

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

BY

**KAMALHA RAM
1153-01024-02147**

**A RESEARCH DISSERTATION SUBMITTED TO SCHOOL OF LAW IN
PARTIAL FULFILMENT FOR THE REQUIREMENTS OF
AWARD OF A BACHELOR'S DEGREE IN LAWS
AT KAMPALA INTERNATIONAL
UNIVERSITY**

JUNE, 2019

APPROVAL

I certify that this dissertation was done under my supervision and is now ready for submission to Kampala International University.

Signature  Date: 03/07/2019

SIMON PETER ODONGOI

(Supervisor)

DEDICATION

I dedicate this work to my beloved father Musungu Nason, my mother Regina Musungu and my entire family the whites. I am so grateful for all the support you have rendered.

ACKNOWLEDGEMENTS

I wish to thank God Almighty for making it possible for me to complete this research effort despite the various constraining factors.

I would also wish to thank my supervisor Simon Peter Odongoi for a detailed and instructive review of my research.

Furthermore, I wish to acknowledge the support received from my sisters Muhindo Eres ,Mbambu Angella, big brother Musungu Edson, and Kabugho Cissy and my colleagues at law school; Byamukama Elton, Niwamanya Audrey, Wanalendo Timothy

In this research, I received full cooperation from various establishments but the support received from the entire management. I wish to thank them for their kind assistance to me.

Finally, I am content to express my immeasurable gratitude to whoever reads this paper.

LIST OF STATUTES

The Constitution of the Republic Uganda 1995 as amended

The Children's Act Cap 59

The Criminal Procedure Act Cap 116

The Magistrates Court Act Cap 16

The Trial of Indictments Act Cap 23

TABLE OF CONTENTS

| | |
|------------------------|-----|
| DECLARATION..... | i |
| APPROVAL | ii |
| DEDICATION..... | iii |
| ACKNOWLEDGEMENTS | iv |
| LIST OF STATUTES..... | v |

| | |
|--|----------|
| CHAPTER ONE | 1 |
| 1.1. BACKGROUND OF THE STUDY | 1 |
| 1.2. Statement of the Problem..... | 6 |
| 1.3. Objectives of the study | 6 |
| 1.3.1. General objectives | 6 |
| 1.3.2. Specific objectives of the research | 7 |
| 1.4. Justification of the Study..... | 7 |
| 1.5. Hypothesis of the study | 7 |
| 1.6. Methodology..... | 7 |
| 1.7. Literature Review | 8 |
| 1.8. Chapterization..... | 11 |
| 1.9. Conclusion..... | 12 |

| | |
|--|-----------|
| CHAPTER TWO | 13 |
| BAIL PRACTICE IN UGANDA | 13 |
| 2.1. Meaning of Bail | 13 |
| 2.1.1. Effect and Object of Bail | 14 |
| 2.1.2. Rationale for Bail..... | 14 |
| 2.1.3. Power to Grant Bail | 15 |

| | |
|--|-----------|
| 2.1.4. Consideration for Bail..... | 16 |
| 2.1.4.1 EXCEPTIONAL REQUIREMENTS FOR THE GRANT OF BAIL..... | 18 |
| 2.2. Conclusion..... | 20 |
| CHAPTER THREE | 21 |
| 3.1. THE LAW GOVERNING BAIL PRACTICE IN UGANDA..... | 21 |
| 3.2. Introduction | 21 |
| 3.3 The constitution of the republic of Uganda, 1995 as amended | 22 |
| 3.4 Magistrate court Act Cap 16..... | 24 |
| 3.5 The trial on indictment Act Cap 23..... | 25 |
| 3.6 The children Act cap 59 as amended | 26 |
| 3.7 The international convention..... | 26 |
| 3.8 case law | 27 |
| 3.9 Conclusion..... | 28 |
| CHAPTER FOUR | 29 |
| CHALLENGES AFFECTING GRANT OF BAIL IN THE ADMINISTRATION OF CRIMINAL JUSTICE..... | 29 |
| 4.2 Introduction..... | 29 |
| 4.3 Political factors..... | 30 |
| 4.4 Discretion of court..... | 31 |
| 4.5 conclusion | 32 |
| CHAPTER FIVE..... | 33 |
| FINDINGS, CONCLUSION AND RECOMMENDATIONS..... | 33 |
| 5.0. Findings | 33 |
| 5.1 non –procedural causes of delay | 33 |

| | |
|--|--------|
| 5.1.2 Slow investigations | 33 |
| 5.1.3 Inadequate staffing | 35 |
| 5.1.4 Lack of motivation | 36 |
| 5.1.5 Legal and procedural causes of delay | 36 |
| 5.2 Conclusion | 37 |
| 5.2.1 Critique of the law | 37 |
| 5.3 Recommendations | 39 |
| BIBLIOGRAPHY | 40 |

ABSTRACT

This dissertation entails the right to bail as one of the fundamental rights that are stipulated under Article 23 of the Constitution of the Republic of Uganda 1995 as amended. The research is intended to critically examine whether the right to bail as enshrined in the constitution has been practically administered in the courts of law, by examining the legal machinery aimed at protecting and enforcing these rights and how the state has contributed to its enforcement among others. The law on bail in Uganda originally stipulated 360 days and 180 days respectively such was too long and cruel for an accused to be brought to court to prove their innocence. But the new amendment stipulates 180 days and 60 days in the constitution of Uganda 1995. How has the law on bail been appreciated by the courts of law? This question gives details on how the research as justified its application. The study used the qualitative method and desk research by using and consulting materials from the libraries, law Journals, internet among others. The findings show the non-procedural causes of delay that have affected the bail process of the criminal justice in Uganda. The research states that however much there are hindrances to the bail practice in Uganda, bail is a constitutional right of an accused and it's granted in accordance into the relevant Jaw. Consequently, the research recommends that the law should be in position to take its course independent of other variable by observing supreme constitutionality of law applicable and also the discretion of the judges on matters of trail; should be subjected to amendment for a more precise law on the yardstick of discretion

CHAPTER ONE

1.1. BACKGROUND OF THE STUDY

Bail in the 1995 constitution as amended is embodied under article 23(6) which is to the effect that where a person is arrested in respect of a criminal offense-

- a) The person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable.

Originally the 1995 constitution provided for bail to be granted after the accused serving a remand period for 360 days where the offense was triable by the high court and 180 days where the offence is triable by the subordinate court¹.

Personal liberty is one of the fundamental human rights under chapter four of the constitution of which personal liberty as an inherent right is so precious and of value to our constitutional system².

Within a free and democratic society, liberty is fundamental to the subjects. Liberty lost is never regained and cannot be fully compensated for; therefore, where there is loss of freedom for even a day we as a democratic society must place the highest emphasis on ensuring that the system of justice minimizes the chances of an unwarranted denial of liberty³.

In the criminal law context, this freedom is embodied generally in the right to be presumed innocent until proven guilty and especially in the right of bail⁴.

Bail is defined as follows

¹ Article 23(6)(c)(b)

² Article 21 of the 1995 Constitution

³ Lacobucci J in R Vs Hall (2012) SCR 309

⁴ IBID

"it is the release from custody by the court of a person accused of a criminal offence after such a person has entered a recognizance consisting of a bond with or without sureties for a reasonable sum of money to the effect that he would appear before court for his or her trial"

The high court is guided by the provisions of the trial on indictment act whereupon section 15(1) is to the effect that,

Notwithstanding section 14, the court may refuse to grant bail to a person accused of an offence specified in subsection (2) if he does not prove to the satisfaction of court

- a) That exceptional circumstances exist justifying his or her release on bail, and
- b) That he or she will not abscond when released on bail.

Section 15(2) of the trial on indictment act specifies the offense being examined and in this it is the justification for the choice of the circumstances in the trial.

Exceptional circumstances have been defined under the ***Trial on Indictments Act Cap 34*** to mean:

- a) Grave illness certified by a medical officer of the prison or place where the accused is obtained as being incapable of adequate medical treatment while the accused is in custody
- b) A certificate of no objection signed by the director of public prosecutions
- c) The infancy or advanced of the accused

All in all, the right to personal liberty enjoins a right to apply for and be granted bail basing on courts discretion.

If such a situation arises, a great hardship is caused to the concerned. On the other hand, where a person is accused of a serious offense which attracts a long criminal antecedents having sufficient means to evade the process of law or tamper or influence the case of the prosecution, his or her release may in probability have dire consequences.

The person may abscond and may never come back and may continue with his criminal activities; the person may threaten compromise the witness or the prosecution and thwart the process of justice. Therefore, detention during pre-trial period, may be justified.

This also raises a question of whether the witness is given adequate protection on the releases of the accused on bail. However, those who are accused of petty offences or who have no criminal antecedents and are not likely to temper with the case must not unnecessarily be made to languish in jail during pre-trial period.

There is a precarious balance of interests in a challenge to the entire jurisprudence on bail. The analysis of the legal position of the right to bail raises a very important question of whether our constitution confers only a right to grant or only a right to apply for bail⁵.

It is important therefore to take note of what ***justice E. Lugyazi*** stated in ***Alipwasadi Matovu Vs. Uganda***⁶, that "in matters under consideration (and in other matters of bail criminal cases), court must bear in mind a few important principles.

Firstly, that bail is new a constitutional right

⁵ Miscellaneous Application No. 955/2006

⁶ Miscellaneous criminal application no. 15/2005

Secondly that article 23(6)(a) of the constitution limits courts discretion in such matters to setting 'conditions' that would guarantee the return of the accused person to court to answer the charges against him or her before releasing him or her on bail" the basis of his reasoning is that for the first time in the legal history of Uganda, the constitution recognizes the presumption of innocence as a fundamental human right and therefore, such recognition is not in vain and should lead to the liberty of an accused person

This raises a controversy within the law as to whether section 14(2) and 15 of the trial on indictments act are inconsistent with the 1995 constitution as we can see in the case of ***Joseph Tumushabe v. Attorney General Twinomuguni***⁷. The learned judge expressed unease with various provisions of our laws on bail, after pointing out that the laws governing bail in Uganda, which are found in article 23(6) (a), (b) and (c) of the constitution, the learned judge made this observation.

"all other laws in this country that are inconsistent with or which contravenes this article are null and void to the extent of inconsistency. The attorney general of Uganda needs to take a closer look at section 15 and 16 of the trial on indictments act cap 23, there may be urgent need to bring them in conformity with article 23(6) of the constitution"

More so in ***Dr. Aggrey Kiyingi vs. Uganda***⁸ Hon. Hudy Justice C.A Okello stated that;

"as can be seen from the wording of the article, the right that an accused has under it is the right to apply to court for bail but the discretion to grant or to reject the application is that of the court"

⁷ Constitutional Petition No. 6/2004

⁸ Miscellaneous criminal application no. 41 of 2005, p.4

In ***Alpusauli Matovu vs. Uganda*** it was held that under art 28(3) (a) of the constitution, the applicant is presumed to be innocent until the contrary is proved that being the case, he should get bail until substantive trial is concluded.

Justice C.A Okello held in response that "it should be observed that a bail application is not a trial in the substantive charge for which an applicant is held in in custody. No evidence in the substantive charge is adduced and the court does not make any pronouncement of guilty or innocent in the substantive charge. A court can therefore reject or grant bail without putting into jeopardy the constitutional presumption of innocence. In this respect, my view is that reference to the presumption of innocent in this type of hearing is misconceived.

From the above discussion, one can deduce that there is a real and serious controversy as what the true state of the law is how should we interpret and apply the relevant articles of the ***Trial on Indictments Act Cap 23***, let alone those of the magistrate's court act cap 16 constitutional or not in the words of justice Janes Ogoola⁹

The situation now obtaining is contradictory and embarrassing at the high court and is downright confusing and perplexing as concerns the judgements must follow the decisions and judgement of the high court"

These judgements have therefore raised a number of issues. The primary issue therefore is whether the constitution confers an absolute right to bail or only a right to apply for bail

Secondly, the presumption of innocence is obviously at the center of this discussion.

⁹ Criminal rev. no 91 of 1972

Does it apply at the pre-trial stage or merely at the trial?

1.2. Statement of the Problem

Much as bail is a constitutional right, it's not a guarantee that it is accessible to every individual who seeks it. The issue is that the law of bail has been subjected to massive abuse and this faces several challenges politically, economically and socially.

Bail in the courts of Uganda has become selective to the public and whether or not the accused is highly placed will be a determinant factor in granting

Secondly the conditions governing the granting of bail have created a controversy and also left crucial matters hanging for instance the protection of witness from the prosecution of witnesses from the prosecution has been left at no man's mercy.

The law in place on bail in the magistrate's court and high court does not address the yardstick on how much money should be paid for bail.

Despite the reduction on the remand period by the constitutional amendment, the accused persons still find it hard to access bail after staying for long on remand since courts are interested in hearing the case than the bail application.

1.3. Objectives of the study

1.3.1. General objectives

1. To investigate the relevancy and efficiency of bail in the administration of justice in Uganda.
2. To ascertain the challenges suspects, have in applying for bail in Uganda.
3. To enlighten members of the public and other stake holders about the right to bail

1.3.2. Specific objectives of the research

To investigate the relevancy and efficacy of the law of bail in the administration of justice in Uganda

1.4. Justification of the Study

This dissertation is to provide more knowledge and awareness on the law of bail practices to the students and community at large. The researcher is optimistic it will be a major step forward for our society if all people get to know the general state of the law governing bail in Uganda so as to be alert to fight and protect their rights.

1.5. Hypothesis of the study

Bail is a constitutional right but court has the discretion to grant or refuse bail. The accused therefore has only the right to apply for bail whereas getting it granted depends on the discretion of the court. This discretionary nature of the court to grant or refuse bail has rendered bail practice a nugatory.

1.6. Methodology

The qualitative method and desk research methods shall be employed, this shall involve use of statutes, library materials such as text books, law journals, articles cases and the internet among others. It shall also involve interviewing people about their experience in bail practice. This is aimed at establishing literature related to the subject matter and find out how much has been written on the subject.

1.7. Literature Review

A lot of work has been done in the area covering bail and its applicability in criminal justice by both local and foreign authors.

Worldwide, there has been a desire that as the laws are put in place; there should be efficacy, competent and impartial mechanisms to enforce them and more so societies that are adherent in respect the rule of that law most authors tend to explain bail but not give solutions to the challenges faced and brought about by the practices of bail in the society.

The **handbook for magistrates, Ayume's book on criminal law and procedures and Odoki's guide to criminal procedure law in Uganda** and many others have contributed to the subject of bail¹⁰. They define bail and labor to explain how magistrates, judges should exercise their powers in cases where they are confronted with bail applications. They also labor to explain the factors considered in granting or refusing bail. **Ayume Francis**, in his book, **criminal procedures and law in Uganda**¹¹ define d bail to include a recognizance entered into by the accused himself conditioning him to appear before court and failure of which may result in for future of recognizance. He further notes that the impact of custodial remand is a grave and therefor it should be redeemed by the bail. That bail should be a substitute for custodial remand and also discusses factors that are considered in granting or refusing bail. Much as he discusses at length, he fails to visualize the rampant abuse that the law faces.

¹⁰ A Guide to Criminal Procedure Law in Uganda, (1975), Publication Kampala LDC by Odoki, B.J.

¹¹ Ayume Francis: Criminal Procedure and Law in Uganda, Page 54 1986

R.E Salhany in his, **Canadian criminal procedures**¹² wrote that recognition of the prisoners right to bail arose not from a sense of justice but rather from circumstances of necessity because the prisoners were compelled to wait for a considerable period for their trial without caring for them adequately during their confinement.

However, it should be noted that R.E Slhany's analysis of bail in their book "**the law, best practice and debate**"¹³ wrote that the individual should be balanced with the needs of the society. In remanding so many un-convicted persons pose a serious effect on prison word conditions.

They further note that much as courts have the discretion to grant bail, they should do so following conditions of the law.

However, cavadinia and Gibson¹⁴ failed to comment on the ever increasing influence of politicians in the enforcement of these laws governing criminal justice. This is because sometimes it takes a section of politicians for laws to be put into play.

Douglas Brown in his **criminal procedure in Uganda and Kenya**¹⁵ noted that bail is not a punishment therefore it should not be excessive and that magistrates should grant bail to an accused whenever possible.

Douglas brown stresses the presumption of innocence as the basis of bail. That the question of the accused liberty arises immediately as the prosecution endeavors to prove his guilt after arrest.

¹² R.E Salhany: Canadian criminal procedure page 77 1989

¹³ Paul cavadinho & b. Gibson: the law, best practice and debate, page 3

¹⁴ Paul cavadinho & b. Gibson: the law, best practice and debate, page 3

¹⁵ Deoglas brown: criminal procedure in Uganda and Kenya, page 27

In 1994, Andrew Sanders and Young wrote in their book criminal justice¹⁶ that bail should be granted where court is satisfied that the accused will not commit an offence not to obstruct the course of justice and will appear in to understand his trial.

The law should not be made for suppressive purposes but to combat crime, that the state power should be used to deny suspects or accused persons their freedom and liberty.

David Bernard in criminal court action argues that bail is a right and the suspect is entitled to its grant.

Benjamin Odoki in his book¹⁷, a guide to criminal procedures in Uganda wrote that the objective of bail is to ensure that the accused persons is removed from the custody of the court thereby observing the right to liberty, which in a constitutional right is seen under Article 23 of the Constitution of the Republic of Uganda, 1995.

In 2004 the handbook for magistrate's states that the bail is recognizance taken by a duly authorized person to ensure that an accused person appears to answer a charge against him, at an appointed place and time.

It however does not state exactly what place, much as the place may be presumed to be court. It also fails to state whether or not haw on bail is effective or not hence this research will try to address this issue as soon from the above review a lot of useful work has been done on this topic of bail in relation to the criminal justice system.

¹⁶ Andrew sanders and young: criminal justice, page 144

¹⁷ 2nd Edition, Page 71

However, none of the work has attempted to discuss the law in the context of the political, social, and economic conditions prevailing in Uganda today. This is probably because the foreign are not aware of the conditions in Uganda and the fact that most of these books were written over twenty years ago, hence it leaves further research in this area wanting.

1.8. Chapterization

Chapter One of the dissertation shall include the background of the study, statement of problem, objectives, justification of the study, hypothesis, methodology literature review, synopsis and conclusion.

Chapter two shall cover the bail practice in Uganda and entail the meaning of bail, effect and object of bail, rationale for bail, power to grant bail and consideration for bail and conclusion.

Chapter three shall cover the legal framework, this includes the constitution of the Republic of Uganda 1995 as amended, the children's act, the magistrates act cap 16 and the trial on Indictments Act Cap 23, international conventions, case law and conclusion.

Chapter four covers the challenges affecting grant of bail administration of criminal justice in Uganda, such as political factors, discretion of court, protection of witnesses and conclusion

Chapter five shall generally windup the dissertation by covering the findings, conclusions and recommendations.

1.9. Conclusion

The details in chapter one gives a detailed analysis of how the desertion shall be written by showing among others the background of the study whereby the law on bail practices was before and the new amendments.

CHAPTER TWO

BAIL PRACTICE IN UGANDA

2.1. Meaning of Bail

The *Black's Law Dictionary*¹⁸ defines bail as a process by which a person is released from custody either on the undertaking of a surety of his or her own recognizance.

In **Uganda Vs Lawrence Luzinda**¹⁹ **Okello J** as he then was stated that "Bail is an Agreement between the Court and an applicant consisting of a bond with or without surety for a reasonable amount as the circumstances of the case permit conditioned upon the applicant appearing before such a court on a date and time as named in the bond to start his trial."

The applicant for bail must enter into an agreement with court and present to court a guarantee that once released on bail, he or she would not abscond.

Bail has also been defined in the law lexicon as security for the appearance of the accused person on giving which he is released pending trial or investigation.

¹⁸ 8th Edition, page 150

¹⁹ (1986) HCB 33.

2.1.1. Effect and Object of Bail

The digest²⁰ states that the object of bail is to secure by a pecuniary penalty the appearance of an accused person or prisoner at trial without being detained in prison or remand pending trial.

Bail would reduce the pressure on prisons due to the ever increasing number of prisoners. This is why it has been commonly agreed upon that it is undesirable to detain persons in prison if it's not necessary.

What is contemplated by bail is to procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit himself/herself to the jurisdiction and judgment of the court. Therefore the general effect of bail is to temporarily release the accused person from custody of the court or police.

2.1.2. Rationale for Bail.

The rationale for bail is derived from the constitutional presumption of innocence. The criminal justice system presumes a person charged with a criminal offence to be innocent until proved guilty or until he/she pleads guilty²¹. According to **Professor Tarsis B. Kabwegyere**²² in his book, the custodians of law and justice reside in the institution of the judiciary which is supposed to be independent and unencumbered by the wills of policy makers and implementers. It can therefore be stated that the integral to the functioning of any criminal justice system is due respect of human rights. The whole idea of bail is secured from article 23(1) of the constitution of the republic of Uganda which stipulates that "no person shall be deprived of his personal liberty except in the following

²⁰ 2nd Reissue, volume 15 (i) page 167

²¹ Article 28, 1995 constitution.

²² The politics of state formation and destruction in Uganda.

cases...” and therefore the jurisprudence on bail aims at achieving a balance between personal liberty and security interest of society more so there are situations where one may be accused of a petty offence and if there were no provisions of release on bail, the accused person shall have to spend the whole of the pre-trial in bail of which at the end of the trial, the accused person may be found not guilty even if he/she is found guilty the period stayed in custody may be longer than the period of imprisonment imposed upon conviction.

It is also prudent to note that keeping an accused in prison would weaken his ability to organize his defence.

This is due to the fact that the accused loses contact with the witness. Thus it would be better to release the accused on bail to enable him/her prepare and organize his case in certain circumstances to ensure the proper determination of the merits of the case before court. This position was stated by in **Uganda V Juruya²³ by Egonda Ntendo**

2.1.3. Power to Grant Bail

The power to grant bail vests in the court and this power is discretionary but the court has to exercise this discretion judiciously.

Both the Magistrate courts and the High Court have powers to grant bail.

The principle legislation governing the grant of bail in the High Court are.

- *The Constitution of the Republic of Uganda, 1995 (as amended).*
- *The Trial on indictments Act cap 23.*

²³ High Court Criminal Case No. 57/1993.

The provisions of the constitution enforcement the provision of the **trial on indictment Act** where upon the High Court has power to grant bail at any stage in proceedings, on taking from the applicant a recognizance consisting of a bond with or without the relevant law, this was stated in case of **Musana & Another Vs Uganda**²⁴.

The constitution states that a person arrested in respect of a criminal offence is entitled to apply for a bail. It also provided for mandatory bail which was also re-echoed by **Sebutinde j** as she then was in the case of **Dr. Mugamba & 2 others Vs Uganda**.²⁵

In the magistrate courts the principle legislation governing the grant of bail include:

- *The Constitution of the Republic of Uganda, 1995 (as amended)*
- *The Magistrate Court Act.*

Bail may be granted by a magistrate in any case except where the accused person is charged with an offence excluded by law.

The offences excluded by law are provided for under s. 75(2) of the *Magistrate Court Act*.

2.1.4. Consideration for Bail.

Since bail is a constitution right, it can therefore be stated that any applicant for bail is constitutionally entitled to apply for its grant although the grant or refusal must be done judiciously.

²⁴ Misc. Appl. No.20/1999.

²⁵ Misc crim. Appl.No.51/1999.

The accused is to satisfy court that in the circumstances of his /her case, he or she should be granted bail, while the prosecution may oppose.

It should be noted that the High Court has aligned itself to the requirement that of the law as to proof of exceptional circumstances which shows that the criminal justice system is quite effective in as far as promoting justice is concerned.

With regard to grave illness, court requires a certification signed by a medical officer of the prison where the accused is being detained that the accused is not capable of acquiring adequate medical treatment while in custody.

In **Janet Mireaba vs Uganda**²⁶ **Justice Mukanza** granted bail to the accused because she had permanent grave illness that is Asthma, Hypertension and severe ulcers.

Further more in the case of **Enos K. Tumusiime V Uganda**²⁷ where the application for bail was grounded on grave illness of the applicant, two medical reports were produced one from Nairobi and a second one from Murchison bay hospital whose prison the applicant was being detained at the time.

The accused had constant chest pain that needed regular surveillance from his consultant an orthopedic surgeon.

The learned judge considered the fact that the accused could not be attended to by his consultant who was in Nairobi and concluded that the applicant was incapable of adequate medical care in prison.

The judge in considering this ground inter alia held that the accused had proved exceptional circumstances to entitle him grant of bail which was granted.

²⁶ Criminal Case no.30/2003

²⁷ H.C.C.S. No.136/1999

It is important to note the lacuna in the law since it is not specific as to which disease constitutes grave illness.

2.1.4.1 EXCEPTIONAL REQUIREMENTS FOR THE GRANT OF BAIL

A certificate of objection signed by the director of public prosecutions

This is document tendered to court by a state representative indicating that they are satisfied with the applicants ground for bail and have no objection.

It is vital that the document be signed by the Direct of Public Prosecutions however it should be noted that in the recent times, this has not been very useful as proof of exceptional circumstances as required by the High Court. This is because most applicants rely on either grave illness or advanced age as exceptional circumstances justifying release on bail.

Advanced age

It should also be noted that several applications for bail have been grounded on advanced age of applicants as an exceptional circumstance justifying the grant of bail.

However, there is no statutory definition for advanced age and in the case of **Suleiman Kiggundu Vs Uganda**²⁸ it was observed that in the absence of statutory definition of advance age, cases are often persuasive.

In the case of **Adimolo Vs Uganda**²⁹ the age between 50 and 55 years was as advanced age for purposes of a bail application.

²⁸ (1991) HCB 42.

²⁹ Misc. Crim. Appl. No. 16/2000

Furthermore, there is no statutory definition as to infancy of an applicant thus in the case of **Kamoga Vs Uganda**³⁰ where the applicant was 16 years and the father had to swear an affidavit that the applicant was 16 years and schooling and that his schooling would be interfered with if he is not granted bail.

It should be noted that the trial judge denied the grant of bail on ground that the applicant schooling being put in Jeopardy by staying in prison was not tenable legally.

Currently, the High Court has departed from the legal requirement of poof of exceptional circumstance as a ground justifying grant of bail.

This departure was brought about by the amendment of section 15(1) of the trial on indictments Act ³¹ which is to the effect that not withstanding section 14, the court may refuse to grant bail to a person accused of an offence specified in subsection (2) if he or she does not prove to the satisfaction of court that exceptional circumstance exist justifying his or her release on bail. The amended and current law states that "the court may refuse" to grant bail the old law provided that "this court shall not " grant bail.

From this position reason for the departure is deduced.

Whether or not upon the grant of bail the accused is is likely to abscond

The other condition courts consider when granting bail is whether the accused is likely to abscond.

In doing this, court considers a number of factors.

³⁰ Misc. Crim. Appl.No.87/1998.

³¹ Cap 23.

- (a) Whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda;
- (b) Whether the accused has sound surities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail.
- (c) Whether the accused has on a previous accession when released on bail failed to comply with the conditions of his or her bail and
- (d) Whether there are other charges pending against the accused.

It has been noted by court in several cases that the High Court has discretion to grant bail even when exceptional circumstances do not exist as seen in **Janet Mureaba V Uganda**³²

Other considerations apart from exceptional circumstances include inordinate delay on the part of the state to try the accused person.

2.2. Conclusion

All in all this chapter discusses, the effect, object, rationale for bail and considerations for bail. That although bail is not an absolute right as cited in the constitution, other factors should absolutely be put into consideration such as rationale, object and effect of granting bail.

³² Criminal Case No. 0136 1994.

CHAPTER THREE

3.1. THE LAW GOVERNING BAIL PRACTICE IN UGANDA

3.2. Introduction

Constitutional law being the basic law, the constitution prevails over all other laws. This is referred to as the supremacy of the constitution. The supremacy of the constitution is derived from the provision that it has a binding force over all authorizes and persons and that all laws and customs derive their validity form the constitution of the Republic of Uganda 1995 as amended³³

Realizing that the principle constitutional function of the judiciary is to administer justice³⁴. To attain justice, the judiciary must maintain the rule of law since the end of the law is the attendance of justice.

The fundamental duty of the courts is to conduct a fair trial of the accused, bearing in mind his or her constitutional rights and the objectives of the criminal justice system.

Justice requires that the applicable laws be applied to the facts evidenced without due regard to the probable reaction of the executive or any other institution.

The judiciary is thereby obliged to ensure that all persons are afforded a fair, speed and public hearing before an independent and impartial court of which the right to a fair and speedy hearing is fundamental to the criminal justice system.

³³ Article 2

³⁴ Article 126

Still under the constitution of the republic of Uganda 1995 under article 28 (3) (a), it is to the effect that every person charged with a criminal offence shall be presumed innocent until proved guilty or until the person has proved guilty

This should come to our knowledge that article 28 of the constitution of the republic of Uganda 1995 which provides for a fair hearing is a basic human right guaranteed under the constitution

The above provision indicated that need for the judiciary to handle case before them bearing in mind the rights of the parties therefore however much as it is key to observe the right to a fair hearing this right has been abused sometimes **justice B. Odoki**³⁵. noted that 'constitutional law is the basic law, the constitution prevails over all other laws. The supremacy of the constitution is seen from the constitution that it has a binding force over all authorities and persons and all laws and customs. There has been a lot of delay in handling cases, with the effect that many cases have had to drag in court for a long time.' This has a devastating effect on both the state and the accused person .

3.3 The constitution of the republic of Uganda, 1995 as amended

The purpose of the law of bail is to facilities the attendance of justice. This law is invoked by an accused (or his or her counsel) where the accused is on remand. it cannot be commenced with immediate effect due to given factors or even where the trial has commenced but is likely to take a long time before completion. The accused can apply for bail and attend court out of prison. Bail is therefore a constitutional right guaranteed by the Constitution of the Republic of Uganda, 1995, under Article 23(6)[a] which states that where a person is arrested in

³⁵ Makerere law journal. 1996 page 31

respect of a criminal offence the person is entitled to apply to the court to be released on bail in such conditions the court consider reasonable”

Bail should therefore not be denied as a way of punishment. Where cash bail is required the court should not use its discretion to over charge,. This would make it virtually impossible for the accused to raise the money. Similarly, it should not be slow as to defeat the purpose for which it was asked. All these factors have to be considered if the constitutional right to bail is to become a reality.

Article 23(6) (a) of the constitution of the Republic of Uganda, 1995 is reinforced by Article 23(6) (c) as amended which empowers the High Court to release an accused person who has been on remand for one hundred eighty days before the accused is committed to the High Court for trial. This is a mandatory release as shown by the phrase, the court shall release.

In the case of **Dr. Martin Kato Mugamba and Another Vs Uganda” Sebutinde³⁶ J** observed that the constitution allows the state a ‘grace period” of 360 days now 180 days as amended with which it can lawfully detain an accused person pending committal for trial and during which period the state is expected to complete its investigations and commence prosecution of the accused persons

This observation suggests that when an accused person spends 180 days in custody without being committed for trial, the High Court is bounded by this provision of the constitution to release the accused on bail. Further detention would be abuse of the accused’s constitutional right since it is not his/her making that the accused was not committed for trial.

³⁶ Misc. crim. Appl. No 51/1996(unreported)

The right to liberty is a constitutional right which relates to bail. It is a fundamental and inalienable right to a person by virtue of being a human. It is the foundation of the right to bail because it is what an applicant for bail relies on the demand for liberty.

Article 23(1) of the Constitution of the Republic of Uganda 1995 provides that "No person shall be deprived of personal liberty....."

It should be observed that the grant of bail by court is to uphold the constitutional right of the accused as a mandate of the judiciary. It is therefore essential that bail be promoted as an alternative to custodial remand where prisoners are kept for lengthy periods of time in overcrowded and often unhygienic conditions.

3.4 Magistrate court Act Cap 16

Section 75 provided for the release on bail in a magistrate court that "A magistrate's court before which a person appears or is brought charged with any offence other than the offences specified in sub-section (2) may, at any stage in the proceedings release the person on bail, on taking from him a recognizance consisting of a bond with or without sureties, for such an amount as is reasonable in the circumstances of the case to appear before the court on such a date and at such a time as is named in the bond.

This means Bail may be granted by a magistrate in any case except where the accused person is charged with an offence excluded by law.

Some of the offences excluded from grant of bail in the magistrate's court includes

- a) An offence triable only by the High Court
- b) An offence under the Penal Code Act relating to act of terrorism
- c) An offence under the under penal code relating to cattle rustling
- d) An offence under the Fire Arms act punishable by the sentence of the imprisonment of not less than ten years

The magistrate's court Act³⁷ also gives the considerations for bail, where any person appears before a magistrate court charged for the offence for which bail may be granted, the court shall inform the person of his other right to apply for bail.

3.5 The trial on indictment Act Cap 23

The Trial on indictment Act whose section 14(1)³⁸ is to the effect that

The High Court may at any stage in the proceedings release the accused person on bail, that is to say, on taking from him/her a recognizance such an amount as is reasonable in the circumstance of the case, to appear before the court on such a date at such a time is named in the bond".

The discretion of court here is demonstrated by the use of the word "may" as shown above.

The court is also given discretion to decide on matters that are not expressly provided for in the law for instance what amounts to advanced age, what kind of sickness, what amounts to grave illness

³⁷ Section 75 (4) cap 16

³⁸ Cap 23

3.6 The children Act cap 59 as amended

Unless the offence to remove him or her from the association with any person, the office has reason to believe that the release of the child will defeat the aims of justice, it is mandatory that the child be released on bail on his or her own recognizance or a recognizance entered into by his or her other person responsible. As according to the children Act

It should be noted that the age of criminal responsibility under the children Act is 12 years and it is mandatory. Therefore, subject to the provisions above, a child's release on bail is of right.

Section 50(1) of the children's Act provides for this right upon the magistrate or person presiding over the court looking into the case.

The law further joins court to give and record the reasons for its refusal to grant bail to a child applicant and inform the applicant (child) of his or her right to apply for bail to a chief magistrate's court or to the High court³⁹.

3.7 The international convention

The right to liberty here is provided for under the International Convention on Civil and Political Rights (I.C.C.P.R) whose Article 9(1) states that 'everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention no one shall be deprived of his liberty except on such grounds and in accordance with such provisions as established by law'. Of which Uganda is signatory to the I.C.C.P.R.

³⁹ Section 90 (2) Cap 59

Related to this is Article 6 of the Africa Charter on Human and Peoples' Rights which Uganda is signatory and it emphasizes the same provision by stating that:

"Every individual shall have the right to liberty and to security of his person no one may be deprived of his freedom except for reasons and condition previously laid down by law in particular on one may be arrested or detained".

Basing on these provisions above it can correctly be stated that the right to liberty and freedom from arbitrary arrest are vial human rights in relation to the institution of bail

3.8 case law

As the case of Woolmington Vs DPP provides "..... no matter what charge or where the trial the principle that the prosecution must prove guilty of the accused is part of the common law of England and an attempt to whittle it down cannot be entertained"

This is a presumption and position, upon which our law stands today. surely in a country like ours (Uganda) where the majority of the population is ignorant of the law that govern them and the fact that very few of such people can afford the legal services, it would be feral to presume them guilty and as them to prove their innocent

However, where incriminating evidence has already been adduced against the accused the grant of bail is not desirable as was noted by **Ayume F.J (RIP) in his book, criminal procedure and law in Uganda.**⁴⁰

The rationale behind this is that an accused, who by the evidence gets to know that he or she has no chances of an acquittal, will do all within his/her means to absent which would temper with the course of justice., be that denying the grant of bail would amount to punishing an innocent person as earlier noted.

When an individual is arrested or detained for having committed a crime, or suspected of committing a crime, many of his basic rights and freedoms are curtailed if not suspended , including the fundamental right to personal liberty case law has also re-echoed several constitutional provisions about bail.

3.9 Conclusion

In conclusion the legal framework of bail practice is based on the laws as discussed above. Therefore, an accused can always invoke the above laws in an appropriate manner as required.

⁴⁰ Page 59

CHAPTER FOUR

CHALLENGES AFFECTING GRANT OF BAIL IN THE ADMINISTRATION OF CRIMINAL JUSTICE

4.2 Introduction

There are a number of challenges faced by the criminal justice system in its attempt to effectively administer justice of which bail is a major component to this study.as a result of delay of administration of justice. This study has established that there has been a violation of the principle of natural justice which is embraced under the constitution and it states that *"in determination of civil rights and obligations or any criminal charge any persons shall been titled to fair, speedy and public hearing before and independent and imperial court of tribunal established by law"*⁴¹.

This is basically the right of fair hearing and it has been re-echoed in **The Universal Declaration of Human Rights**⁴² which provides that "Everyone is entitled in full equity to fair and public hearing before and independent and impartial tribunal in determination if his rights and obligations and of any criminal charge against him.

The research has found out that the delay in administration of justice has been enormous and can be blamed on many factors such as corruption, inadequate staffing, slow investigations and general technicalities involved in criminal proceedings as discussed below.

⁴¹ Article 28 (1) 1995 constitution

⁴²Article 10 Universal Declaration of Human Rights, 1948

The main challenges affecting bail practice in the Magistrates and High Court in Uganda are mainly, the delay in administration of criminal justice, political factors, lack of statutory provision on bail to be specific.

4.3 Political factors

Our criminal justice system has been so much invaded by politics hence some judicial officers are now guided by the political ideology in reaching decisions.

The first and profound scenario is the "black mambas" scenario where the High court was besieged by army men in November 2005 during the trial of the 22 Peoples' Redemption Army (PRA) rebel suspects who were Besigye's co-accused charged with the offence of treason.

Justice Ogoola as the principal judge of the High Court described this as a rape on the temple of justice.

The executive interferes with the work of the judiciary so much for instance as in the case of the former IGP Kale Kayihura who was kept in custody beyond the constitutional time.

This raised public concern before he could be granted bail.

The political influence therefore contravenes Article 128(1) and (2) of the constitution of the Republic of Uganda 1995 which is to the effect that in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or discretion of any person or authority.

"(2) no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions."

Therefore, there has not been realization of the spirit of Article 128 of the constitution of the Republic of Uganda 1995 since political factors have played a major role in the grant or denial of bail.

4.4 Discretion of court

The law of bail gives court a wide discretion. The jurisdiction of grant of bail is constitutionally subject only to such conditions as the court considers reasonable as stated under **the Trial on Indictment Act** whose section 14(1)⁴³ is to the effect that "the high court may at any stage of the proceedings realize, the accused person on bail, that is to say, on taking from him other a recognizances such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date at such on time as is named in the bound."

The discretion of court is demonstrated by the use of the words 'may as shown above.

The court is also given discretion to decide on matters that are expressly provided for in the law for instance what amount to advanced age what kind of sickness amount to grave illness

The same view was held in the case of **Chemusua V AG**⁴⁴ that each case had to be decided on its own merits .

⁴³ Cap 23

⁴⁴ (1973) HCB

4.5 conclusion

As a result of these challenges as stated in this chapter, bail practices in these courts is a nugatory as the hindrance among other political factors and discretion of court are paramount in affecting bail administration in court's jurisdiction

CHAPTER FIVE

FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0. Findings

5.1 non –procedural causes of delay

Judicial officers most especially magistrates have been pronounced to be very corrupt. This interval means that judges are more ethical than magistrates because of facilitation.

Due to corruption tendencies, the research found that some of the witnesses are paid not to appear in court to give evidence. This implies corruption leads to the delay and obstruction of justice.

5.1.2 Slow investigations

Delay means some slow pace or late handling of a matter or case. According to chambers 21 century dictionary means to slow someone or something down or to make them late or to be slow in doing-something. It should be noted that delay defeats justice. The constitution of the Republic of Uganda 1995 is to the effect that justice shall not be delayed and requires fair and speedy dispensation of justice as a mandatory right to the accused person(s). As per Article 28 of the Constitution of the Republic of Uganda.

In relation to the concept of delay Justice **B.Odoki in the Makerere University Law Journal**⁴⁵ noted that,

“Delay is the enemy of justice and criminal justice in particular.” He further stated that delay of justice is denial of justice” Magna Charta also declared that “to no one will we deny or delay the right to justice.

⁴⁵ The Delayed Justice: page 32

However much as delay is undesirable it is generally accepted that some measure of delay is inevitable in criminal proceeding and therefore in some instances justified.

A complex case involving extensive documentary evidence may take several months to be prepared adequately and it is in every body's interest that it should be brought to trial in a fit state.

Therefore, to determine whether or not delay in a particular instance is justifiable or acceptable, we should look into the degree of the delay, its cause, objects and extent, so that the longer it becomes, the more it may be unjustifiable and indeed a denial of justice considering that "justice denied".

Basically the delay has to be reasonable in the circumstances of a particular case before court, to be acceptable. This was considered in the case of **Uganda Vs Alfred Juruga**⁴⁶ where the learned **Judge Egonda Ntende** held that the delay of the trial of the accused was unreasonable as to warrant the release of the accused person on bail pending his trial.

He also noted that "court ought to ensure that the constitutional rights of an accused person are not rendered nugatory by a delay in trial.

Therefore the approach adopted by court reflected the constitutional mandate of the courts of law, to ensure that all cases brought before them are dealt with expeditiously without fear or favor or ill will. it is also the researchers view that if

⁴⁶ HCCS No 57/1993

this approach is adopted by the judiciary as an institution, the protection of rights of individuals accused of committing crimes shall be realized.

The idea of bail has been put in place to mitigate circumstance that are caused by the inevitable and reasonable delay. Bail ensures that those caught up in crimes are not unduly punished due to delay. The law of bail is the concern of this research and specific provisions of the constitution on bail thus discussed herein.

The study established that as a result of slow investigations, there has always been a frequent adjournment especially by the state which may decide to always pray for adjournment claiming that the police are still investigating. It should be noted that these slow investigations are due to poor funding of the police especially the department of CID in terms of transport and other equipment to ease their work.

5.1.3 Inadequate staffing

This research found that the judiciary is poorly staffed in terms of prosecutors, judges and interpreters.

In **the judiciary monthly staff newsletter**⁴⁷, it was noted that there is still indispensable cutter against delay justice and the rate at which cases are coming into the system exceed the rate of disposal.

Therefore, in the bid to ensure effective justice there is need for the government to increase the number of judicial officers to as well as state attorneys and interpreters to ease the process of trial

⁴⁷ Vol.3, issue 2 Feb Pg 5

5.1.4 Lack of motivation

During this research, the researcher observed that there was need to motivate the judiciary through allowances, increases salaries inter alia. The judiciary being poorly staffed poorly paid yet they are usually loaded with lots of work to do, this is an indication that they need to be motivated so as to reduce backlog in the judiciary.

5.1.5 Legal and procedural causes of delay

Political influence greatly affects the courts discretion to grant bail whether or not it desirable for example the case of **Col. (RTD) Kiiza Besigye and 22 others V Uganda**⁴⁸ can be used to show this point whereby the 22 co-accused were continuously detailed even after they had been granted bail by the high court. furthermore, the study found that once some politicians are granted bail they are likely temper with the prosecution witnesses given their political and economic status in the areas as was in the case of **Dr. Aggrey Kiyingi Vs Uganda** thus in the case of **Ug V Wilberforce Nadiope & 5 others** bail was refused on the ground that because of the accused prominence and apparent influence in life, there was every likelihood of his using his influence to interfere with witness.

In essence therefore political influence delays the administration of justice as discussed above and this affects the accused persons who are on remand thereby infringing on their right to liberty and security to the person as enshrined in the constitution.

⁴⁸ HCCC No 955/2006

Article 23(6) of the **constitution of the Republic of Uganda 1995** which provides that where a person is arrested in respect of a criminal offence, the person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable has in effect delayed justice. This is because the provision is at this invokes to grant bail where it is not even applicable or appropriate due to factors likely bribery.

Article 23(b) (c) of the constitution of the Republic of Uganda which provides that where a person in respect of a criminal offence, in case of an offence tribal only by the high court the person shall be released on bail.

On such conditions as the court considers reasonable if the person has been reminded in custody for 180 days before the case is committed to the high court.

The provision delays justice because when such people are released on bail especially those on capital offences like murder, they rarely comeback for trial and when a warrant of arrest is issued it also takes too long to be executed as the excused will have taken advantages of the justice system to escape trial and thereby defeat the aims of the criminal justice system.

5.2 Conclusion

5.2.1 Critique of the law

As earlier noted the purpose of the law of bail is to facilitate justice not to defeat it, the constitution of the Republic of Uganda 1995 guarantees the right to bail.

However, bail should be granted in accordance with the relevant law in view of the circumstances of a particular case. The jurisdiction for grant or denial of bail in corruption of offences currently is vested in the high court.

In considering whether or not to grant bail, the High Court requires the accused to satisfactorily prove the exceptional circumstances existing warrant release on bail and proof that when released the accused will not abscond.

A critical examination of the law of bail as applied in the High Court, especially in respect of corruption and cognate offences, as compared to other offences leaves a lot to be desired. The law looks weak and is further weakened by others, with the effect that in certain case the rights of the accused person are rendered nugatory.

As already discussed, bail is a constitutional right of an accused person and it is granted in accordance with the relevant law. it should be noted that bail is simply an alternative to custodian remained where a person trial can be expended.

The criminal justice system in its effort is to address the law on bail has been affected by many factors as discussed herein however, it should be noted that the public needs to be corrupt against victims who are corrupt.

In essence the court of law should not be accomplice to the transgression of people's rights and freedoms as thus be used to promote justice and also uphold the fundamental rights and freedoms as stipulated under chapter four of the constitution.

5.3 Recommendations

To begin with having examined the law of bail, rule of law should be strictly and strongly adhered to in this country. The law should be in position to take its course without any interference, political or otherwise. The independence of the judiciary should be strongly observed and the court be left to perform its constitutional mandate independent as seen in Article 128(1) of the constitution.

This is because interference may lead to degradation form the law and the basic trends of the administration of justice. The law on bail in the high court especially the issue of discretion should be revisited. This is because the discretion is abused by some judges who for example set a very high amount of cash bail thereby defeating the aim of justice.

Furthermore, the wording of the law is also ambiguous hence subject to the interpretation of the judges thereby rendering the rights of an accused uncertain.

The researcher considered view is that court should do massive sanitization of the general public about their rights, the right to apply for and be realized on bail being one of those rights as enshrined under the constitution of the Republic of Uganda 1995 as amended.

This would encourage transparency and reduce on the temptations of judicial officers to take the case bail for selfish use.it would also slave them embarrassment form allegations that the cash bail is a bribe. The public will be in position to ascertain whether cash bail is refundable to the accused upon completion of trial

BIBLIOGRAPHY

- Odoki.B. A Guide to criminal Procedure in Uganda, LDC, Publication Kampala (1975)
- Brown Douglas, Criminal Procedure in Uganda and Kenya, 2nd Edition London (1980)
- Ayume Francis J. Criminal Produce and Law in Uganda Longman Publishers, Nairobi (1986)
- Saihany, R.E Canadian Criminal Procedure, Canadian Law BookMc, Ontairo(1989)
- Cavandino, P and the Law best Practice and Debate Winchester Waterside Gibson G. Presss, (1993)
- Sanders, A and Young, Criminal Justice, Butterworth (1994)
- Kabwegyere Tarsis, . The politics of State formation and Destruction in Uganda