THE THEORY AND PRACTICE OF BAIL AND BOND IN KENYA

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By

Kunyili N. (Mrs.)

Nairobi

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DEDICATION

TO

My mother, Robai Lusiana for an early introduction to literacy.

and to

My elder brothers Martin and Amos for valuable guidance and support in school.

ABBREVIATIONS

CASES

A.C.	Appeal Cases
E.A.	East African Law Reports
Cr. case	Criminal Case.
K.L.R.	Kenya Law Reports
Cr. App.	Criminal Appeal
E.A.C.A.	East Africa Court of Appeal

TABLE OF STATUTES

The Kenya Constitution Chapter 5 of 1969.

Criminal Procedure Code Chapter 75 Laws of Kenya

Police Act Chapter 84 Laws of Kenya

Criminal Procedure Code Chapter 7 of 1930

Criminal Procedure Code Chapter 20 of 1930

Magistrates Courts (amendment decree 1972

Orders - In - Council

1897 Order In Council

1902 East African Order In Council

1911 East African Order In Council.

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THE THEORY AND PRACTISE OF BAIL AND BOND IN KENYA

INTRODUCTION

1. STATEMENT OF THE PROBLEM

The Kenya Constitution guarantees an individual's right to liberty.[1] Section 77(2)(a) of the constitution states that everybody is innocent until proved guilty or he or she pleads guilty. This implies that until the courts of law establish through the judicial process that a person is guilty, he should have his freedom and liberty. The accused person can only have his freedom if he is granted bail or bond. Section 77(2)(c)provides that a person accused of an offence should have adequate time and facilities to prepare for his defence. The accused person can only be able to prepare for his defence adequately if he is free and out of custody. The bail system provides for this liberty. Section 77(3)(a&b) states that anybody arrested should be brought before a court of law within a reasonable time. If the person arrested can not be brought before a court of law within a reasonable time then under section 72(5) he should be released unconditionally or upon reasonable conditions to ensure that he appears for ~~trail~~ trial at a later date. The bail system is an instrument for effecting this right to liberty in practise.

The law relating to bail and the right to bail is outlined in section 123 of the Criminal Procedure Code.[2]

However, the practise of bail in the courts of law leaves alot to be desired. This dissertation will focus on the exercise of grant and refusal of bail in the courts of law with particular emphasis on how the discretion in granting bail has been exercised i.e. how the legal provisions relating to bail have been implemented in practise.

2. ISSUES

(a) WHAT ARE THE GROUNDS FOR DECIDING WHO MAY BE GRANTED BAIL AND WHO MAY NOT?

The Criminal Procedure Code states that everyone is entittled to bail except where murder or treason is alleged.[3] However in actual practise not all people are granted bail or bond although they may not have been suspected of murder or treason offences. The question we pose here is: what are the reasons for denial of bail or bond in such instances?

(b) TO WHAT EXTENT DOES A DENIAL OF BAIL COMPROMISE THE CONSTITUTIONAL GUARANTEE TO INDIVIDUAL LIBERTY?

The constitutional right to an individual's liberty is set out in sections 77(2)(a) 77(2)(c) and 77(3) (a & b). This implies that any slightest interference with anyone's liberty is unconstitutional.

The bail system seeks to enable the provisions of the constitution as to an individual's liberty be complied with. Where bail or bond is thus not granted, an individuals right to liberty is jeopadized. The question posed here: is the effect of not granting bail to persons and how such denial compromises with the constitutional provisions as to the individual's liberty.

(c) ON WHAT GROUNDS IS SUFFICIENCY OF BAIL DETERMINED?

The power to grant or refuse bail is vested in the magistrates or police officers. What is sufficient bail is not defined in the Criminal Procedure Code. The officers in charge of granting or refusing bail have a discretion to grant or refuse bail. The question to be examined here is how the magistrates and police officers exercise their discretion in granting and refusing bail and how they determine what is sufficient bail.

2. PERSPECTIVE

The legal system or institution of a country cannot be looked at as being isolated or abstract. It is part of a broader social, political and economy of a country. It can best be understood only within

the context of the concrete material conditions which brought it about and which continue to shape it. Any analysis of alegal system must therefore focus on the economic organisation of the society in which it operates. Frederick Engels points out that,

> "..... the economic structure of a society always forms the real basis which in the last analysis, is to be explained, the whole superstructure of legal and political institutions,.....4

However, the economic structure of a society is not static, it develops and changes. Nor is the society itself homogemons and stable. It is differentiated into social classes with diverse and conflicting economic interests. Eventually therefore, the explaination for a legal institution must be sought in the economic development of a society, in the changes the modes of production and exchange, in the division of society into distinct and antagonistic classes and in the ensuing class struggles.

The dominant classes express its will through law and the exercise of state power. In order to harmonize the economic interest and the various social classes in the society, it is necessary to have a power seemingly standing above society, that

would alleviate the conflicts in the society and keep them within bounds and order. Through the state apparatus, the economically powerful are also the dominant class in the society.

The Kenyan state is part of the arsenal of domination used by the economically powerful, the bourgeosie, in their attempt to make or pass laws to protect their interests in the society and suppress the working class. The law relating to bail is one such law used by the economicaly powerful class to protect their interest.

As an embodiment of rules, of conduct in the society, the legal regime is neither the result of some general agreement within the society nor is it created in the interests of the entire social community.[5] Its the expression of the role of the class that holds power and controls state power. The appreciation of these rules such as the law relating to bail are guaranteed by the compulsory power of the state so as to conserve, strengthen and develop social relationships and orders useful and convenient to the dominant class, the ruling class.[6] When state guarantees the right to liberty in the constitution in section 72,

the impression given is that everybody is equal before the law and so everybody is entittled to his liberty. The fact that the state, the ruling class recognizes the persons right to liberty enables the ruling class to get the confidence of the working class. The atmosphere for coercion then becomes comfortable and the ruling class can perpetuate its interests without incurring revolutions from the working class.

In social formations where the capitalist mode of production is dominant state power and law are used by the bourgeosie, not only to institute social relationships and orders conducive to their interest but also to protect and preserve these relationships. Thus the relationships can only be protected if law is formulated that can also give protection to the working class. The law of bail is such law that guarantes an individual's liberty.

The ruling class lays down laws that appear on the surface to be protecting the interests of both the bourgeosie and the working class. The law is then followed with exceptions. These exceptions then render the law not a right but only a priviledge. However on the surface, the law appear to be protecting all classes.

The Kenya constitution at section 72 guarantees an individual's right to liberty. This is further enforced by the Criminal Procedure Code S.123. However, the Criminal Procedure Code does not guarantee persons suspected of having committed capital offences liberty. The Criminal Procedure Code also gives the magistrates or police officers the discretion to grant bail or bond to accused persons. Its at this stage that the law relating to bail is used to serve the interests of the ruling class. Only those who can afford bail or bond get it, the poor remain in custody. Some persons as we shall see in the proceeding chapters are denied bond or bail on public policy grounds. The ruling class then achieve their aim through the exceptions to the general rule.

4. METHODOLOGY AND DATA

In this paper, I shall rely on both primary and secondary materials. The primary materials will include; interviews with court and police officers. The secondary materials will include; textbooks, articles, recommendations from seminars and unreported as well as reported cases.

The dissertation format is as follows;

1. Introduction

1. statement of the problem
2. issues arising
3. the pospective from which the study is undertaken.
4. methodology and Data

2. CHAPTER ONE

THE LEGAL PROVISIONS RELATING TO BAIL AND BOND.

(a) Historical background to the law of Bail and Bond.

(b) The Legal Provisions Relating to bail and bond.

3. CHAPTER TWO

The Practise of bail and bond in Kenya

4. CHAPTER THREE

Conclusions and suggested reforms.

CHAPTER ONE

THE LEGAL PROVISIONS RELATING TO BAIL AND BOND

SECTION A

THE HISTORICAL BACKGROUND TO THE LAW OF BAIL AND BOND

In order to trace the history of the law relating to bail and bond in Kenya, its important to look at the origin and development of the history in England. This is because, most of the law relating to bail and bond in Kenya was imported directly from England or indirectly from England to India then to Kenya.[1]

In England, and particulary in the 13th century, any person who was unknown in the place where he stayed was arrested.[2] Any person who went around armed without lawful course was also to be arrested under the Assize of Clarendon Rolls.[3] Under Article 16 of thisRolls,suspicious person's fell under the categories mentioned above.

The powers of arrest kept on widening. Between 10000-1200 A.D. any person who was suspected of havingcommitted an offence could be arrested by civilians

if there were reasonable grounds for such suspicious. From this we can see that the liberty of the individual was in jeopardy. Strangers could not walk around freely because they were unknown and could be labelled as "suspicious persons" and arrested.

Once the suspected persons were arrested, they were taken to the Sheriff who had the powers to try cases as well as granting bail. Bail was granted not as a right but because imprisonment was troublesome and costly.[4] The conditions in cells were gruelsome, unhealthy and terrible. Many people died in cells as a result.

There were itinerant justices who delt with cases outside the sheriffs Jurisdiction. These cases were of a more serious nature. The justices were appointees of the King. They went round from county to county hearing the cases. During this time, the means of communications were very poor. The justices took along time to arrive at any place to hear cases. Prisoners thus stayed in prison for long periods, others died while others were starved or suffered from illness in the prisons.[5] Many people who were suspected of crimes saw prison as a place to break out of.[6]

The sheriff thus tried to release the accused persons on bail to evade the heavy responsibility of keeping them. The sheriff had the discretionery power to release prisoners on "mainprize"[7] Mainprize was only granted to prisoners who had not committed homicide, any forest offence, an offence against the King or an offence against his chief justice.[8] Persons who were suspected of having committed any other offence which was irreplevisable under the English law could not be mainprized.[9] This gave wide powers of discretion to the sheriff in deciding which these "other offences" were and who to grant main prize.

The sheriff discharged his duty of keeping prisoners by giving the prisoners to their friends. These prisoners friends had to be wealthy people.[10] We can see that even at this early stage in the development of the law of bail, the right to bail was only available to the rich not the poor i.e. those who could afford to have their liberty.

If a prisoner who had been granted mainprize could not be found later, the friend in whose custody, the prisoner was could be taken by way of reprisal.[11] Thus the person who was meant to hold him could be taken in custody until he produced the prisoner.

This created fear in persons who were rich and so many people were not willing to keep prisoners for fear of being arrested in case the prisoners absconded.

In the early developments of the law of bail, there was a difference between bail and mainprize. Under mainprize as mentioned earlier, if the prisoner absconded, then the surety ~~surety~~ would be put in prison until he produced the prisoner. When one was granted bail, one was committed into the custody of the surety and in practice, the prisoners were still prisoners and in custody. The sureties were likened to jailors. The sureties were responsible for detaining the prisoners because if the prisoners absconded, then the sureties would suffer the punishment hanging over the head of the absconded prisoner. This was not pleasant mostly where the offence with which the accused person had been charged carried a death penalty. The sureties thus had to detain the prisoners to ensure that they do not abscond.

Depending on the nature of the offence, the sheriff could grant "bail below" or "bail above" Bail below was a sum of money which could be forfeited if the prisoner could not be produced by the surety. In this case, the sheriff himself could stand as surety as it was within their level of income. In the bail

above whereby the surety could lose his life or suffer the sentence if he failed to produce the prisoner, this was pledged to a court.

As the developments in the law took place, there was no difference between bail and mainprize. The prisoner who was suspected of homicide or any other irreplevisable offence had to proof to the jurors that the offence with which he was charged was brought against him inspite and hatred.[13] If the prisoner proved this allegation successfully then he would get a provisional release pending trial. If he did not, then he stayed in prison.

The law relating to bail met with such wide abuses because of the wide discretionery powers given to the sheriff. It was not until the time of Edward I's reign in the 11th century that the rules relating to bail were laid down. The rules were laid down in the statute of Westminister I 127.[6][14] This statute tried to categorize the offences that were bailable. This statute also reduced the powers of the sheriff. The law relating to bail and mainprize were absorbed and later on rules as regarding bail were made more precise by later statutes.[15] This is where most of the present law on bail in England was taken from.

The law relating to bail in Kenya was imported into Kenya from India. The Indian one being imported from England. The law was imported into Kenya by virtue of the 1897 East Africa Order in Council.[15] At Article 11, the order in council provided that the civil and criminal jurisdiction in Kenya would be exercised in comformity with the civil procedure, criminal procedure and penal code of India. The law relating to bail was contained in the criminal procedure code of India. These provisions were further incorporated in the 1902 East Africa order in council which replaced the 1897 one. Article 15 (2) provided the same.

The 1911 East Africa Order in Council ammended Article 15(2) by allowing common law, doctrines of equity and statutes of general application that were in force in England on 12th August 1897 to apply in so far as circumstances permitted. The same Order in Council gave her majesty the power to create, modify, alter or repeal any ordinance passed for the protectorate. Thus the Indian Criminal Procedure Code which contained the law relating to bail would apply to Kenya as well as the aspects of the English law.

The provisions of the 1911 Order in Council were incorporated in the 1921 Kenya colony Order in Council.

The Governor was given powers under Government Notice number 422 of 1923 to make legislation with the help of the legislative council. The laws were subject to the alteration, modification and repeal by His Majesty the King of England. In 1930, the Governor exercised his powers and those of the legislature council by passing the Criminal Procedure Code.[16] The Attorney-General Mr. A.D.A. Macgregor K.C. gave one of the reasons for creating the legislation as:-

> "when one was called upon to enter into bond and one did not have money ------- imprisonment (that is custody) follows as a matter of course"17

The Attorney-General was referring to vagrants who were mostly natives and could not afford bail. However this legislation when was wholly British type of legislation did not seek to enable the poor natives get access to bail. Bail was only accessible to those who could afford it. The Attorney-General was quoting what was true but applying it to a wrong Act. The practise of the poor people not getting their liberty because they cannot afford it continues to date as we shall see in the proceeding chapter.

The law relating to bail has undergone very few changes. The 1913 ordinance was an embodment of the

Indian Criminal Procedure Code of 1898 verbatim. The 1913 ordinance defined non-bailable offences as those indicated in the second schedule. Among them were offences such as: all offences carrying a death sentence, transportation for life, nigious imprisonment for three years before transportation were non-bailable. Also offences carrying along custodial sentence were non-bailable. The 1930 Criminal Procedure Code reduced non-bailable offences to murder, treason and rape. This increased the discretion of magistrates in granting bail but widened the number of suspected persons who could be released on bail or bond. In 1959 rape ceased to be non-bailable.[18] The result as I shall show in the proceeding chapter has been many male persons have indulged in rape cases of even children of 3 years. Section 129 of the 1930 code was detailed and subsituted for in 1934. In the later section unlike the former, the accused had to show course why the recognisance should not be forfeited and the alterterment and since of moveable property had to be after default in paying the fine. This still stands to date in the present Criminal Procedure Code.

Like many other laws, the Criminal Procedure Code was adopted after independence.[18] It however changed

from being chapter 21 to chapter 75 Laws of Kenya. There has been little change in substantial law of bail. The major amendment relating to bail was section 121 of the Criminal Procedure Code. This section allowed those accused of rape to be bailable. To date only capital offences i.e. treason and murder are non-bailable. The effect was to allow accused persons who were suspected of rape case their freedom prior to trial. This has lightened the attitude of people towards rape cases. Persons accused of muder or treason are even as more dengerous to the community.

SECTION B

THE LEGAL PROVISIONS RELATING TO BAIL AND BOND.

The Kenya law ~~that~~ relating to bail and bond is embodied in the constitution and the criminal procedure code.[1] Section 72 of the Kenya constitution outlines individual rights to liberty.[2] However, even this right to liberty has got exceptions.[3]

Section 72(2)(b) states that a person arrested upon reasonable suspicion of having committed an offence shall be brought before a court of law as soon as is reasonably practicable "--- and where he is not brought before a court within twenty four hours of his arrest or from the commencemnt of his detention ----". The section goes on to state at paragraph 3,(b) that where such an accused person is not brought before court within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either conditionaly or upon reasonable conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

The court is able on first appearance to determine whether the trial will be delayed just by looking at

the court diary. Thus once a court finds that there will be delay then the accused person should be released on bail or bond. Section 72(5) of the constitution contemplates such a situation as it says that the conditions of release are to ensure that the person appears for "trial or for proceedings preliminary to trial". In the case of Musoke v. Uganda[4] where the appellants case was adjourned from time to time while the accused person remained in cells, Kiwanuka A.G. C.J. granting the bail on appeal noted that in cases where there is delay and the accused person is kept in custody for unreasonably long period of time, bail should be granted.

Section 77(2)(a) of the constitution states that everybody is innocent until adjudged guilty or until he pleads guilty. This implies that until the courts of law establish that someone is guilty then the accused person should have his freedom and liberty.

Section 77(2)(c) provides that where a person is accused of having committed an offence he should be allowed adequate time and facilities to prepare for his defence. An accused person should get access to

an advocate, witnesses and books, if necessary, to enable him prepare his defence. This he can only do if he is granted bail and thus is out of custody. In the case of Mohammed Salim v. R [5] it was held that it was in the interest of justice that the accused person should have the benefit of legal aid in the preparation and conduct of his defence.

The bulk of the law relating to bail is outlined in the Criminal Procedure Code and the Police Act.

Section 36 of the Police Act empowers a police officer of a police station, where an accused person cannot be brought before court within 24 hours, "---- unless the offence appears to be of a serious nature, release the person on his executing abond, with or without sureties ----". Section 23 of the Police Act emphasizes the same. Thus police officers can grant bail before an accused person appears before a court of law. The purpose is to ensure that accused persons don't serve sentence before trial by being detained in custody.

Bond can be given for prevention of offences.[7] Bond may also be given as a security for good behavious.[8] This is from suspected persons. Habitual criminals can only be given bond by a magistrate.[9]

When granting such bail, the magistrate must state the information received, the amount of bond granted or to be executed, the period for which it will be inforce and the number, class and character of surities if any that are given.[10]

Bail may be granted to anyone except those persons suspected of having committed murder or treason.[11] Section 123(1) of the Criminal Procedure Code states that:-

> "when any person, other than a person accused of murder, robbery without violence or treason is arrested or detained, with warrant by any officer incharge of a police station or appears or is brought before a court and is prepared at any time while in custody of such officer or at any stage of the proceedings before such court to give bail, such person may be admitted to bail."11

Thus the intiative is for the accused person to ask for bail.

The right to bail can arise at any stage of the proceedings.[12] Once the application is made, the court will consider such aspects as it thinks fit before granting bail. These aspects do not appear in the Criminal Procedure Code. The magistrate and police officers have the discretion in granting of bail.

Magistrates or police officers may release an accused person on bail either cash bail or on the deposit of some money or property.[13] The bail can be granted with or without sureties.[14] Section 123 of the Criminal Procedure Code states that the amount shall not be excessive and shall be fixed with due regard to the circumstances of the case. This is to ensure that the right amount of bail or bond is asked for and to ensure a number of releases on bail and bond. Section 125 of the Criminal Procedure Code says that in granting bail and before the release of the accused person, a bond for the amount stated shall be executed by the accused in case of personal recognisance or by one or more of the sureties in case of bail bond. The bond shall state the time and place of his appearence. Release follows immediately.

Magistrates have the powers to order for sufficient bail[15] where the first taken is insufficient. Sureties are at liberty to discharge the responsibility on applying to a magistrate regarding the applicants, either wholly or in part and a warrant of arrest will be issued.[16] The applicants will then be required to furnish sufficient bail or be committed to prison. Under section 125 of the Criminal Procedure Code, the the state of the surety is discharged of all the liability

but the applicant has to find another sufficient surety. The Kenya High Court has the powers of hearing appeals or revising orders made by magistrates of lower courts on matters of bail.[17] The High Court can also order a magistrate to levy the amount due on recognizance to attend and appear at the High Court.[18]

We have looked at the provisions that guarantee an individuals right to liberty. We have seen how the provisions in the Criminal Procedure Code attempt to safeguard an individuals right to liberty by providing for the grant of bail or bond. In the next chapter, I proceed to examine how these legal provisions have been implemented in the courts of law.

CHAPTER TWO

THE PRACTICE OF BAIL AND BOND IN KENYA

In this chapter, I shall attempt to examine the extent to which courts have in practice, tried to give effect to the statutory provisions relating to bail. A critical analysis of case law highlighting the grounds for refusal of bail or its grant will be attempted. I shall examine and show the legal merits of such grounds. I shall examine to what extent the police officers have conformed or not conformed with the legal provisions. If there are violations, what explains such violations and the extent to which courts of law have reacted to such violations. I shall also examine the effects on the accused person of denial of bail. To this particular issue, I shall critically look at the resultant delay in processing the accused persons case due to lack of personnel. The issue of the accused not being able to prepare his defence adequately will be examined in detail. I shall also look at the resultant effects of such denial of bail to the family of the accused person.

1. GROUNDS FOR GRANT OR REFUSAL OF BAIL

The Kenya Criminal Procedure Code does not set out the grounds for grant or refusal of bail. However, in practise as I shall show, the following are the grounds

upon which bail or bond is granted in the courts of law:[1]

1. The weight of the offence and the sentence in the event of conviction

2. The nature of the accusation.

3. The residence of the applicant i.e. whether the applicant has a fixed abode.

4. Whether the accused person is likely to interfere with the witnesses if so released.

5. Whether the accused person is likely to abscond if released on bond or bail.

These grounds are not exhausitive but are amongst the common grounds that the court or the police officers normarly look at in the event of granting or refusing of bail, section 123(2) of the Criminal Procedure Code vests the discretion of granting bail in the magistrate. The section states that the circumstances of the case shall determine the amount of bail to be offered or whether the magistrate will grant it or not. The power of granting bail is thus discretionary. It is upto the person granting bail to look at each case on its own merits and decide whether to grant bail or not.

A test for granting bail was set down in the case of Jaffer v. R.[2] In this case the accused person was charged with corruption contrary to section 3(2)

It should not have been diffficult to do so this if such allegations had any basis". The court rejected the prosecutors allegations because the allegations had not been proved. The court can not be called upon to speculate on facts and base their Judgements on such speculations. What is alleged should be proved.

The nature of the offence determins whether one can be granted bail or not. This is because where the offence is serious such as having an intention to defraud a bank of millions of shillings, the sentence that is likely to be given will be a longer and heavier one. A person charged with such an offence may opt to abscond even if he had deposited a large amount of money or property. The person decides to lose his money or property so long as he can have his liberty. Thus in such grave offences. The courts are bound not to grant bail or bond. This was the issue in the case of R. v. Samuel Cheruiyot Arap Langat.[5] In this case the defendant was charged with conspiracy to defraud the Jomo Kenyatta Foundation of KSh. 3,520,500 in 1981. The state counsel in this case opposed bail on the ground that the case involved a large amount of money and was therefore of a serious nature. Though the state counsel did not substantiate his allegation, the chief

magistrate[6] took note of the fact that the money involved was of great concern and proceeded to refuse bail on that ground.

An accused person is kept in custody for his own safety. This is so where the accused person is charged with an offence such as rape. Letting him off would spark off violence in the community in which the offence was committed. A cooling off period is necessary in the interests of law and order. This can only be achieved if bail is not granted. The case of R v. Gajjam Sigh and Another,[7] is illustrative of this point. In this case the landlord was charged with a criminal offence. Letting him off would have led to a breach of the peace. The tenants would have attacked him. Bail was not granted in the interests of peace and order.

Bail may also be refused in the interests of public policy. In the case of Bobert v. Martins[8] a lecturer was charged with insulting a police officer and inciting students to riot. Bail was refused on ground that the crisis at the University had not cooled down.

Any consideration may be brought up when an application for bail is made. It is however not sufficient for the prosecution to merely allege the grounds for refusal of bail. They have to prove them.

Bail can also be applied for when a person has been convicted and he wants to appeal against such an order. This is referred to as bail pending appeal. The law relating to bail pending appeal is well set down in S.356 of the Kenya Criminal Procedure Code which states that:

> "The High Court or the surbodinate court which has convicted or sentenced a person - may grant bail or may stay execution on any sentence or order pending the entering of an appeal on such terms as the security for payment of any money or the performance of any act or the suffering of any punishment ordered by or any punishment or order as to the High Court or such surbodinate court may seem reasonable."

* 2/10/92

A person can apply for bail pending appeal from the court that convicts him. The difference between bail pending appeal and bail pending trial is that whereas in bail pending trial one can appeal to a higher court if one has not been granted bail, In an application pending appeal once the convicting or sentencing court rejects the application there can be no further appeal to a higher court.

The grounds for bail pending ~~trial~~ appeal were well laid down in the case of Somo v R[9] as follows:

1. One must show that there are unusual and exceptional circumstances that warrants getting of bail.

2. The application must not be frivolous or vexacious and intended to delay the sentence.

3. The appellant must be of good character and the offence committed must have been non violent or should not have involved personal violence.

4. The appeal must have an overwhelming chance of being successful.

In Somo's case,[10] Trevelyan J, as he then was, made it clear that it should not be forgotten that the presumption is that the applicant was rightly convicted. The applicant can only establish otherwise by proving unusual and exceptional circumstances in the conviction and sentence. This issue was the subject of discussion in the case of R v. Kanji.[11] In this case two men were charged with [illegible]occasioning actual bodily harm. One was sentenced to 8 months and the other to four months imprisonment. Both appealed against sentence and conviction. The trial magistrate released one of them on bail pending ~~trial~~ appeal. and the other was refused bail. The later applied to the High court for bail pending trial. The application was allowed, when allowing the application. The judge

stated that "---- The appellant in this case is a first offender and his appeal has been admitted to hearing showing thereby that it is not frivolous. In addition to that his co accused who is in no respect in a different position from him as regards bail has been admitted to bail". The judge thus held that the simple fact of there being two identical applications with one being allowed and the other refused constituted unusual and exceptional circumstance. This was coupled with the fact that the accused was a first offender, and his character was not bad.

Good character alone, can not entitle an accused person to bail or bond. This was stated in the case of Lamba v. R [12]. It must be supported by other factors, to make the application successful. This was the subject of discussion in the case of Hasham v R [13]. In this case Madan J. stated that the shortness of sentence which happened to be the maximum for the offence of which the appellant was convicted was a ground of granting bail particularly if the appellant was a first offender, and his previous character good.

However, the shortness of a sentence cannot by itself be a special ground for applying for bail pending appeal. Judges normally consider the fact that

a sentence might be served before the appeal is heard or the sentence is served when the appeal is being heard.

Delay alone is not sufficient ground for grant of bail pending appeal, it must be corroborated. Trevelysh J. in Somo's case[14] said that there must be a delay between conviction and sentence and the hearing of an application for the bail pending appeal.

In Somo's case[15] Trevelyen J maintained that the most important ground in the bail pending appeal was to prove that the application was likely to succeed. He said,

> "---- the most important of them is that the appeal will succeed. There is little if any, point in granting the application if the appeal, if not thought, to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with, so that the applicant will be granted his liberty by the appeal court."

Thus two things must be proved. That there is an "overwhelming possibility" that the appeal will succeed. That there are "exceptional and unusual circumstances" in the case that merit the applicant to get bail. Muli J, as he then was granted an application for bail in the case of Matichant v. R[16] on the ground that the appeal had an overwhelming chance of succeeding.

(2) ON WHAT GROUND IS SUFFICIENCY OF BAIL DETERMINED?

Section 123(2) of the Criminal Procedure Code provides that:

"The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive". [Emphasis added]. Thus the issue of determining what is excessive bail or sufficient bail is discretionary. Every case is decided on its own merits. In practise however, magistrates tend to grant the amount of bail basing on the following grounds:

1. The nature and weight of the offence.
2. The economic set up of the accused person i.e. how rich or poor the accused is.
3. For the deterrence of offences.

Since the issue of granting bail is discretionary what is "sufficient bail" is thus what is sufficient in the eyes of the magistrate or police officer dealing with a particular case.[17]

In offences that carry a heavy sentence, the courts have often granted bail at high amounts compared to offences carrying a lighter sentence. This is based on the view that if large sums of money are deposited by the accused, then he won't abscond.

In lighter offences, the accused does not anticipate a heavier sentence if so convicted and so he is not likely to absconde. What is sufficient bail here will depend on the type of the offence with which the accused is charged and the sentence that goes along with such an offence. This point can clearly be seen in the case of Surinder and another v. Makhecha[18]. In this case, the defendant was charged with fradulantly receiving 175,000 shillings from the plaintiff. He was released on a bond of 300,000 with two sureties of a like amount. In the case of R v. Bentite Kihondo[19], The accused was charged with being drunk and disorderly. He was granted bond of 500 shillings. And in the case of R v.Mariera s. Marita [20]. The accused was charged with the offence of careless driving a motor vehicle on a public road contrary to Traffic regulations. He was released a bond of 2,000 shillings. Thus the magistrates tend to grant higher amounts of bail or bond to offences that carry a graver sentence than offences with lighter sentences. In the case of Makecha[21] such an offence may carry a sentence of upto 7 years whereas in the case of Bentite the accused may get a sentence of six months if found guilty.

Different magistrates have different temperements and views of life.[22] What one magistrate may look at as excessive bail may be quite sufficient bail or bond to the other. That is what explains the difference in the grant of bail or bond by different magistrates dealing with cases of similar charges.. As we saw in the case of R v. Mariera[23] a bond of 2,000 shillings was given. In the case of R v. Abdalla Abchi[24] a bond of 400 shillings was granted. The above cases were listened to by different magistrates.[25] Though the two cases carried similar facts and offences, different amounts of bonds were given. There can be nothing better to explain such differences in the amount of bonds granted other than the different temperements and view of life of the magistrates. I had the opportunity to talk to Mrs. Walekhwa, the resident magistrate in the law courts of Nairobi. Mrs. Walekhwa explained to me that the issue of granting bail or bond is a personal one. She went ahead to tell me that there are magistrates who were brought up in poor and rich families what a rich magistrate may consider as sufficient bail may be quite excess bail to the poor magistrate. So the problem here is what a particular magistrate in his normal cause of business would look at as sufficient may be opposite to the other. In the end its the

accused person who is the victim of the excessive bail. He can not afford it and so his liberty must be curtailled. In the case of Marere [26] where the accused was given a bond of KSh. 2,000 he could not afford it and so he did not obtain a release. In the case of Abdalla Abchi [27] where the the accused was given a bond of 400 shillings, the accused obtained a release.

I had the opportunity to talk to Mr. Kanyangi of the law courts of Kakamega. He explained to me that he did not see the need why persons charged with misdemour offences should not obtain releases as a matter of right. Thus as I observed in his court, persons charged with lighter offences such as assaults or being in drunk and disorderly were always released on bond. The amount was quite sufficient never exceeding 200 shillings. At times, some would even be released on a free bond. Mr. Kanyangi argued that if persons accused of misdemour offences are asked to pay large sums of money before obtaining their release, its like denying them their liberty because they can not afford the large sums of money asked for. What is sufficient bail or bond must therefore be the amount

of bail or bond that can enable an accused person to get a release and then appear later for trial.

Mrs. Khasiani the resident magistrate of the Kisumu law courts submitted in her talk to me about the issue of sufficient bail that she examines the accused person to find out the economic welfare of the accused. She went ahead to say that if she found that the person was poor and that the offence committed was light, then she would proceed to release the accused person on a free bond or grant bond of not as much as 300 shillings. Her purpose here was to ensure that she does not offer large sums of money in terms of bail or bond which the accused cannot afford. The result will be as if she had not granted bail because the accused will not be able to afford his release. If the accused was rich, she asked for an amount higher than what she asked from the poor accused persons. She explained that the accused person would be able to afford his release in any case and that this would restrain him from absconding to evade trial. The difference in granting bail to the rich and poor can also be seen in the case of Makhecha[28] and Abdalla Abchi[29] above. While Mr. ~~Mahecha~~ Makhecha was a senior advocate of the law courts of Kenya, Abdalla Abchi was only a "matatu" driver. Makhecha's bond is higher in sums

than Abdalla Abchi's. Its because he can afford it since he is well paid in his profession. Abdalla Abchi is only a "Matatu" driver whose earnings are not so high. - sure.

Not a persons name!

~~Moreso~~ More so, there are magistrates who give the amount of bail with a view to deterring offences. Such magistrates work on the unconstitutional belief that the accused persons are guilty unless they proof otherwise. wbol mig tom So they give large sums of money so that the accused person may not be able to afford the cash bail and so may remain in custody. While in custody, the accused person undergoes cruel and unhealthy conditions. When found guilty or not the accused will always remember the unhealthy conditions in cells and so may opt never to commit an offence again.

The only remedy against this issue of excessive bail and bond is the fact that the accused can appeal to the High court which has powers to revise the amount of bail given. These powers are set out in section 123(3) which state that:

> "The High Court in any case save where a person accused of murder or treason direct that any person be admitted bail or that the bail required by a surbodinate court or police officer be reduced" [Emphasis added].

This power is discretionary. The High Court may revise the bail amount or it may not. This discretionary power can also be misused just as it may be misused in the surbodinate courts. The only practical remedy to the issue of discretion in granting sufficient bail is to adopt the system shown in Table 8. By getting the relevent information pertaining to the individual's age, residence job, offence committed, previous criminal record, a magistrate or police officer in charge of granting bail or bond will be in a better position to ascertain the amount of bail or bond to give to an accused person.

(3) WHAT ARE THE EFFECTS OF DENIAL OF BAIL AND BOND TO AN ACCUSED PERSON AND THE STATE?

Consequences of pretrial detention affect the accused person and the state. The accused person suffers psychologically socially and economically. The state may undergo economical detriments. Not always!

When an accused person is brought before a court of law, a plea is taken. If he pleads guilty, he is sentenced straight away, if he pleads not guilty, he is remanded in custody for along time pending the hearing of his case. If bail is not granted to the accused person, the accused right to liberty and fair trial are invalidated.[30]

Pretrial incarceration results in punishing of innocent persons. When a person is arrested having been suspected of commiting an offence, the law implies that such a person is innocent until proved guilty.[31] If bail is denied, except in cases where murder and treason are alleged, the implication is that the accused is guilty and he has to prove otherwise. The result is the subsequent denial to an individual's liberty. The case of R v. David John Mbuqua illustrates this.[32] In this case the defendant was arrested but pleaded that he was innocent. He was however detained in custody for one year and sixteen days after which he was found innocent. The accused was denied his right to liberty. He was not granted bail yet the trial court found him innocent. If bail had been granted to him, there would have been no prejudice to the accused's fair trial. There have been cases where accused persons stay in remand for even 13 years only to be found innocent by the courts.[33] Such persons are denied bail. This leads to their denial of constitutional right to liberty.

When an accused person is detained in custody without being granted bail, he loses his job if he was working. He is psychological tortured. He is cut

off from the general life and more so from his family. The accused person can not show that he is not againfull member of his society, hence he has a less chance to obtain probation. His family is in turn psychologically and economically tortured. They are not sure of the life the accused leads in custody. If the accused person was working, the members of his family cannot get the economic support that they used to get from him.

When a person is in cells he cannot prepare his defence properly. He is the subject of suspicion, the police officers are at all times around him. He can not easily engage an advocate as the means of communication are remote. The accused person has no access to libraries, books from which he can obtain materials or literature to be able to defend himself. Even if he was able to engage a lawyer, he can not easily communicate with the lawyer. The police are always around him. The accused person can not be able to find witnesses whom he knows only by first name or by description. The result is a denial of the individual's right to a fair trial as laid down in by S.77(2)(c) of the constitution. The accused is denied his liberty as per section 72 of the constitution. In the end, the accused persons who are detained in custody pending

trial recover longer sentences than their freed counterparts who had been released on bail or bond.

The conditions in cells are quite detrimental to accused persons. As Thomas Wayne puts it[34] ".... Crowded into a tiny room full of strangers who are at best not friendly and at worst physically or sexually threatening .... you don't know what is going to happen to you or your family, or to your job.....". The accused persons are subjected to unhealthy conditions and may can conduct diseases ranging from diarrhoer to cholera. A talk with the prisons officer in Kakamega revealed that at least one prisoner died in cells per month. The course is most often than not poor feeding and unhealthy conditions in cells. Accused persons live in one small room with no ventilators. There is no urinal or toilet. The accused persons use a 'debe' in which they urinate and pass faeces. The debe is placed in the same room in which prisoners are crounded".

A look at Tables 5,6 & 7 shows that court registers in Nairobi are usually congested. This congestion does not apply to Nairobi courts alone.

It is all over the country. There are a few magistrates and court rooms to deal with the increasing number of accused persons. Thus accused persons who plead innocent are usually kept in cells for long before the hearing of their cases commences. Even when the hearing commence. There are bound to be a number of adjournments. Tables 5, 6 & 7 show us that there were in July, August and June, 1983 19 magistrates in Nairobi law courts. Tables 1, 2 & 3 show us the number of cases that were filed at the beginning of every month, the cases that were listened to during the month, and the number of cases that were pending at the end of every month. These tables show that many accused persons are kept in custody for long periods because of the congested court diary. The danger thereby posed to the liberty of the individual can only be averted through judicial exercise of discretion in granting bail. Thus where this is not done, some accused persons plead guilty not because they are guilty but to acquire a fast disposal of their cases.[35] A long stay in custody results, in extraction of confessions from the accused persons. In the case of Njuguna s/o Kimani v. R , the accused had been under police custody from 15th March 1954 to 7th June 1954. Confessions were extracted from him in May after a long stay in custody. On the conviction was

quashed. However, the long stay in custody had prompted the accused person to plead guilty. Its only through the grant of bail or bond that such confessions may not be extracted from accused persons.

When an accused person has been denied bail, he has to be kept in custody. When in custody, he has to be fed and be under police supervision. To do this the government spends alot of money. The government supplies alot of food to prisoners to take care of accused persons. There must be people to cook the food. The government employs and pays such persons. The government also employs and pays salaries to the security personnel to guard accused persons. Such officers are housed by the government. Rehabilitation programmes have to be set up. Such programmes include the building of churches and the employing and housing of church officers. If the system in Table 8, is to be effected, more accused persons will be released on bail or bond and the government will in turn save alot of money and expenses in taking care of the prisoners.

CHAPTER THREE

SUMMARY AND SUGGESTED REFORMS

The evil of not granting bail, lies in the machinery for the administration of Justice.[1] Though the statutory provisions guarantee the individuals right to liberty, and thus his right to bail, the same provisions provide for the exceptions. Even in cases that are not covered by the exceptions, the discretion given to the magistrates and the police officers lead to such denial of bail.

The original purpose for pre-trial release was the assumption, which assumption is constitutionally right that one was innocent until adjudged guilty.[2] The imposition of conviction and sentence before trial is inconsistent with the constitution. A related purpose was to ensure that the accused is accorded sufficient time and facilities to prepare for his defence.[2] The interest of the state has limited the original purposes for pretrial release. The state must ensure that the accused appears for trial. Its on this ground that the state lays down grounds for grant and denial of bail to the accused persons. In capital offences where one has a choice between

hazarding his life before the court and forfeiting sureties, factors indicate a likelihood of flight or absconding. To safeguard this situation, the Kenya Criminal Procedure Code does not give a right to bail to persons who are suspected to have committed capital offences.

There should be a law that will categorize bailable and non bailable offences and the amount of bail if any, to be given in such cases. This will make certain, the incertainty that pertains to what is termed "sufficient" bail and reduce the misuse of discretion accorded to magistrates and police officers in the grant of bail. The amount of bail or bond asked for should correspond as nearly as possible to the offence committed. Setting bail too high is another way of denying it. Its a way of asking the accused to forfeit his liberty or buy his liberty. The constitutional provisions relating to bail do not have the intention of forfeiting a persons' liberty nor the persons buying his freedom, they are only meant to ensure that a person gets his liberty but appear later for trial. I would therefore suggest that where a person is charged with an offence that carries a lighter sentence, a cash bail to that effect should not be very high. Where the offence carries a heavier

sentence, the amount should be higher. The aim being to secure the presence of the accused person for trial still on the issue of sufficient bail or bond, first offenders or persons who are below the age of 18 years should have access to a free bond. This is so because the accused persons may have committed the offence if so, in ignorance. Shame! This will also reduce the likelihood of the accused persons from getting influenced by perpetual criminals into becoming "jail birds" they should be given a chance to change and the only way to change them is to let them have their liberty.

Its easy to establish who the first offenders or persons under the age of 18 years are. Table 8 shows a bail determination interview. If such information is availed to the police officers and the magistrates, they will be able to ascertain the age of the accused person, his family his job if any, character of the accused and his permanent residence. If this information is gathered, it will help the magistrates to grant sufficient bail, not according to the allegations of the prosecutors but to his general knowledge about the accused. Table 8 will also help in ensuring that any accused person who is eligible for

bail gets the type of bail he can afford. This is because it will be able to proof to the magistrate the economical and social conditions of the accused persons. Thus the magistrate will be able to ascertain without much delay, persons eligible for a free bond, cash bail or bail with surities. Thus if followed, Table 8 will evade the problem of magistrates keeping suspected persons in cells for long periods. It will ensure that accused persons get the right type of bail and the right amount. The system will then ensure that all persons charged with non capital offences get their liberty in time.

A long period for pre-trial detention is serving the sentence and a period within which confessions may be extracted from the accused persons. The confessions are later used against the accused to prove his guilt. To obviate this situation, the Kenya Criminal Procedure Code should incorporate a section as that of section 72 of the magistrates courts Act of Uganda. This section restricts the period in remand to 365 days in murder cases and 182 days for any other offence. If this section is incorporated, it will do away with the system of

people serving sentences before they are proved guilty.[3] It will also ensure that no evidence is extracted from the accused by force because he is in cells.

Further to the amendments the Kenya Criminal Procedure Code should incerpirate S.72(3) of the magistrates courts Act of Uganda. This section states that magistrates are supposed to tell accused persons their right to bail.[4] The full extract of S.72(3) of the Act states that if the accused is not granted bail, the court shall:

1. Receive the reasons why

2. Inform the accused of his right to apply to the High Court or Chief Magistrate as circumstances require. This section should be incorporated for the benefit of persons who are charged with offences and are ignorant of the law. Most accused persons do not know their right to bail. They always look at the issue of bail as a privilege done by the magistrate or the police officer. Though ignorance of law is no defence, the need to do justice is wanting in judicial officers. My experience in Kakamega law courts and and my interview with Mrs. Roseline Walekhwa of the Nairobi Law Courts revealed to me that most accused persons do not know of their right to bail. Magistrates did not bother to inform them either. Even where the

few accused persons ask for bail, they are usually whisked away by the police before the magistrate responds to their claim.

Section 36 of the Kenya Criminal Procedure Code which gives the police powers to grant or deny bail should be amended. The section reads:

> "If it does not appear practicable to bring such a person before an appropriate surbodinate court within twenty four hours .... inquire into the case and unless the offence appears to be of a serious nature, release the person on his executing abond with or without surities..... but where a person is retained in custody, he shall be brought before a surbodinate court as soon as practicable...." [Emphasis added]

In practise the police seem to look at every case as being of a "serious nature". The police always look forward to the conviction of any suspected persons. The power to grant bail should be made absolute where the accused can not be brought before a court of law within twenty four hours. More so, in bailable offences. The words "serious nature" should be done away with. This will ensure that persons arrested the day before the holiday can have their liberty. If the police officers are availed with a questionaire as that in Table 8, they will be able to ascertain the amount or type of bail or bond to ask for in each case.

The criminal justice process begins with the arrest of a suspected person. The person is arrested and detained by the police in cells. The police are thus in the best position to grant bail. In practise however, pre-trial release has not been a police function. This has been the work of magistrates. The result has been the subsequent delay in granting of bail and the jeorpady of an accused person's right to liberty. The police Act should give wide discretionary powers to the police to grant bail. This should be in lighter offences. This will release the congestion in prisons of accused persons. The congestion in court diaries will be done away with. The case that will be taken to court for magistrates to grant bail will only be those cases which are felonious.

In some countries such as Connecticut state of the United States of America, the police have wide powers to grant bail in both lighter and graver offences. They are further empowered to set bail amounts in cases in which they do not grant a non-financial release." The police have the power to inform the defendant of his right to be interviewed for pre-trial release. Unless the defendant waives or refuses to

be interviewed, he is granted bail. This system promotes early releases. The police know the circumstances of the alleged offence, they have access to the prisoners local arrest records and are in a better position to know the prisoners residence. Thus if given this powers the police will serve better in early releases.

The summary of the need and potential for police involvement in pre-trial release process was that given by professor Wayne La fave at the 1965 institute on, the operation of pre-trial release projects when he said;

> ".... Although we may hope to improve somewhat on the prevailing practice of bringing the arrested person into court only on the morning of the first business day following the arrest, it seems to me that we still are going to have to rely on police release."

Its unlikely that Kenya will be able to employ sufficient man power to deal with the increasing number of cases in the courts.[5] Immediate pre-trial release continue to be a problem and the court register continue to be congested as seen in table 4, 5 and 6. The liberty of the individual continues to be a myth. The only saviour to this situation is to increase police powers in granting of bail and bond.

They work twenty four hours and are closer to the accused persons. They can afford to release accused persons at any time of the day. Another way of obtaining quick releases of prisoners would be by pre-setting bail amounts. The setting is done by the courts and the amounts set posted to prisons. The police officers then release the accused person on posting of the required amount of bond without any contact even having been made with the court. This system has worked quite effectively in California and many accused persons have been able to secure release prior to appearence in court[7].

One method for reducing pre-trial detention is by introducing a longer court session. This will include night courts. This can work very effectively if the government accepts to employ many more magistrates to man the courts. Persons arrested in the evenings and at night hours can obtain their releases during the night court sittings. In New York, this system has worked very well.[6] In Chicago, the night court sits from 8.00 p.m. to 3 a.m. for the sole purpose of setting bail. In Chicago, there is a judge assigned to hear cases pertaining to bail and bond.[7] While the cost of employing many

judicial officers and expending court rooms will be felt by the government. This will however help to lessen the congestion in cells and courts of suspected persons. This will be a favourable idea mostly for courts in urban areas like Nairobi where the courts are quite unable to cope up with the increasing number of accused persons.

The concept of financial or property propriety should be dispensed with in misdemenour cases. Where there is forfeiture of property in felonious cases where the accused has not turned up for trial, it should only be partial. This will remove the burden and appalling thought of becoming a surety. For the youths, their parents should serve as sureties and they should not deposit any amounts. The evils of cash bail are well brought out by Thomas Wayne when he says:

> "But helping the poor to buy their freedoms is no solution; it merely perpetuates release upon money as the criterion for release .... the release of greater numbers on their own recognizance appeared the broadest and most potentially valiable approach".8

Thus the system of cash bail is only favourable, to the rich and not the poor. The rich can buy their freedom. The Kenya constitution did not intend to create

discrimination when it guaranteed persons their freedoms of liberty. The poor can only benefit from this liberty if the under cognizance system is encouraged. The Vera foundation working on the issue of own cognizance found out as a matter of fact that the number of persons who are released upon own recognization a and then gailed to appear for trial was less than the number o of those who furnished cash bail and later jumped bail.[9]

The law of bail should have a provision to the the effect that persons detained for unreasonable time and later found innocent should be compensated by means of damages. The law should incorporate such a provision. As we saw earlier the accused person suffers social economic loss, this also extents to his family. There is a need to compensate him for the damage suffered. This will encourage the courts to grant bail in time for fear of incurring economic loss.

The Kenya Criminal Procedure Code should create an offence for failing to answer bail without giving clear reasons and evidence that can be used and have to be used to show the reasons for its refusal. This will encourage the magistrates and police officers to grant bail or bond most effectively and without discrimination.

CONCLUSIONS

The criminal justice system in Kenya begins with the arrest of the accused person. Whether or not there exist need for continued custody the accused is detained until he satisfies the conditions imposed for his release. The foregoing reforms are designed to enable the accused persons to get their liberty quickly. The case for doing so is quite strong. Detaining an accused person for long periods prior to court appearance serves an essentially bureacratic purpose. If the accused will be released, the period from detention to intial court appearance cannot prevent flight to avoid court appearance. The financial conditions set down by the magistrates and police officers, their temperaments and different ways of thinking greatly affect bail administration. The defendants rights are violated. The amount of money set for bail is higher than what the accused person can afford. The accused can not adequately prepare for his defence and this goes against the presumption that one is innocent until proved guilty.

The law of bail thus leads to persons being deprived of it. The evils that arise from its deprivation lie in the judicial procedure. The speed

at which cases are disposed of is quite slow. Many cases are never disposed of immediately. Many of them are carried forward and when added to the new cases leads to congestion. Tables 1, 2 and 3 clearly show this. Congestion finally leads to the accused staying in remand for even longer periods. If the reforms are implemented, the bail system in Kenya will be a system to be proud of. As of now, the bail system continues to be a priviledge and not a right in the courts of law.

TABLE I

JUDICIAL DEPARTMENT

MAGISTRATES COURT AT NAIROBI

A SUMMARY OF CASES FOR THE MONTH OF AUGUST 1983

	CRIMINAL	PRIVATE PROSECUTIONS	INQUESTS	TOTAL
No. of cases pending on first day of the month	781	4	203	988
No of cases filed during the month	439	Nil	84	523
No of cases decided during the month	395	Nil	39	434
No of cases pending during the last day of the month	825	4	248	1077

1. No. of persons acquited or discharge - 241

2. No. of persons fined - 85

3. No. of persons sent to prison - 131

corporal punishment - 53.

4th September, 1983.

TABLE 2

JUDICIAL DEPARTMENT

MAGISTRATES COURT AT NAIROBI

A SUMMARY OF CASES FOR THE MONTH OF JUNE 1983

	CRIMINAL	INQUEST	PRIVATE PROSECUTIONS	TOTAL
No of cases pending on firs day of the month	751	185	4	938
No of cases filed during the month	426	90	Nil	516
No of cases decided during the month	365	83	Nil	448
No. of cases pending on last day of the month	812	190	Nil	1006

1. No of persons acquited/discharged - 263

2. No of persons fined - 54

3. No of persons sent to prison - 146

TABLE 3

JUDICIAL DEPARTMENT

MAGISTRATES COURT AT NAIROBI

A SUMMARY OF CASES FOR THE MONTH OF JULY, 1983

	CRIMINAL	INQUESTS	PRIVATE PROSECUTIONS	TOTAL
No of cases pending on the 1st day of the month.	812	190	4	1006
No of cases filed during the month	361	60	Nil	421
No of cases decided during the month	392	47	Nil	439
No of cases pending the last day of the month	781	203	4	988

1. No of persons acquited/discharged - 257

2. No of persons fined - 46

3. No of persons sent to prison - 202

10th August 1983

TABLE 4

COURT CASE NO.	ACCUSEDS NAME	CHARGE	ARRESTED ON	BROUGHT TO COURT ON	INQUEST FILED ON	REASONS FOR MORE THAN 60 DAYS DELAY BETWEEN D TO G BY SUBSEQUENT COURT
883/82	Stanley Murage	C/s204 of P.C.	13/4/82	20/4/82	M6/9/83	Committed to mental Hospital
2305/82	Christopher Otieno	"	7/9/82	18/9/82	M7/9/82	Prosecution not ready to start
2699/82	Charles Oroko	"	30/10/82	2/11/82	"	"
23/83	Cyprus Kagiri	"	25/11/83	4/1/83	"	"
24/83	Charles Odero	"	30/12/82	"	M/3/83	"
79/83	Margret Muruiki	"	7/1/83	10/1/83	M6/9/83	"
574/83	Mutua Wambua	"	11/1/83	14/3/83	M14/9/83	"
919/83	Maurice Nzioka	"	31/3/83	5/4/83	M6/9/83	

TABLE 5

LIST OF MAGISTRATES FOR THE MONTH OF JULY 1983

NAIROBI LAW COURTS

NAME	RANK	CASES HEARD
1. A Rauf	Chief Magistrate	121
2. T. Aswani	Senior Resident Magistrate (SRM)	23
3. L.B. Ouma	"	3
4. Buch	"	17
5. Bosire	"	14
6. Jamide	"	1
7. G. Osango	Resident Magistrate	22
8. Ngatia	"	35
9. Walekhwa	"	1
10. R. Mutitu	Acting Resident Magistrate	7
11. Karue M.W.	"	20
12. P.J. Mwayulu	D.M. I	37
13. J. Mbiti	"	25
14. Desai	"	3
15. P.N. Mugo	"	16
16. Kipury J.	D.M. II	4
17. Mwangi R.	"	41
18. Githire	"	4
19. J. Mbogo	"	8
	Total	344

TABLE 6

LIST OF MAGISTRATES FOR THE MONTH OF AUGUST 1983

NAIROBI LAW COURTS

NAME	RANK	NO OF CASES HEARD
1. A. Rauf	Chief Magistrate	15
2. T.T. Aswani	Senior Resident Magistrate	105
3. H.H.Buch	"	24
4. J. Mwerea	"	1
5. A.Jamide	"	2
6. S.E.Bosire	"	3
7. G.Osango	Resident Magistrate	33
8. A.A.Chite	"	1
9. Karani M.	"	19
10. D.M.Ngatia	"	40
11. R.M.Mulilu	"	3
12. J.Mwangulu	D.M. I	28
13. J.Mbiti	"	27
14. J.P.Mugo	"	20
15. J.Ole Kipury	D.M. I	15
16.R.Mwangi	"	20
17.W.M.Githire	"	4
18.J.A.Mbogo	"	28

TABLE 7

LIST OF MAGISTRATES FOR THE MONTH OF JUNE,1983

NAIROBI LAW COURTS

NAME	RANK	NO OF CASES HEARD
1. A. Rauf	Chief Magistrate	128
2. J.J.Aswani	Senior Resident Magistrate	21
3. Buch	"	3
4. Bosire	"	2
5. G.N.Osengo	Resident Magistrate	2
6. R.Mutitu	Ag. R.M.	2
7. Murua	"	33
8. P.J.D. Mwengulu	D.M. I	6
9. J.Mbiti	"	13
10. Desai	"	10
11. Mugo	D.M. II	6
12. J.L.o Kipury	"	11
13. Ngatia	"	38
14. Mwangi R.	"	46
15. W.Githire	"	1
16. Mbogo	"	13

TABLE 8

BAIL DETERMINATION INTERVIEW

1. Name .....
2. Age .....Date of birth ..... Place of birth
3. How long has the accused lived in the area where arrested?
4. Home Address .....
5. How long he stays at home address ..... Telephone No.....
6. Who does the accused live with .....
7. Is the accused married .....
8. Does he live with the wife .....
9. How many children if married /.....
10. Does he have any other dependants .....
    (state the No. if any & names) .....
11. Is the accused Employed .....
    (if so state type of job)
12. .....If non employed, state period for which he has been unemployed.....
13. If unemployed, who supports him .....
14. Name of present employer .....
15. How long at job .....
16. Senior officer's name ..... address .....
    Is the accused employed permanently of still on probation..
17. Has the accused appeard before court charged with an offence before ..... which one .....was bond given.....
18. Is the accused presently on bond in any other case.....
19. Is any friend or relative before court today?.....
    if so who?.....

FOOTNOTES FOR THE INTRODUCTION

1. The Kenya Constitution Cap.5 Laws of Kenya S.72
2. Cap 75 of the laws of Kenya
3. at S 123 of Cap 75
4. F. Engels: Anti Dühring London, 1943, Pg 32
5. F. Engels on Historical materialism in Marx and Engels: Writings on Politics & Philosophy, Lewis, S. Feur (ed); Auchor Basic Books New York, 1959, pg. 43
6. Ivo Lapena; State and Law Soviet & Yugoslav Theory, University of London, 1964.

FOOTNOTES FOR CHAPTER THREE

1. The courts and the police
2. See section 77 of the Kenya Constitution
3. S 72(1) of the Kenya Constitution
4. Bail Practice in Magistrates Courts [1974]
5. See Tables 4,5, & 6
6. Bail and Summons [1965] New York, U.S. Department of justice and the Vera Foundation. Inc. August [1966] Pg. 129
7. See Califonia: Penal Code 1269 [1970]
8. Thomas Wayne: Bail Reform in America pg. 4-5
9. This was the goal of the Vera foundations undertaking. The Manhattan Project.

FOOTNOTES FOR CHAPTER ONE, Section A

1. Orders in Council Debates 1897
2. Assize of Clarendon Rolls of England
3. See footnote No.2
4. Holdsworth: A history of English Law: Sd Marxwell, 1966
5. Pollock says that most people who were put in jail saw it as a , "place to break of" pg. 584.
6. Northumberland Assize Rolls Pg. 584
7. Ibid. "Main prize" - Manicaptus in Latin pg. 584
8. Ibid. "Writ of Dethomine Repleqiondo" pq. 585
9. Ibid. See footnote No.8
10. 70 Y.L.J. Elements of Wealth Pg. 967
11. Infra - see footnote No 7 Holsworth Vol.9 pg.105
12. "Writ of Withernam" pg. 105
13. Ibid. "De ODIOET ARIA" That hatred and malice or spite & ʀ hatred pg. 107
14. Infra, see footnote No. 1
    Statute of Westminister I 1275 pg. 585
16. Legislature Council Debates 1930, pg. 39
    Sir. William Macleay Grigg
17. Ibid. footnote No. 16 Pg. 40
18. No. 22 of 1959
19. No. 24 of 1934 (Criminal Procedure Amendment Code)
20. After 1963

FOOTNOTES FOR CHAPTER ONE Section B

1. The Kenya Constitution No. 5 of 1969 Chapter 5 of the Laws of Kenya respectively.
2. Ibid see footnote No.1
3. S 72 (i) (a) - (i)
4. [1972] E.A. 137
5. Chapter 75 of the Laws of Kenya and Chapter 84 of the laws of Kenya respectively.
6. S. 45 of Chapter 75, laws of Kenya
7. S. 46 of Chapter 75 laws of Kenya
8. S. 47 of Chapter 75 laws of Kenya
9. Ibid. No.8
10. S. 123 (i) of Chapter 75 laws of Kenya
11. S. 74 (i) of Chapter 75 laws of Kenya
12. S. 124, 126 of Chapter 75 laws of Kenya
13. Section 123 of the Criminal Procedure Code Chapter 75 laws of Kenya.
14. S. 127 of the Chapter 75 laws of Kenya
15. S. 128 of the Chapter 75 laws of Kenya
16. S. 131 of the Chapter 75 laws of Kenya
17. S. 132 of the Chapter 75 laws of Kenya

FOOTNOTES FOR CHAPTER TWO

1. [1972] E.A. 476
2. [1973] E.A. 39
3. Trevelyani J. as he then was
4. [1973] E.A. 282
5. Cr. Case No. 2969 of 1981
6. Chief Magistrate F.E. Abdulla, as he then was
7. [1947] 14 E.A.C.A.
8. Robert v. Martin [1954]21 E.A.C.A. 266
9. Supra - see footnote 1.
10. Ibid footnote No. 9
11. [1946] 2 K.L.R. 77
12. [1958] E.A. 337
13. Cr. App. 552 of 1967
14. Supra. Footnote No. 1
15. Ibid Footnote No. 14
16. [1972] E.A. 137
17. For example see Daily Nation, Friday January 9th 1983
18. Ibid footnote No. 17
19. Unreported Cr. case No. 1702 of 1983 of Kakamega
20. Unreported Cr. case No. 1611 of 1983 of Kakamega
21. Supra footnote No. 17
22. Discussion with Mrs. Roseline Walekhwa R.M. and Mr. Kanyangi Ag. R.M. By then, respectively.
23. Supra footnote No. 20

24. Unreported Cr. case No. 1615 of 1983

25. Mr. Kanyangi Ag. Resident Magistrate, Kakamega, and Mr. Muschella D.M. 2 Kakamega, by then

26. Supra footnote 20

27. Supra footnote No. 24

28. Supra footnote No. 17

29. Supra footnote No. 24

30. Section 77 of the Constitution

31. S. 77 (2)(a) of the constitution

32. [1973] E.A. 39

33. Daily Nation November 13th 1983

34. Thomas Wayne: Bail Reform in America at pg. 4-5

35. Njuguna s/o Kimani v. R. [1954] E.A. (C.A.) 316

36. [1954] E.A. 316.

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Daily Nation 8th October, 1983

Daily Nation November 13th 1983

These are NOT Periodicals