if justified, necessary, reasonable and according to the law applicable. Therefore, all possible means of non-custodial measure such as bail, or the accused giving an undertaking to appear must be explored by the police or judicial authority before making a decision to remand an accused person in custody.

At domestic level Kenya has adopted international and regional law into her domestic laws. The Constitution does not specifically determine what type of bail conditions should be imposed by the courts, the CPC provides for both financial and non-financial bail conditions. However, Kenya has predominantly relied on financial bail release conditions rather than exploring all possible means of non-custodial decision before to remanding an accused person in custody.

The next Chapter will undertake a comparative analysis of the legal regime and systems governing bail in New Zealand, New South Wales, Australia and South Africa.

CHAPTER 4

COMPARATIVE ANALYSIS OF THE RIGHT TO BAIL IN NEW ZEALAND, NEW SOUTH WALES AND SOUTH AFRICA

4.0 Introduction

In the previous Chapter the study discussed the international, regional, domestic and institutional legal framework governing the right to bail in Kenya. In this chapter, the study will analyse and compare the best legal and regulatory frameworks on alternative non-financial bail conditions in New Zealand, New South Wales and South Africa with a view of identifying best practices which Kenya can apply for the continued realisation of the right to bail. New Zealand and Australia were selected because both are former colonies of Britain and that they have integrated alternative non-financial bail conditions into their systems, and therefore relevant to Kenya which is also a colony of Britain. On the other hand South Africa, was chosen as it is an African country that has incorporated an alternative non-financial bail conditions into her bail system.

4.1 The Right to Bail in New Zealand

The New Zealand's bail system is governed by the Bail Act 2000.²²⁴ Parts 2 and 3 of the Act empower the police and the court to either grant bail or refuse bail to accused persons.

4.1.1 Police Bail

Bail Act empowers the police to grant bail for a maximum period of up to seven days before taking an accused person to court and also prohibit them from granting bail on serious charges

²²⁴ Bail Act 2000 No 38.

such as rape and murder.²²⁵ Further, Section 21B of the Bail Act, sets conditions for bail by the Police and states that every accused person granted bail must attend court personally at the time, date, and place specified in the notice of bail.²²⁶

4.1.2 Court Bail

Section 7 of the Act sets the general right to bail where judges are not able to refuse bail. Such circumstances a person is described as being “bailable as of right” where they are charged with an offence not punishable by imprisonment or charged with an offence with a maximum punishment of three years imprisonment. However, there are exceptions to Section 7 of the Act where a person shall not be bailable as of right if they are charged with particular violence and domestic violence offences, even though such offences carry maximum punishments of less than three years imprisonment. These offences are outlined under Section 194 of the crimes Act 1961 as assault on a child or assault by male against female and breaching a protection order against Section 49 of the Domestic Violence Act 1995. Further, a person will not be bailable as of right if they have been previously been convicted of an offence punishable by imprisonment.

Nonetheless, even where a person is not bailable as of right, they may still be released on bail at court’s discretion. Part 3 Section 27 (1) and (2) of the Bail Act²²⁷ empower a judicial officer Registrar to grant an accused person bail if the prosecutor does not object.²²⁸ Thus, the court must release such a person on reasonable terms unless satisfied that there is a just cause for the

²²⁵ The New Zealand Criminal Procedure (Reform and Modernisation Bill allows the police to grant bail for any offence up to 14 days. However Sections 9, 10, 12, 16 and 21(A) of the Bail Act 2000 provide for offences police cannot grant bail.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Section 27 (1) and (2) of the Bail Act 2000.

continued detention. In determining whether just cause exist, a court must take into account whether there is a risk that the person may fail to appear in court, interfere with witness or evidence, or offend while on bail.

Further, Section 8 of the Bail Act outlines other factors that the court may take into consideration while granting or deny an accused bail such as the seriousness of the offence which the person has been charged, the seriousness of the punishment that could be imposed, the strength of the evidence, the person character and past conduct, particularly proven criminal record, whether a person has a history of offending bail, the likely length of time before a matter goes for trial or hearing and any other matter relevant to the circumstances.

4.1.3 Electronic Monitoring Bail (EM bail)

New Zealand has set out an electronic monitoring bail regime in its legislation known as “EM Bail”, which has been in operation since September 2006.²²⁹ Section 30A of the Act stipulates that the purpose of the EM condition is to restrict and monitor an accused person’s movement to ensure that he appears at trial, does not interfere with any witness or any evidence against the defendant and does not commit offence while on EM bail. Further, Section 30B of the Act empowers the Registrar to impose an EM bail conditions to an accused persons,²³⁰ who are eligible and those that the court has satisfied itself as to the matters set out in section 30I. According to Section 30B (2) of the Act for an accused to be eligible for a bail with an EM condition is required, first to be remanded or be in custody, not liable to be detained in custody under any sentence or order and if an EM is granted is likely to be on bail with an EM for less

²²⁹ *New Zealand Police, Frequently asked questions about EM-Bail*
<http://www.police.govt.nz/services/embail/faq.html> accessed on 10/06/2018.

²³⁰ Ibid Section 30.

than 14 days. On the other hand, Section 30 (c) of the Act prohibits courts from granting an EM condition if the court considers that a less restrictive condition or combination of conditions of bail would be sufficient to ensure the purpose of EM condition as set out under Section 30A.

4.1.3.1 Application for Bail with EM Condition

Section 30D²³¹ of the Act outlines the procedure for the application for bail with an EM bail condition and states that it must be in a formal form approved and issued under section 30D (4). More so, Section 30D (2) of the Act provides that on receiving the EM application, the Registrar must set the matter down for a hearing and notify the defendant, the Police, and the prosecuting agency of the date, time, and place of the hearing. Meanwhile, Section 3D (3) the Act provide that the defendant must, as soon as practicable after receiving a notice of the hearing, serve a copy of the application to the Police or the prosecuting agency. As soon as, the copy of application for an EM has been served to the police or prosecuting agency the chief executive of the Ministry of Justice approves and publishes bail with an EM condition.²³²

4.1.3.2 Responsibilities for Management of EM Condition

Section 30E (1)²³³ of the Act empowers the responsibility for the management of EM bail to the Minister for Justice, in consultation with the Minister for Police and the Minister for Corrections, that, by notice in writing, nominate either the Commissioner of Police or the Chief Executive of the Department of Corrections or both of the following as the person or persons responsible for the management of EM bail. Therefore, Section 30E (2) of the Act ensures that a person or persons nominated under subsection (1) to be responsible for the management of EM bail and

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

may authorize their respective employees to act as EM assessors. Further, Section 30E (3) the Minister for Justice may make a nomination under subsection (1) from time to time, and, in consultation with the Minister of Police and the Minister for Corrections, may revoke a nomination by notice in writing to the person concerned.

4.1.3.3 EM Reports

Section 30D of the Act²³⁴ provides that an accused person who applies for bail with an EM condition, the court or a Registrar may direct that an EM assessor prepares an EM report in relation to the application or, if satisfied that a previous EM report is sufficient, may direct that the previous EM report be used in relation to the application. Thus, the purpose of an EM report is to assist the court hearing the application in determining whether an EM condition is practicable and appropriate.

On the other hand, Section 30 (F) (3) requires that an EM report must address all of the following matters whether an EM condition is appropriate, whether an EM condition is practicable at the proposed EM address, including whether the monitoring equipment will function adequately at that address, whether the proposed EM address is appropriate for electronic monitoring of the defendant, including whether there is any evidence of violence between the defendant and any occupant of the premises at that address and the defendant and any person who may reasonably be expected to visit those premises or whether every relevant occupant of the premises at the proposed EM address has consented, in accordance with section 30 G (2), to the defendant remaining at the address while on bail with an EM condition.

²³⁴ Ibid.

Further, under section 30F (3) (e) of the Act if the defendant has been charged with an offence of a kind referred to in Section 29 of the Victims' Rights Act²³⁵ 2002, the views of a parent or legal guardian to the appropriateness of bail with an EM condition. In addition, under Section 30F (4) of the Act an EM report may address any of the following matters the defendant's personal circumstances, including employment, training, and childcare commitments, recommendations for other bail conditions, the response of the prosecuting agency to the application, including any reasons for opposing it and any other matter that the EM assessor considers to be relevant to the decision whether or not to grant a defendant bail with an EM condition.²³⁶

Section 30 G²³⁷ stipulates that EM assessor must ascertain whether relevant occupants consent to defendant remaining at EM address in preparing an EM report in relation to an application under section 30D, an EM assessor must ascertain, after following the steps set out in subsection (2), whether the relevant occupants consent to the defendant remaining at the EM address while on bail with an EM condition.

However, before ascertaining whether or not a relevant occupant consents, the EM assessor must ensure that the occupant is aware of the nature of the charges faced by the defendant is aware of the nature of any past offending by the defendant and understands the effects of an EM condition inform the occupant that the information in paragraph (a) is given to the occupant to enable him or her to make an informed decision whether to consent to the defendant remaining at the EM address while on bail with an EM condition and also inform the occupant that the

²³⁵ Section 29 of the Victims' Rights Act 2002.

²³⁶ Ibid.

²³⁷ Ibid.

information in paragraph (a) must be used only for the purpose of making the decision referred to in paragraph (b) and (d) to inform the occupant that consent to the defendant remaining at the EM address while on bail with an EM condition can be withdrawn at any time and inform the occupant how he or she may withdraw his or her consent.²³⁸

Section 30H, use of information obtained from EM report uses to which information obtained for the purpose of preparing an EM report under section 30F may be put into use in the determination of the application to which the report relates in the preparation of a pre-sentence report under section 26 of the Sentencing Act 2002 in relation to the defendant.²³⁹ Therefore, the court hearing an application made under section 30D must, before granting bail on an EM condition, be satisfied that the defendant has been made aware of and understands his or her obligations. Therefore, Section 30L provides that an accused person who is grant bail with an EM condition and a defendant who is on bail with an EM condition must comply with all the requirements of the condition. Requirements include staying at the EM address, surrender to police station except as authorized under Section 30M or to attend his or her scheduled court appearances or to seek urgent medical or mental treatment.

In New Zealand the general rule is that the police or prosecution must satisfy the court that there is just cause, the onus of proof is therefore with the police or prosecution. However, there are circumstances where an accused person seeking bail must personally prove to the court that bail should be granted. The onus of proof therefore shifts to the accused person seeking bail, in such a scenario a reverse onus of proof apply in cases involving repeat offenders, convicted but

²³⁸ Ibid.

²³⁹ Ibid.

awaiting sentence and cases involving serious offences. Therefore, the courts when deciding whether to grant bail in such cases must consider if a person awaiting sentence is unlikely to receive a sentence of imprisonment or likely length of time until sentence of repeat offenders and their background and immediate family.

4.1.4 Lessons to be learnt from the New Zealand

In New Zealand the EM condition is used as an alternative non-financial bail condition, compelling offenders to remain within precincts of specified residence during specific hours and assuring appearance at trial.

4.2 The Right to Bail in New South Wales, Australia

Australia has a federal state system whereby criminal law is controlled by the individual state government. Australia just like other common law nations has undergone several bail reform movements through the late 1970's and 1980's in each federal state.²⁴⁰ However, the most extensively documented of this bail legislation is that of New South Wales because it has a mixture of common law principles and those of New South Wales. The study will examine the current Bail Act 2013²⁴¹ in order to understand how the state has approached the issue of non-financial bail condition and lessons that can be learnt the New South Wales.

The Bail Act has been amended frequently since 1979 when the Bail Act came into force; some of these amendments are contained in the Bail Act of 2013²⁴² which adopted a risk management approach focused on the “show cause” and “unacceptable risk”, as opposed to the justification

²⁴⁰ New South Wales 1978, Victoria 1977, Northern Territory 1982, South Australia 1985 and Western Australia 1982.

²⁴¹ Bail Act 2013 No 26 came into force on 20th may 2014.

²⁴² Ibid Section 17.

approach to bail which had been recommended by the New South Wales Law Reform Commission.²⁴³ The Act has Parts 1 to 10 that empower the police and the court to grant bail, refuse bail and manage accused persons. Part 1 Section (3) of the Act stipulates that the purpose of the Act is to provide a legislative framework for a decision as to whether a person accused of an offence or his otherwise required appearing before a court should be detained or released, with or without conditions.²⁴⁴ Therefore, under Part 1 Section (3) of the Act empowers the court or police to either detain an accused person or release him/her with or without a condition? Thus, the rights and liberties of an accused person are provided for and protected under the Act.

Under, Part 1 Section (1) of the Act provides for definitions to various bail terminologies such as bail conditions, bail guarantor,²⁴⁵ bail authority,²⁴⁶ bail security,²⁴⁷ show cause, unacceptable risk and some explanation notes to the Act which does not form part of the Act.²⁴⁸ Further, Part 2 Section (1) defines bail as an authority to be at liberty for an offence and can be granted under the Act to any person accused of an offence. At the same time, Part 2 Section (11) provides that the police or the courts can either refuse or grant bail, therefore, is not an absolute right to an accused person. Once bail is granted an accused person is required to appear in person before a court and surrender to the custody of the court, as and when required.²⁴⁹

Part 3 Division 1A Section 16A of the Act regard to “show cause” on serious offenders the onus

²⁴³ New South Wales Law Reform Commission (April 2012) Bail Report 133.

²⁴⁴ Supra note 246 Part 1 Section (3).

²⁴⁵ Means any person who enters into a bail security agreement, other than the accused person granted bail.

²⁴⁶ Means a police officer, an authorized justice or a court.

²⁴⁷ Means security for the payment of bail money deposited with a bail authority.

²⁴⁸ Ibid.

²⁴⁹ Ibid Part 2Section (13).

of proof therefore shifts to the accused person seeking bail. Thus, under Section 16 A,²⁵⁰ a Bail Authority making a bail decision for a show cause offence must refuse bail unless the accused is able to show cause as to why detention is not justifiable. Therefore, in circumstances where the accused person does not satisfy the bail authority why his or her detention is not justified. The bail authority makes bail decision in accordance with Division 2 rules on unacceptable risk test. Show because offences are listed under Section 16B of the Act as offences that are punishable by imprisonment for life, serious indictable offence that involves sexual intercourse with under the age of 16 years by persons who is above the age of 18 years, robbery with violence and other capital offences.²⁵¹ However, Section 16A of the Act has exceptional to accused person who have not attained the age of 18 years.

In circumstances, where a person accused of a capital offence does not show because why detention is not justified under Section 16A of the Act, a bail authority must, before making a bail decision, under Section 17 of the Act²⁵² conduct an unacceptable risk test. Nonetheless, an unacceptable risk test only applies to accused persons who have successfully shown cause and the bail authority has granted them bail under Division 1.

Part 3 Section 17 (2) of the Act in assessing unacceptable risk test requires a bail authority to address the issues of bail concern by assess any bail concern of an accused person, if released from custody, will abscond court, commit further offences, endanger the safety of the society or interfere with the evidence and witness. Further, Section 18 (1) of the Act provides for other matters to be considered by a bail authority while assessing bail concerns. These matters are

²⁵⁰ Section 16A Bail Act 2013 (NSW).

²⁵¹ Part 3 Division 1 A Section 16 B of Bail Act No 26.

²⁵² Supra note 22.

accused person background, nature and seriousness of the offence, strength of the prosecution, and length of time an accused person is likely to spend in custody if bail is denied, likelihood of custodial sentence, need of accused to be free for any law reason. Therefore, Section 19 of the Act if there are no unacceptable risk test empowers, the bail authority must grant bail with or without condition. However, if there are unacceptable risks, the bail authority shall deny bail based on the assessment. Notwithstanding, the assessment of unacceptable risk test the Act has special rules for certain offences for which there is a right to release. Division 2A Section 21 of the Act provides that there is a right to release an offence under Summary Offence Act,²⁵³ offences that attract fines only or offences before a conference under Part 5.²⁵⁴

Division 3 Part 3 Section 23 of the Act provides that a bail condition shall be imposed when bail is granted or a bail decision is varied.²⁵⁵ Further, Section 25 provides for a conduct requirement bail condition that either requires an accused person to do or refrain him from doing something. A conduct requirement condition does not require an accused person to provide security for compliance with bail. However, Section 23 and 25 of the Act they have not categorized on which offences require a conduct requirement bail condition.

Under, Section 26 of the Act requires a security to be provided for bail condition such condition as agreement between acceptable persons, specified amount of money if the person granted bail fails to appear before court the money is forfeited. However, Section 26 (6) requires that a bail authority not to impose a security requirement unless of the opinion that the purpose of which the security reason is imposed is not likely to be achieved by imposing one or more conduct

²⁵³ Summary Offence Act 1988.

²⁵⁴ Young Offender Act 1997.

²⁵⁵ Division 3 Part Section 23 of the Bail Act No 26 of NSW.

requirements.

Under, Section 27 provides that a bail condition can require character acknowledgements given by an acceptable person other than the accused person. However, Section 27 (4) requires that a bail authority not to impose a character acknowledgements unless of the opinion that the purpose of which the security reason is imposed is not likely to be achieved by imposing one or more conduct requirements.

Under, Section 28 of the Act require that a bail condition required by court or authorized justice on the grant of bail can require special arrangement be made for the accommodation of the accused person before he/she is released on bail. However, an accommodation requirement can only be made if the accused person is a child or circumstances established by the regulations. More so, under Section 29 of the Act a bail condition may require pre- release requirements be complied with before a person is released such as surrender passport, security, character or accommodation. Further, under Section 30 of the Act bail condition may require enforcement conditions such as refrain from consuming certain drugs or directions to report to a police station on weekly basis.

The New South Wales Bail Act has defined different bail terminologies, provided for the rights to bail has also elaborated on the issue of show cause, unacceptable risk test and emphasized that conduct bail condition to be imposed unless of the opinion that the purpose of which conduct bail is to imposed will not achieved the ultimate purpose of bail.

4.3 South Africa

The sources for the right to bail in South Africa are the Constitution of South Africa, the

Criminal Procedure Act²⁵⁶ and Case Law. The South African Constitution guarantees individual liberty including the right to freedom and security of the person.²⁵⁷ The protection is extended to arrested, detained and accused persons. However, the right to bail is not absolute in sense that there is limitations clause.

4.3.1 The Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa²⁵⁸ expressly provides that accused persons may be arrested for allegedly having committed offences, and may for that reason be detained in remand. Therefore, the Constitution places a limitation on the liberty interest. Notwithstanding a lawful arrest, an arrested person has a right to be released from custody subject to reasonable conditions. The criterion of release is whether the interest of justice permits. Thus Section 35 (1) (f) provides that “Everyone who is arrested for allegedly committing an offence has a right to be released from detention if the interests of justice permit, subject to reasonable conditions.”²⁵⁹

Section 35 (1) (f) of the Constitution infringes a deprivation of freedom by arrest that is constitutional to a person who has committed an offence. At the same time, the Section deprives this freedom for a short time subject to reasonable conditions or if justice permit. However, Section 60 (4) of the CPA establishes the grounds to the factors to be considered in determining what if interests of justice permit such as the likelihood if an accused person is released on bail will endanger the safety of the public, will abscond, he will intimidate the witness or conceal evidence if released on bail or jeopardise the functioning of the criminal system.

²⁵⁶ The Criminal Procedure Act Cap 51 of 1977.

²⁵⁷ Section 12 of the South African Constitution of 1996.

²⁵⁸ The Constitution of the Republic of South Africa, 1996.

²⁵⁹ Section 35 (1) (f) of the Constitution of South African 1998.

Kriegler J analysed Section 35 (1) (f) in *Dlamini case*²⁶⁰ stated the position under the Section is that unless there is sufficient evidence to establish that interests of justice permit an accused person to be released from custody, the imprisonment continues. He asserted, firstly, that Section 35 (1) (f) of the Constitution is an acknowledgement that an accused might be held in custody for an allegation or offence, the arrest is constitutional and its purpose is to ensure that the accused person is duly and fairly tried.²⁶¹ Secondly, the Section expressly indicates that people who are held in custody have a right to be released, which right is dependent upon reasonable conditions. Thirdly, the Section sets out the criteria for releasing the accused person, namely, if interest of justice permit.²⁶²

Section 35 (1) (f) of the Constitution on the bail law has now been interpreted by a further development, namely, the amendment of the CPA. The amended Section 60 (4) of the CPA reflects the position of Section 35 (1) (f) of the Constitution.

4.3.2 The Criminal Procedure Act 51 (amended)

The Criminal Procedure Act (CPA),²⁶³ deal with securing the attendance of an accused person to the court by assuring that an accused person will be released from custody upon payment of, or furnishing a guarantee to pay, the sum of money determined for his bail and that he shall appear at the place and date appointed by the court.²⁶⁴ Thus, Section 58 of the Act provides that all offences are bailable upon payment of money determined by the court for the bail or furnishing a guarantor and assuring the court that accused person shall appear for his trial. However, Section

²⁶⁰ S v Dlamini [1999] (4) SA 623 (CC).

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ The Criminal Procedure Act 51 of 1977.

²⁶⁴ ibid Section 58 of the CPA of 1977.

59 contradicts Section 58 of the Act in that an accused person who is in custody in respect of an offence other than offence referred to in Part ii or Part iii of the Schedule 2 therefore, Section 59 of the Act categorizes betweenailable and non-ailable offences.

On the other hand, Section 59 empowers a police officer to release an accused person who is in custody on offences not mentioned under Part ii or Part iii of Schedule 2 on a recognizance which a receipt shall be issued for the sum of money deposited as bail. More so, Section 59A of the Act empowers the Attorney General, prosecutor in writing and consultation with the police or investigating officer and in accordance to Schedule 7 authorizes release of an accused person. Thus, Section 59 a (3) provides the attorney general shall impose reasonable terms or upon payment of such sum of money the accused shall be released from custody.

Section 60 (1) (a) of the Act outlines the procedure of releasing an accused person who is in custody in respect to the provisions of Section 50 (6) which entitles him/her to be released on bail at any stage preceding before conviction in respect of such offence. If court is satisfied that the interest of justice so permit.”²⁶⁵

Therefore, Section 60 (1) (a) illustrates the position of the accused before the bail application, namely that his right and freedom of movement already has been curtailed, since he/she is in custody. Further, Section introduces the manner in which the right to freedom of movement may be regained, namely, through bail application. In addition, it does not categorize offences asailable or non-ailable. As long as the person has not been convicted he can still make a bail application as long as he/she meets the requirement for release from custody, namely, the interest

²⁶⁵ Criminal Procedure Act Second Amendment Act 75 of 1995.

of justice. Further, Section 60 c of the Act empowers the court to ascertain from the accused whether he or she wishes to be released on bail when the accused or prosecution has not raised the bail issue.

Under, Section 60 (2A) of the Act provides that the court must, before reaching a decision on bail application; take into consideration any pre-trial services report regarding the release of an accused person on bail.²⁶⁶ Further, Section 60 (2B) (a) of the Act provides that if the court is satisfied that the interest of justice permit the release of an accused person on bail as provided for in subsection (1), and if the payment of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the of the accused to pay the amount of money being considered.

Section, 60 2B (b) (i) of the Act provide that if the accused is unable to pay any sum of money, the court must consider setting appropriate conditions that do not include money for the release of the accused person.²⁶⁷ On the other hand, Section 60 (2B) (b) (ii) provides that if it is found that an accused person is able to pay a sum of money, the court must consider setting conditions of the accused on bail and a sum of money which is appropriate in the circumstances. However, if it is the opinion of the court that it lacks sufficient information to reach a decision on bail application, the court shall order that the investigating officer or the police place such evidence or information before court.²⁶⁸

Under the provisions of Section 60 (11) (b), which applies only to serious violent crimes

²⁶⁶ Section 60 (2A) of the Criminal Procedure Act Cap 51 of 1977.

²⁶⁷ Section 60 (2B) (a) (1) of the Criminal Procedure Act Cap 51 of 1977.

²⁶⁸ Ibid Section 60 (2B) (3) of the Act.

enumerated in Schedule 6²⁶⁹ of the CPA, the accused is required to adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release. Hilary S Axam states that in the bail context, as in the criminal trial context, a revers onus of proof raises a presumption against the individual's liberty interests, permitting the state to deprive an individual liberty by relying on his failure to rebut a legal presumption in state's favour, instead of by affirmatively establishing factual grounds to justify the deprivation.²⁷⁰

Section 63 of the Act empowers any court before which a charge pending in respect of which bail has been granted may upon application by the prosecutor or accused person increase or lower the amount of bail determined under Section 59 or 60 of the Act. Further, Section 63A of the Act empowers the Head of Prison under Correctional Services Act,²⁷¹ if the population of a particular prison is reaching such proportions that constitutes a material and imminent threat to human dignity, physical health or safety of an accused person who is charged with offences that police can grant bail under Section 59 of the Act, those granted bail by lower court but unable to pay bail amount and those accused of petty offences to apply to the court to be released on

²⁶⁹ Schedule 6 provides murder when.

It was planned or premeditated.

The victim was-

A law enforcement officer performing his or her function as was such whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such position.

A person who was given or was likely to give material evidence with reference to any offence referred to in Schedule 1

The death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit on of the following offences rape or robbery with violence.

²⁷⁰ Hilary XS Axam, *'If the Interest of Justice Permit: Individual Liberty, the Limitation Clause, and the Qualified Constitutional Right to Bail'* (2001) South African Journal Human Right 17 330.

²⁷¹ Correctional Services Act, 1988.

warning in lieu to bail.²⁷² Therefore, under Section 63A (3a) of the Act provides if the court is satisfied may order the release of accused person from custody or reduce the amount of bail determined under Section 60 of the Act.

Section 65 of the Act provides that an aggrieved person by the refusal of lower court to admit him on bail or imposition of an unaffordable bail condition may appeal against such refusal or imposition of such unaffordable bail amount to the superior court. At the same time, Section 65A empowers the attorney general to appeal to a superior court against a decision of a lower court on bail or against imposition of unreasonable amount of bail.²⁷³

Section 66, 67, 67A and 68 of the Act outlines the grounds to fail to observe conditions of bail under which an accused is released on bail subject to any condition imposed under Section 60 and 62 the courts shall declare the bail provision cancelled and the amount of money forfeited to the state and issue a warrant of arrest of the accused, and if arrested shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment not exceeding one year and the bail condition shall be cancelled.

4.4 Conclusion

This Chapter has discussed and analysed the various bail practices in New Zealand, New South Wales, Australia and South Africa. From the discussions New Zealand and New South Wales, Australia have managed to legislate a comprehensive Bail Act to regulate their criminal justice system while South Africa and Kenya bail regulation are founded in Constitution and Criminal

²⁷² Ibid Section 63A of the Act.

²⁷³ Ibid Section 65A of the Act.

procedure Act/Code.

While New South Wales, Australia and South Africa and Kenya police are empowered to grant bail to petty offenders and deliver them to court within reasonable time those of New Zealand can grant bail for a maximum of seven days. In the next Chapter, the study shall discuss the conclusion on the right to bail in Kenya recommendations how to legislate on alternative non-financial condition terms in our criminal justice system and minimize the use of financial bail conditions.

CHAPTER 5

EXPLORING ALTERNATIVE NON-FINANCIAL BAIL CONDITIONS: A STUDY OF MACHAKOS COUNTY

5.0 Introduction

This chapter discusses the Methodology, analysis of the data collected, research design, the instrument for data collection, defines the population, the sampling procedure, the sample size and primary collected in a survey of Machakos County.

5.1.1 Research Design and Methodology

The study is designed on qualitative method. The choice of qualitative technique was informed by the fact that pre-trial detention is both a legal and social issue and for that matter a relatively complex phenomenon which cannot easily be captured in quantitative terms. As far as this study was concerned, the qualitative methods for data gathering focused on face to face interviews with the pre-trial detainees and key informant.

5.1.2 Data Collection Methods

The primary data was collected through interviews with pre-trial detainees²⁷⁴ and face to face interviews with the Key informants.

5.1.3 Population

The interview with the pre-trial detainees was conducted at Machakos Main Prison and Athi River Remand Prison. Both Athi River Remand Prison and Machakos Main Prison host a total of

²⁷⁴ Bail and Bond Policy Guidelines defines Pre-trial detainees as accused persons who have been formally charged and are awaiting the commencement of their trials.

1700 pre-trial detainees while interview with 12 key informants was conducted with knowledgeable respondents from five institutions which were involved with criminal justice system in Machakos County namely, Machakos Main Prison, Athi River Remand Prison, Machakos Law Courts, Machakos Central Police Station and Machakos Office of the Director of Public Prosecution were interviewed.

5.1.4 Sampling Technique

The study used non-probability sampling technique. A core characteristic of Non-probability sampling technique was that sample was selected based on the subjective judgment of the research, rather than random selection. The study involved purposive type of non-probability sampling technique was used to select both the pre-trial detainees and key informants who were based on the study's purpose and population. Through purposive sampling technique 269 of the respondents were issued with structured questionnaires but only 258 of the respondents returned their questionnaires.

Out of the returned questionnaires, only 188 were fully filled and merited inclusion in the study. This represented a response rate of 69.91 %. The response rate was considered adequate based on the total number of responses received which compared well with other previous studies where the average rate was 60 % and were considered appropriate.²⁷⁵ The 188 respondents who merited inclusion in the study were taken through their level of education, employment, offence committed, length in detention and reasons for prolonged detention.

Through purposive sampling technique two prison wardens from Machakos Main Prison, one

²⁷⁵ Olive Mugenda, *Research Methods: Quantitative and Qualitative Approaches* (Act Press, Nairobi Kenya) 1999

police officer from Machakos Central Police Station, one Magistrate from Machakos Law Courts and Mavoko Law Courts, one police officer from Athi River Police Station, one Magistrate from Mavoko Law Courts and one prison warden from Athi River Remand Prison were purposively selected because of their knowledgeable role in handling accused persons at various stages during pre-trial proceedings.

5.1.5 Ethical Considerations

Introduction to these institutions was through an introductory letter from University of Nairobi, Parklands Campus outlining the research proposal and requesting for permission to conduct the research. In all the above named institutions oral permission was granted, interview schedules took place with pre-trial detainees and key informants at different dates between 11th February and 27nd April 2018. This introduction letter ensured that those respondents volunteering information to the right to bail: exploring alternative non-financial bail conditions were accorded protection and confidentiality during the study.

5.1.6 Data Analysis

This study employed descriptive statistics to analyze primary data obtained from the field work. The researcher ensured that all the questionnaires were completely answered and the information was coded and categorized for analysis. The main purpose for coding was to transform data into a form suitable for computer-aided analysis.

5.2 Pre-trial detainees

Pre-trial detainees these were respondents who could not afford their bail conditions and were remanded at Machakos Main Prison and Athi River Remand Prison..

5.2.1 Level of Education Attained by the Respondent

The findings revealed that 64 % of the respondents had acquired primary level education, 20% of the respondents had attained secondary level education, 10 % of the respondent had attained tertiary level education, 4 % of the respondent had attained university level education and 2 % had not attained any kind of formal education in their life time. Majority for example, 64% of the respondents had not gone beyond primary level.

5.2.2 Employment

The findings indicated that 65 % of the respondents were in informal employment (*jua kali*)²⁷⁶, 30 % of the respondents were unemployed while 5 % of the respondents were in formal employment. From the findings it showed that majority 65% of the respondents were in informal employment and only 5% were informal employment.

5.2.3 Offence Committed

The findings indicated the respondents were charged with various offences ranging from capital offences, grievous harm, felonies²⁷⁷, and petty offences²⁷⁸. Courts imposed stringent bail conditions even where petty offences such as loitering, causing obstruction, being drunk and disorderly were committed. 70% of the respondents were granted bail of between Ksh. 5,000-60,000/=. The findings revealed that accused persons were remanded in custody for petty offences which are punishable only by fine or imprisonment of less than six months contrary to

²⁷⁶ Jua Kali it is an informal employment where employees are not permanently employed and involved in all kind of works.

²⁷⁷ The Penal Code Cap 63 defines a felony as an offence which is declared by law to be a felony or, if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three or more years.

²⁷⁸ Article 49 (2) of the Constitution provides that petty offences are offences which an accused person can be released by a cash fine or attract imprisonment of less than six months

constitutional provisions.

90% of the proportion of persons charged with capital offences, namely murder and robbery with violence were granted bail amounts of between Kshs.400, 000 and 800,000 also accompanied with a bond or surety.

For the respondents charged with grievous harm²⁷⁹ or serious crimes such as assault, rape, defilement, bail amounts ranging from Kshs.50, 000 and 300, 000 were imposed. The respondents in all the offences, namely, capital offences, grievous harm and petty offences were unable to post.

5.2.4 Length in Detention

The study revealed that 10 % of the respondents had been detained between (1-7 days), 14% of the respondents were detained between (8-14) days, 19% of the respondents were detained between (15-21) days, 16 % of the respondents were detained between (21-28) days, 15% of the respondents were between (29-35) days, 10% of the respondents were detained between (36-42) and 27% of the respondents had been detained for more than 61 days. The findings revealed that majority 80 % of the respondents had spent more than 14 days in remand due to inability to post financial bail.

5.2.5 Reasons for Detention

Majority of the respondents, namely, 100% reported that an unaffordable financial bail condition was the major reason to their detention. From the findings it can therefore be deduced that all the

²⁷⁹ The Penal Code Chapter 63 defines harm as any amount to a main dangerous harm, or serious or permanently injures health, or likely so to injure health, or extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.

respondents had been detained due to inability to post a financial bail.

5.2.6 Whether Alternative Non-Financial Bail Condition were imposed by the courts

The study sought to establish whether the respondents were granted alternative non-financial bail condition. The findings indicated that majority 95% of the respondents were not granted an alternative non-financial bail conditions while 3% of the respondents did not respond to the question.

5.2.7 Whether bail was Granted or Denied

The study revealed that 91% of the respondents were granted bail on their first appearance while 9% of the respondents were granted bail later after the police had completed their investigations and none of the respondents had been denied bail.

5.2.8 Whether Bail Conditions were accompanied with Bond or a Surety

The study indicated that majority 80 % of the respondents were granted financial bail condition with no accompanying conditions, 14% of the respondents had been granted a financial bail accompanied with a similar surety while 6 % of the respondents had been granted an option to either post the sum amount of bail or provide a security of an equivalent amount. The findings revealed that even in circumstances where a bail condition was granted accompanied with securities of a bond or surety, these securities of bond or surety were of a financial nature, for example log book, title deed, pay slip or a surety of a similar amount.

5.3 Interviews with Key Informants

Key informant interviews were conducted with selected professionals who had a knowledgeable role in handling pre-trial detainees at various stages during pre-trial proceedings.

5.3.1 Presentation of Result and Data analysis.

The study analyzed the qualitative data collected through key informants. The data collected was arranged according to the following themes;

5.3.2 Whether Courts Request for Pre-Bail Inquiries

A Magistrate at Mavoko Law courts asserted that Kenya has no legislation on pre-bail inquiries although such information could be obtained from Probation Officers and Aftercare Services which prepares bail reports on the request of the courts. She was also was of the opinion that the integrity of such independent information cannot be taken for granted although courts are not obliged to use bail reports. She further stated that due to lack of a regulatory framework on pre-bail inquiries accused persons brought before her never raised the issue of bail being high or low. However, after detention the issue of the bail amount being high arises and some magistrate courts review their bail decision as circumstances change, others do not and advice accused persons to seek redress from the High Court, which is empowered review application from lower courts and the police.

She was of the view that there is insufficient time to conduct pre-bail inquiries because under Article 49 (1) of the Constitution requires a police officer to bring an accused person before court not later than 24 hours.

5.3.3 Determination of Amounts of Bail

A Magistrate at Machakos Law Courts responded that in determining the amount of bail courts considered factors such as the nature of the offence, weight of the evidence and severity of the punishment if found guilty, weight of evidence, character of the accused and risk of flight. The

police officer in charge of Athi River Police Station stated that there is no legislation in place for determining the amount to bail that court should impose for a specific offence. This is the reason why courts impose different amounts of bail even for similar offences. The Prison Warden was of the view that in determining the amount of bail courts should consider whether the accused can afford the amount because detention were congested due to inability of pre-trial detainees to post bail.

5.3.4 Predominant financial bail conditions

The finding seeks to establish why courts predominantly imposed financial bail condition to accused person. A Magistrates at Mavoko Law Court suggested that imposing a financial bail condition to an accused person deterred flight because of the economic pressure and unwilling to forfeit their own money or friends money to the Republic.

On the other hand, a police officer attached to Athi River Police Station responded that a financial bail condition was more efficient because once an accused person posts bail he/she is set free to continue with his or her life without any supervision.

A prison warder at Machakos Main Prison suggested that courts predominantly imposed financial bail conditions because accused persons who cannot afford bail are detained which guarantee their next court appearance.

5.3.5 How frequents do court release an accused on his own recognizance

A Magistrate at Mavoko law courts responded that the main reason militating against the widespread of release on own recognizance is that the legislation is in adequate because it does not provide who has the responsibility to ensure the accused attend court. Further, she asserted

that unlike the financial bail, the accused released on his own recognizance has no financial interest at stake therefore the likelihood of attending court are minimal.

5.3.6 Do prolonged detention periods infringe on an accused persons fundamental rights and freedom

The Station Commander in Charge of Machakos Main Prison asserted that there was a marked increase of prison population which was as a result of pre-trial detainees. He was of the view that jailing an accused person whose appearance in court would be insured with an alternative non-financial bail condition or their own recognizance infringed on their constitutional right to bail.

On the issue of prolonged detention he responded that the maximum remand period was 14 days, where upon that, what usually happened was that the pre-trial detainees are brought before the court for mention of their case and back to remand. He further stated that if an accused remains in custody for more than 60 days he formally writes to the magistrate informing him/her the number of pre-trial detainees, their names and dates they were brought in remand.

5.3.7 What legal reforms should be put in place to regulate on the accused persons right to bail.

The police officer in charge of Athi River Police Station responded that there is a necessity for legal reforms to regulate on the accused person is right to bail because police cells are congested as a result accused person inability to post high bail or bonds. He further asserted police officers are also reluctant to grant bail since the purpose of bail is to guarantee that an accused person appear in court within the 24 hour period that a police officer is required to arraign an accused person before a court. He felt there was need for reforms on police bail because police overburdening an accused person on bail and yet the court will revoke the police bail and impose a new bail.

Magistrate at Machakos Law Courts responded that to increase availability of bail, the right to bail should be extended to all accused person irrespective of their financial status. In addition, legislation should be adapted to require an investigating officer obtain the background and financial background an accused person in order to facilitate the court to determine what form of bail condition to impose, for example, financial bail or an alternative financial bail.

5.4 Discussion of the findings

The chapter presents the discussions of the findings from interviews with pre-trial detainees and key informants.

5.4.1 Pre-trial detainees

The study found that 64 % of the detainees had not gone beyond primary level education and 70 % of the respondents were either in informal employment or unemployed. The low level of education of those detained coupled with their employment status implies making it difficult for them to post bail. Thus, before denying or granting bail, courts need to obtain a bail report in order to arrive at a fair and appropriate bail decision. Further, the study indicated that 100% of the respondents had been detention because they could not post bail.

The study findings on the offences committed by the respondents indicated that regardless of the category of the offence i.e. capital offences, serious offences or petty offences, courts did not impose alternative non-financial conditions. Further, respondents were demanded in custody for offences punishable by fine only or imprisonment for not more than six months which was contrary to Article 49 (2) of the Constitution.

5.4.2 Key informants

The interviews with key informants revealed that due to lack of a streamlined legal framework courts have determined amounts of bail depending on the gravity of the offence, for example the more grievous the offence the higher the amount of bail. Further, despite Section 124 of the CPC providing for release on own recognizance the courts were reluctant to implement the regulation because of lack of a proper enforcement and supervisory mechanism that ensures accused attends court. Due to this courts have opted for financial bail conditions. However, the key informants acknowledged that predominance of financial bail conditions infringed on the fundamental rights and freedoms of an accused persons right to bail.

5.5 Conclusion

The study revealed that imposition of financial bail conditions result in detention, often for long periods of times due to inability post bail and courts did not grant alternative non-financial bail conditions. This infringed on the constitutional right to bail.

The next chapter will be on conclusion and recommendations.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.0 Conclusion

This study sought to analyse the right to bail in Kenya and explore alternative non-financial bail conditions with an aim of understanding the historical, international, policy and institutional framework governing this sector as well as the challenges predominant financial bail conditions pose to the right to bail.

The specific objective of the study included first, to analyze the historical development of the bail during the Anglo-Saxon period to the present Kenya and how bail forms and conditions evolved. Secondly, to analyze how right to bail is regulated at the international, regional, domestic, institutional level and identify gaps and violations. Thirdly, to compare New Zealand, New South Wales and South Africa with a view of obtaining best practices that Kenya can adopt because of the challenges it faces in predominant use of financial conditions.

The study was guided by the hypothesis that the current legal framework has not adequately provided for an alternative non-financial bail conditions, therefore, predominant use of financial bail conditions as subjected accused person being to detention.

The study was desktop and field based with both primary and secondary sources of data being used for analysis. The various chapters of the study sought to meet the stated research objectives. Chapter two of the study analyzed the historical, development, forms and outlined various financial and non-financial conditions of bail in Kenya. From the study, it was clear that the right

to bail has a history that spans since Anglo-Saxon times and it has stood the test of time. One of the key reasons why the right to bail has been in existence for all these centuries is to secure the presence of the accused at trial while protecting his/her fundamental rights and freedoms before the courts makes a verdict of guilty or innocence.

Thus, the idea of bail before trial can be explained as a presumption of innocence and that bail relieves the accused from detention until disposition of the trial which takes a long time depending on the case backlog. The right to bail has developed in Kenya from India and England. During the colonial era the right to bail law was governed by the Criminal Procedure Code while at pre-independence an enactment on the right to bail was also incorporated in both the Constitution of Kenya, 1963 and 1969 (now repealed). The right to bail provisions under both the Constitution of Kenya, 1969 (now amended) and the Criminal Procedure Code have undergone several amendments in the 80's and 90's to distinguish between bailable or non-bailable offences.

The Constitution has guaranteed the right to grant or refuse bail to the police and the courts. Further, the constitutional right to bail is not an absolute right because it is subject to several conditions. These conditions include either financial bail conditions or non-financial bail conditions that court find appropriate to guarantee the accused appearance in court for example, a certain amount of money or a recognizance. Despite, the Constitution of Kenya, 2010 not categorizing between bailable and non-bailable offences or describing the form of bail conditions, the courts have predominantly used financial bail conditions which have resulted to incarceration of accused persons who cannot post bail.

Chapter 3 of this study analysed the international, regional and domestic laws and institutional level in Kenya so as to ascertain whether alternative non-financial bail conditions have been adequately legislated in recognition of the problems and challenges encountered by accused persons who cannot meet their financial bail conditions. As much as international and the regional instruments prohibit arbitrary detention, the underlying impediment to the fundamental rights and freedom to liberty is lack of alternative non-financial bail conditions.

Both the Constitution of Kenya, 2010 and the Criminal Procedure Code have inadequately legislated on the bail conditions. Due to this weak legislation the police and the courts have predominantly granted financial bail conditions. The judiciary came up with a Bail and Bond Policy Guideline for the regulation of bail and bond at institutional level. However, due to the challenges of bail administration the Guideline has not been implemented.

Chapter 4 involved a comparative study of New Zealand, New South Wales and South Africa with a view to identifying best practices which Kenya can borrow to ensure that alternative non-financial bail conditions are implemented. New Zealand and New South Wales are common law countries which have been able to incorporate non-financial bail conditions in their legislation.

On the other hand, South African was chosen as it is an African country that has incorporated alternative non-financial bail conditions on her statutes. South African realized that financial bail conditions are an impediment to realization of the fundamental rights and freedoms and incorporated a non-financial provision under their Criminal Procedure Act that provides that if the accused is unable to pay any sum of money, the court must consider setting appropriate conditions that do not include money for the release of that accused person. Further, courts must,

before reaching a decision on bail application, take into consideration any pre-trial report regarding the release of an accused person on bail and also those who have committed petty offences and granted bail by lower courts but unable to pay the bail amount to be released on warning in lieu to bail.

The main challenges on the right to bail in Kenya is inadequate legislation which has made it difficult for the courts and police to impose alternative non-financial bail conditions for example, Section 124 of the CPC provides for non-financial bail conditions such as own recognizance but there are not mechanisms in place to effectively monitor non-custodial detainees. Due to inadequate regulatory framework that would ensure the constitutional right to bail is realized according to the Constitution, has opened a window for courts and the police to self-regulate which has led to perceive bail as a financial conditions. This deviate from the primary purposes of bail and has resulted to the infringement of accused person's right to bail. A lack of regulatory frame work has led to lack of an efficient institutional framework.

Although currently there is a Bail Bond Guidelines Policy this policy does not address the core issue of bail condition therefore predominant financial bail conditions have continued. This has raised the concerned that the Bail Bond Guidelines policy is more of a theoretical than practical because it has just outlined what the Constitution and Criminal Procedure Code has stipulated. This in turn has led to the courts and the police not implementing this policy because they believe that it is a replica of both Constitution and Criminal Procedures Code on the issues concerning the right to bail.

Kenya can learn a lot from New Zealand, New South Wales and South Africa who have

incorporated specific provisions on alternative non-financial bail conditions in their legislation. The success of these three countries in developing alternative non-financial bail conditions has come from the establishing a right to bail that is separate from financial conditions and adheres to the constitutional right to bail. This would ensure that a proper bail system will be set up with the necessary legal framework and institutions established in order to ensure that alternative non-financial bail conditions are in place for continued enjoyment of the right to bail.

Chapter 5 consists of a case study of Machakos County focused on exploring alternative non-financial bail conditions based on field work involving interviewing pre-trial detainees and key informants. Interview with pre-trial detainees was conducted at Machakos Main Prison and Athi River Remand Prison. Purposive sampling technique was used to select respondents based on the subjective of the research, rather than random sampling.

Through a questionnaire respondents were asked several questions namely, their level of education, employment, offence committed, length in detention, reasons for detention, whether alternative non-financial bail conditions were imposed by the courts, whether bail was granted or denied and whether bail conditions were accompanied with bond or surety. The findings from the interview with the pre-trial detention revealed that court did not grant accused persons alternative non-alternative bail conditions and courts predominantly imposed financial bail conditions which resulted to detention. The interview with key informants revealed that the legislation on the right to bail in Kenya does not adequately address the issue of alternative non-financial bail conditions. Further, predominant bail conditions have infringed the constitutional right to bail because courts never imposed alternative non-financial bail conditions.

6.2 Recommendations

Based on the study and its findings, the following are recommended action for realization of alternative non-financial bail conditions in Kenya.

6.2.1 Creation of a Legal, Regulatory and Institutional Framework to govern bail/bond in Kenya.

The legislative arm of government in Kenya needs to enact a separate and distinct legal, regulatory and institutional framework for bail. This would entail the enactment of laws that specifically govern bail/bond. This is important because the Constitution of Kenya, 2010 and the Criminal Procedure Code are very limiting in regard to accused person's right to bail and the courts have predominantly granted financial bail conditions. Such a law would provide for a manner in which alternative bail conditions will be regulated and the institutions that will be charged to ensure compliance.

In New Zealand for example, Electronic Monitoring provision in their Bail Act ensured that accused persons who could not afford monetary bail conditions were afforded an alternative non-financial bail condition. In New South Wales the burden of proof shifts to the accused person to show cause as to why detention is not justifiable. Once the an accused person has successfully shown cause an unacceptable risk test applies that requires the bail authority to assess whether the accuse, if released will abscond, commit further offences, endanger the safety of the society or interfere with the evidence.

6.2.2 Implement Alternative Non-Financial Bail Condition

The Constitution guarantees an accused person to be released on bail or bond, on reasonable conditions pending charge or trial. In the case of petty offences, which attract a punishment of

either fine or imprisonment for a maximum period of six months. Therefore, the Constitution underscores the need to embrace alternative non-financial bail conditions and non-custodial mechanisms. Sadly, this has not been practical in practice because courts have predominantly imposed financial bail conditions regardless of the offence committed. Because of this imposition of financial bail conditions accused persons entitled to fines and imprisonments for less than six months end up being incarcerations due to inability to post bail.

For an effective implementation of alternative non-financial bail conditions there is need to specifically set up a task force to harmonize on the issue of financial bail conditions and alternative non-financial bail conditions. Further, accused persons granted alternative non-financial bail conditions need institutions, agencies, groups and facilities that will enable courts to monitor non-custodial detainees for example, nyumba kumi,²⁸⁰ reporting to chiefs, non-governmental organizations that supervise and monitor accused persons and also obtaining non-financial sureties from family members like an identity card has an assurance that the accused will appear in court. Alternative non-financial bail conditions bail ensures that the accused person is socially and economically productive while at the same time attends courts for his/her hearing.

6.2.3 Amendment the Criminal Procedure Code

Section 123 (1) of the Code which provides that capital offences are not bailable should be amended so as to harmonize with Article 49 (1) (h) of the Constitution in that it all offences shall be bailable unless there are compelling reasons. Further, Section 123 (2) of the Code which

²⁸⁰ Nyumba Kumi community policing initiatives which comprises of ten neighbors who acts like ‘my brother keepers’ the person who keeps his brother

provides the amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive be amended and replaced with words similar Section 60 (2B) (b) (ii) of South Africa which provides that the court should consider setting amount of bail which are appropriate in regard to the circumstances of the case, and must consider appropriate non-financial conditions in regard to the circumstances of the case. Therefore, such an amendment under Section 123 would empower the court grant bail to all offences unless there are compelling reasons and also put into consideration either financial conditions or non-financial condition while imposing bail conditions.

The head note under Section 123A of the CPC provides for joinder of two or more accused in one charge or information and does not reflect the provision. Therefore, an amendment is necessary to replace the head note with ‘factors to consider when making a decision on bail or bond’. According to the researcher such a head note would be in harmony and consistence with the provision.

Section 124 of the CPC provides financial bail and non-financial bail. Therefore, there is need for an amendment to Section 124 of CPC creating a separate and distinct provisions for own recognizance and cash bail because the latter is a financial condition while the former is a non-financial bail condition.

6.2.4 Implementation of Bail and Bond Policy Guidelines

Clause 1 (1.2) of the Bail and Policy Guideline should be implemented to ensure that police officers inform suspects of the reason of arrest, inform suspect that they have a right to be released on bail, where a suspect has committed a petty offence and he is not a flight risk police

should give him a free bond as provided under the Constitution and CPC. Further, the policy provides for pre-bail inquiry if there is no opposition from the prosecution, request for a bail report prepared by officer of Probation and After Care Services. In South Africa for example, Section 60 (2) of the Criminal Procedure Act provides that the court must, before reaching a decision on bail application; take into consideration any pre-trial services report regarding the release of an accused person.

Clause 5 of the policy provides for mechanisms to be put in place for effectively monitoring accused persons who have been granted alternative non-financial condition to ensure their appearance at the court. In New South Wales for example, Section 27 of the Bail Act provides that bail condition may be require character acknowledgements by an acceptable person other than accused. Unfortunately, Kenya does not have a bail supervision system at present. As a result, the enforcement of bail conditions is not effective. Notwithstanding, Clause 6 of the Policy provides for inter-agency coordination, oversight of places of detention, and public awareness which are concerned with the supervision of bail and bond terms should be implemented to the letter. Therefore, in order for these rights of accused to be observed there is need for agencies such has the National Police Services, Kenya Prison Services, Independent Policing Over Sight Authority, Commission on the Administration of Justice and human rights Non-Governmental organization, nyumba kumi initiatives and chiefs.

6.2.5 Creation of Awareness among the Public

There is need for the police, the courts, the prison and other stakeholders in the criminal justice system to create awareness among the public about the bail conditions so as to demystify the misconceptions that are held by many who believe that bail conditions are only meant to be

financial conditions only. Awareness through courts notices and other media platforms with regard to categories of bail and who is eligible that ensure the primary function of bail which is to assure the presence of accused at trial will cause other accused persons who are of good character and cannot afford the financial condition benefit from it and enhance their constitutional right to bail has been achieved.

The constitutional right to bail is not a new phenomenon in Kenya, every accused person encounters bail on a daily basis as they undergo through the criminal justice system. Both the CPC and the Constitution of Kenya, 1969 (repealed) have been amended several times in order to balance the rights of an accused person and those of the society. Further, Article 49 (1) (h) of Constitution of Kenya, 2010 does not categorize between bailable or non- bailable offences, accused persons are entitled to be released on reasonable bail conditions unless there are compelling reasons. Notwithstanding, the constitutional provision that all offences are bailable the main challenge for a long time has been the predominant imposition of financial bail conditions by the court which have been an impediment on the accused persons right to bail . The courts should conduct pre-bail inquiries to establish who is eligible for alternative non-financial bail conditions. Therefore, accused persons who are of good character, can enjoy their constitutional right to bail, equally as those who can post financial bail, because the primary purpose of bail is to guarantee accused person appearance at trial. In South Africa for example, if an accused person is unable to pay any sum of money, the court considers appropriate conditions that do not include money for the release such a person accused person.

6.2.6 Further Research

Based on the findings of this study, Kenya can borrow best practices from New Zealand, New South Wales and South Africa which have incorporated electronic monitoring in their legislation.

For this reasons the study recommends a pilot study should be carried out to establish the effectiveness and the challenges of implementing electronic monitoring in Kenya.

BIBLIOGRAPHY

BOOKS

Ayume, Francis, *Criminal Procedure and Law in Uganda* (LawAfrica Publishers, Nairobi 1986).

Brix B, Jurisprudence, *Theory and Context* (4th Ed, Sweet and Maxwell 2006).

Bwonwong'a Momanyi, *Procedures in Criminal Law in Kenya* (East African Educational Publishers, Kenya 1994).

Devine F. E, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (Pager Publishers, One Madison Avenue, New York, USA 1991).

Fuller Lon, *Morality of Law* (Oxford University Press 2002).

Itemba J.M, *The Law Relating to Bail in Tanzania* (Dar es salaam University Press 1991).

Lumumba Patrick, *Criminal Procedure in Kenya* (Law Africa Publishing Ltd Nairobi 2008).

Kiage Patrick, *Essentials of Criminal Procedure in Kenya*, (LawAfrica Publishers, Nairobi, Kenya 2008).

Kramer Mathew, *In Defence of Legal Positivism: Law Without Trimmings* (OUP, Oxford Press 1999).

Kiage Patrick, *Essentials of Criminal Procedure in Kenya*, (LawAfrica Publishers, Nairobi, Kenya 2008).

Paul O.J, *Key Essentials in jurisprudence: An In-depth Discourse on Jurisprudence problems* (Law Africa, Nairobi 2006).

Pinner James, *The Law Student's Dictionary* (Oxford Law University Press, New York 2008).

Ndulo M, *African Customary Law, Customs and Women's Rights* (Cornell Law Publications, 2011).

Nowak Manfred, *Introduction to the International Human Rights Regime* (Brill Nijhoff Publishers, Australia 2003).

Ouguergouz Fatshah, *The African Charter on Human and Peoples' Rights; A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Brill Nijhoff Publishers, 2003).

Rawls John, *A Theory of Justice*, (Harvard University Press 1971).

Rawls John, *Political Liberalism* (Colombia University Press, New York 1993).

Sax Helmut, *Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty. A Commentary on the United Nations Conventions on the Rights of the Child* (Martinus Nijhoff Publishers 2006)

Singh Chanab, '*The Republican Constitution of Kenya: A Historical Background and Analysis*' 14 *International And Comparative Law Quarterly* 878 (Cambridge University Press, 1965).

Shurma R, *Human Rights and Bail*: (Ashish Publishing House Corporation, New Delhi, 2002).

Worth W Holds, *A History of English Law* (3rd ed, Sweet and Maxwell, 1945).

JOURNALS AND ARTICLES

Axam Hilary XS, *'If the Interest of Justice Permit: Individual Liberty, the Limitation Clause, and the Qualified Constitutional Right to Bail'* (2001) South African Journal on Human Rights 2001.

Duker William, *'The Right to Bail: A Historical Inquiry'* (1977) 42 Albany Law Review 33.

Foucault Michael, *'Power/Knowledge and Epistemological Prescriptions'* (2004) Honors Theses Paper 534.

Larkin Paul J, *'The Lost Process Doctrines'* (2016) Catholic University Law Review Vol. 66

Kinyanjui Sarah, *'Pre-trial detention in Kenya: A Balancing the Rights of Criminal Defendants and the Interest of the Society'* Open Society Initiative of East Africa 2011.

Morgan Willis D, *'History and Economics of Surety ship'* (1972) 12 Cornell Law Revision 153.

Simpson R, *'Bail in New South Wales'* (NSW Parliamentary Library Research Briefing Paper No. 25/97 1997) 2.

Schoteich M, *'pre-trial detention and human rights in Africa in Human Rights in African Prison'* (2008) Cape Town HSRC Press, p. 95.

Stewart Hamish, *'The Right to be Presumed Innocent Criminal Law and Philosophy'* 8 (2) p 416.

INTERNET LINKS

[Http://www.judiciary.go.ke](http://www.judiciary.go.ke)

<http://www.prisons.go.ke>

[Www.Pretrial.Org/](http://www.Pretrial.Org/)

<http://bit.ly/2u5kH4D>

<http://www.britannica.com/topic/wreglid#ref31625>

<http://digitalcommons.law.yale.edu/yli>

<https://www.jstor.org/stable/757055>

<https://papers.ssrn.com>

<https://trove.nla.gov.au>

<https://brill.com>

<http://doi.org/10.1080/02587203.2001.11827629>

<http://www.prisons.go.ke>

APPENDICES

APPENDIX A: Research Questionnaire Administered to Pre-trial detainees in Machakos Main Prison and Athi River Remand Prison.

Dear respondent,

My Name is **Nduru Louis Tarcus**, a Masters of Law Student at the University of Nairobi Law School. I am conducting a study on the “Right to Bail in Kenya: Exploring Alternative Non-Financial Bail Terms in Kenya.”

Kindly, assist in conducting this study by answering the questions in this questionnaire appropriately. This will help me in understanding whether courts granted accused persons alternative non-financial bail conditions. The information provided will remain confidential, and will only be used for the purpose of this study.

1. Name of respondents (Optional).....
2. What is your age in years
 - a. 18-29
 - b. 30-39
 - c. 40-49
 - d. 50-59
3. What is your Sex
 - a. Male
 - b. Female
4. Highest Level of education

- a. Primary level of education
- b. Secondary education
- c. Tertiary level education
- d. University level
- e. Others (specify)

Part B: Personal Information

- 5. Were you employed before detention?
 - a. Yes
 - b. No
- 6. If, yes what type of employment did you engage in?
 - c. Informal employment (jua kali)
 - d. Unemployed
 - e. Formal employment
- 7. What is your marital status?
 - a. Married
 - b. Single
 - c. Widowed
 - d. Divorced

Part C: Institutional Factors

- 8. What offence did you commit.....?
- 9. What amount of bail were you granted.....?
- 10. For how long have you been in detention?

- a. 1-7 days d. 21-28 days g. 42-48 days j. 61 and above
- b. 8-14 days e. 29-35days h. 49-54 days
- c. 15-21 days f. 36-42 days I. 55-61 days

11. What are the reasons for being detained.....?

12. Was an alternative non-financial bail condition granted?

- a. Yes ()
- b. No ()

13. Were you granted bail by the court?

- a. At first court appearance ()
- b. Later after police investigation ()

14. Was you bail condition

- a. Cash bail ()
- b. Cash bail with a surety ()
- c. Either deposit cash or a bond ()

Thank you for your time

APPENDIX B: Interview Guide for Key Informants

My Name is **Nduru Louis Tarcus M**, a Masters of Law Student at the University of Nairobi Law School. I am conducting a study on the “Right to Bail in Kenya: Exploring Alternative Non-Financial Bail Terms in Kenya.”

Kindly, assist in conducting this study by answering the questions in this questionnaire appropriately. This will help me in understanding whether courts granted accused persons alternative non-financial bail conditions. The information provided will remain confidential, and will only be used for the purpose of this study.

1. How often do courts request for pre-bail inquiries?
2. How do courts determine the amount to bail?
3. Why do courts predominantly grant accused person financial bail conditions?
4. Do the courts release accused persons on their own recognizance or grant alternative non-financial conditions?
5. Does detaining an accused person infringe on his/her fundamental rights and freedoms?
6. In your own opinion, what legal reforms should be put in place to regulate accused persons right to bail?

THANK YOU

APPENDIX C: Letter from the University of Nairobi



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OFFICE OF THE DEAN

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Kenya.

February 4th 2013

TO WHOM IT MAY CONCERN

Dear Sir/Madam

RE: NDURU LOUIS TARCUS – G62/69002/2011

This is to confirm that the above named is a student at the University of Nairobi, Law School. He is currently undertaking studies leading to the award of the Master of Laws (LL.M) degree.

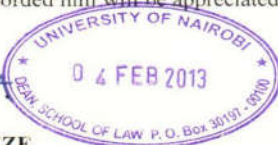
Mr Louis Nduru is specialising in Law and Democracy and yet to defend his Master thesis (LL.M project paper).

Please do not hesitate to direct to us any query regarding this reference.

Any assistance accorded him will be appreciated.

Yours faithfully


NOEL MANYENZE
ADMINISTRATIVE ASSISTANT
SCHOOL OF LAW



NM/mo