

**ADDRESSING THE INADEQUACIES IN THE BAIL AND BOND
PROVISIONS IN KENYA: FOCUS ON CORRUPTION CASES.**

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Declaration

I, **KILUNGYA CHARITY MUMBE**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This dissertation has been submitted for examination with my approval as University Supervisor.

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ABSTRACT

The Constitution of Kenya does provide for the right to bail for arrested persons, however, there are no clear guidelines to govern the granting of bail and bond for corruption cases. The discretion has been left at the hands of the court to decide the amount of bail and bond to be granted to those arrested for corruption. This is a challenge as the cases have increased over time. There is, therefore, a need for clear legislation that will govern the courts. Through a keen study of past precedent in Kenya, it has been realized that indeed there is a gap that needs to be filled by legislation regarding the bail and bond for corruption cases.

Generally, there should be comprehensive legislation guiding the courts on bail and bond.

List of cases

Carlson v Landon (1952) The Supreme Court of United States

Ferdinand Odoyo Matano & 8 Others v R (2019) eKLR.

Lahan Yahaya v Uganda (2005) High Court of Uganda.

Margaret Magiri Ngui v R (1985) eKLR.

Ng'ang'a v R (1965)

Prof. Muhammad Abdalla Swazuri & 23 others v R (2019) eKLR

R v Danson Mgunya & Another (2010) eKLR.

R v Laban Omwaka (2011) eKLR.

Reuben Marumben Lemunyete v R (2019) eKLR.

Rodgers Nzioka & 10 others v R (2018) eKLR.

S v Dlamini (1999) Constitutional Court of South Africa.

Stack v Boyle (1951) The Supreme Court of United States

Taito Phillip Hans Field v The Queen (2011) Supreme Court of New Zealand.

Vincent Makonjio & 2 others v R (2019) eKLR.

List of International Statutes

African Charter on Human People's Rights (27 June 1981).

International Convention on Civil and Political Rights (16 December 1966)

Universal Declaration of Human Rights (10 December 1948)

List of Foreign Statutes

Anti-Corruption Act 2009 (Uganda).

Bail Act 2000 (New Zealand)

Crimes Act 1961 (New Zealand).

Criminal Procedure Act (South Africa)

Constitution of Uganda (1995)

Constitution of South Africa (1996).

Magistrates Court Act (Uganda).

Penal Code (Uganda).

Prevention and Combating of Corrupt Activities Act (South Africa).

Trial on Indictments Act (Uganda)

List of National Statutes.

Anti-corruption and Crimes Act (No.3 of 2003)

Constitution of Kenya (2010).

International Crimes Act (No.16 of 2008)

National Police Service Act (No.11A of 2011)

Repealed Constitution of Kenya (1969).

The Criminal Procedure Code (cap 75)

The Ethics and Anti-corruption Commission Act (No.22 of 2011).

The Penal Code (cap 63).

List of Abbreviations

EACC - Ethics and Anti-corruption Commission

EM – Electronic Monitoring

ICC –International Criminal Court

ICCPR - International Convention on Civil and Political Rights.

CHAPTER 1

1.0 INTRODUCTION

An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.¹ Bail is an agreement between the accused, their sureties and the court where a sum of money is lodged that will guarantee that the accused will show up in court when required.² Bond, on the other hand, is defined as an undertaking, entered into by an accused person in custody, with or without sureties under which he or she binds him or herself to comply with the conditions required by the court, failure to which the accused should pay the amount of bond.³

Under the Repealed Constitution of Kenya, the right to be released on bail and bond was provided for under certain circumstances. If a person is arrested or detained on reasonable grounds of suspicion of committing a criminal offence and is not tried within a reasonable time unless he is charged with an offence punishable by death, be released unconditionally. Secondly, upon reasonable conditions, including in particular such conditions are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.⁴ This means that if the offence is not punishable by death, one may be released through bail or bond. Secondly, there should be reasonable conditions for one to be released by bail or bond,

From the onset, the main rationale of, the right to be released on bail or bond was a security to the courts that the accused will not abscond court. The granting of bail and bond solely lies at the courts' discretion and it is done after the accused person has taken a plea. The right to be released on bail and bond however, is still a limited right under Article 24 of the Constitution of Kenya 2010. Article 24 highlights that a right can only be limited if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and other additional factors'. Article 24 enumerates as follows:-

- a) The nature of the right or freedom;
- b) The importance of the purpose of the limitation;

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

² National Council on the Administration of Justice, "*Bail and Bond Policy Guidelines*," The Judiciary, March 2015.

³ National Council on the Administration of Justice, "*Bail and Bond Policy Guidelines*," The Judiciary, March 2015.

⁴ Article 72 (5), *Repealed Constitution of Kenya* (1969).

- c) Nature and extent of the limitation;
- d) The enjoyment of the right and freedom does not prejudice the rights and freedoms of others;
- e) The relation between the limitation and if other less restrictive measures can be used to achieve the purpose.

1.1 BACKGROUND OF THE STUDY

Corruption has been an aching issue in Kenya. It has become a matter of great concern both nationally and internationally.⁵⁶ It has been a pain that has stabbed the country's economy in the back and has hindered a lot of development in this country. Corruption not only involves high officials in government, but it also trickles down to the common Kenyan citizen.

Corruption can generally be defined as a fraudulent intention to evade the prohibitions of the law.⁷

Under the laws of Kenya, corruption means bribery, fraud, and embezzlement of public funds, abuse of office, breach of trust or an offence involving dishonesty; in connection with any tax, rate or impost levied or under any written law relating to the elections of persons to public office. ⁸

The most prevalent form of corruption in Kenya is bribery at 66.2% mainly encountered as people seek services from public offices.⁹ Other forms of corruption and unethical conduct are an abuse of office, favouritism, delay in service provision, discrimination and embezzlement and misappropriation of public funds.¹⁰ Moreover, there are two other broad forms of corruption; grand and petty corruption. Grand corruption usually involves high placed public officials and a large staggering amount of money that causes a huge dent in the economy of a country.¹¹ Petty corruption involves less amount of money and it is a way of supplementing

⁵ Kempe R, 'Kenya's Corruption Problem: Causes and Consequences', *Commonwealth & Comparative Politics*, 6, 1-<
https://www.researchgate.net/publication/267457638_Kenya's_corruption_problem_causes_and_consequences>
on 8 February 2019.

⁷ Black's Law Dictionary, 2 ed.

⁸ Section 2(1), *Anti-corruption and Economic Crimes Act*, (No.3 of 2003).

⁹ Ethics and Anti-Corruption Commission, *National Ethics and Corruption Survey*, 6 May 2018, 9.

¹⁰ Ethics and Anti-Corruption Commission, *National Ethics and Corruption Survey*, 6 May 2018, 9.

¹¹ Mungiu P, 'Corruption: Diagnosis and treatment,' *Journal of Democracy*, 2006, 91 -<
<https://www.journalofdemocracy.org/sites/default/files/Mungiu-Pippidi-17-3.pdf>> on 10 February 2019.

¹¹Transparency International Global Corruption Report, *Corruption in Judicial Systems*, 2007, 184.

low salaries of those in the low rank in the public sector.¹¹ Kenya is involved in both forms of corruption.

In a bid to promote fair trial, the right to bail has been provided on reasonable conditions to an arrested person as they await trial on reasonable conditions unless there are compelling reasons not to be released.¹² The same right to bail has also been provided for under the Criminal Procedure Code.¹³ The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced. ¹⁴ Additionally, a police officer investigating an alleged offence may also require a person to execute a bond as required subject to the condition that the person will duly attend court when required.¹⁵

Corruption is an economic crime in Kenya,¹⁶ and thus an accused person charged with corruption indeed has the right to be granted bail and bond.

The right to bail and bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.¹⁷ This specific provision leaves the court with the discretion to decide the amount of bail or bond to grant the accused persons. However, this discretion provided has sparked a debate that there has been an abuse of this power concerning corruption cases. It is quite evident that the Judiciary is experiencing difficulties in establishing a standard to grant bail and bond for corruption cases. This is also enhanced by the idea that no legislation breaks down ways to handle offences such as corruption in granting of bail or bond. Nevertheless, the country is cognizant of the establishment of the Anti-corruption and Economic Crime Division in the High Court which listens to disputes regarding corruption and economic crimes.¹⁸ Practice directions were also issued under Gazette Notice No.10263 to guide the court. Nevertheless, these practice directions are general and just highlight the overriding objectives and a summary on the pre-trial release which is; the release shall comply with the Order 11 of the Civil Procedure Rules, once the pre-trial is released, every party shall be bound by them.

¹² Article 49(1) (h), *Constitution of Kenya* (2010).

¹³ Section 123, *Criminal Procedure Code*, (cap.75).

¹⁴ Section 123(3), *Criminal Procedure Code*, (cap.75).

¹⁵ Section 53(1), *National Police Service Act* (No.11A of 2011).

¹⁶ Section 2(1), *Anti-corruption and Economic Crimes Act*, (No.3 of 2003).

¹⁷ Section 123(2), *Criminal Procedure Code*, (cap 75).

¹⁸ Gazette Notice No.10293, 9 December 2016.

1.2 STATEMENT OF THE PROBLEM

The right to bail and bond is a constitutional right though still a limited right. The constitution outlines that it can be limited under reasonable conditions or if there are compelling reasons together with the limitations provided under Article 24 of the Constitution of Kenya.

Corruption has gathered momentum and the Judiciary should be challenged to ‘rise to the occasion’.¹⁹ These commentaries have been made as the Judiciary has slowed the process in handling corruption cases. There is no judicial framework or set rules that have been laid down to handle corruption cases. To narrow it down, there is no judicial policy and practice directions towards pre-trial releases that is, the granting of bail and bond to the accused persons. This has left the courts with a discretion that is too wide and not clear thus leading to varying verdicts on the granting of bail and bond which in turn has slowed down the process of fighting corruption in Kenya.

1.3 OBJECTIVES OF THE STUDY

1. To outline the history of bail and bond in corruption cases in Kenya and the current applicable regional and international instruments.
2. To analyse whether the courts have been consistent in their exercise of granting bail and bond in corruption cases; the rationale the courts have been applying.
3. To highlight the challenges the Kenyan court is facing in the granting of bail and bond for corruption cases.
4. To compare the practice between Kenya, South Africa, Uganda and New Zealand in the granting of bail and bond for corruption cases.
5. To keenly study Kenyan legislation and analyse whether it amply provides for bail and bond for corruption cases in Kenya.

1.4 HYPOTHESIS

Kenyan legislation including the Bail and Bond Policy Guidelines have clearly instructed the courts and set a direction towards the granting of bail and bond in corruption cases. The challenges that the Kenyan courts are facing concerning the granting of bail and bond for corruption cases have been resolved by the current legislation governing bail and bond.

¹⁹ The Judiciary to deal with corruption cases according to the law, 20 August 2018, <
<https://www.judiciary.go.ke/7582-2/>> on 10 February 2019.

1.5 RESEARCH QUESTIONS

- i. Firstly, what is the current structure in handling bail for corruption cases in Kenya and is there any form of consistency in the application of the structure?
- ii. Are there any challenges that the Kenyan court is facing concerning the granting of bail and bond for corruption cases?
- iii. Is Kenyan legislation as well as the Bail and Bond Policy Guidelines sufficient to guide the courts on the granting of bail and bond for corruption cases?

1.6 JUSTIFICATION OF THE STUDY.

The Anti-corruption and Economic Crimes division of the high court were given practice directions as soon as the division was established. The practice directions just emphasised the overriding objective that the court is meant to achieve which is general to all divisions; civil and criminal divisions. This study will be significant as it will outline the benefits of having a clear judicial policy in granting of bail and bond in corruption cases. It will indicate the urgency of having a policy that will direct the courts as corruption is a persistent issue in Kenya. The comparative study can provide a sense of direction for Kenya to take which will hasten the trial process.

1.7 LIMITATIONS OF THE STUDY

This dissertation will face a time restraint as the research period is 9 months. The media reports such as newspaper reports providing some inaccurate information. Due to the high number of corruption cases in the country, there will be an inability to cover all cases.

1.8 CHAPTER BREAKDOWN

1.8.1 Chapter 1- Introduction

This chapter introduces the study, it provides a background of the problem, as well a brief statement of the research problem and a justification of the study.

The same chapter will also entail the objectives of the study and research questions.

1.8.2 Chapter 2- Theoretical framework and research methodology

This chapter will entail the theoretical framework which gives a logical explanation behind the study. The theoretical framework will expound on the importance of judges being guided by law using different theories.

This same chapter will contain the research methodology that will have been used.

1.8.3 Chapter 3- History of granting bail and bond in Kenya; the legal framework applied in Kenya.

This chapter will provide an analysis of how bail and bond are granted in Kenya generally and the procedure used in corruption cases. This chapter will also evaluate the judicial trends that have set concerning the setting of bail and bond. The major legal framework that governs the process of granting bail and bond both nationally, regionally and internationally.

1.8.4 Chapter 4 – The challenges the Kenyan Courts are experiencing in granting bail and bond.

This chapter will expound on the problem which is the fact there lacks a clear set policy which guides the courts on setting bail and bond for corruption cases. There is a gap which needs to be filled and this way there will be consistency in the courts. This will tackle the main objective and research question of whether the current legislation is sufficient enough in guiding the courts.

1.8.5 Chapter 5- Comparative Study

This chapter will expound on the position of other jurisdictions in granting bail and bond for corruption cases.

1.8.6 Chapter 6- Conclusion and Recommendations

This will be a summary of the findings throughout the whole study and recommendations.

1.9 TIMELINE

This study will take 9 months to be completed.

CHAPTER 2

2.1 THEORETICAL FRAMEWORK.

2.1.1 Natural Rights Theory.

The natural rights theory propounded by John Locke suggests that everyone is born with equal rights and these rights cannot be taken away by anyone. No one ought to harm another in his life, health and liberty.²⁰

This theory further proposes that the government ought to protect the rights of its' citizens as government exists through the consent of the people. Natural rights theory suggests that individuals have rights and privileges which they ought to enjoy and have been given freely.²¹ Kenya recognizes the natural rights theory through the rights enshrined in the Constitution. These rights are given under the Bill of Rights, Chapter four of the Constitution. Every Kenyan citizen has the right to enjoy these rights and freedoms unless in the instance where it has been limited. Article 24 of the Constitution of Kenya, however, provides limitations to some these rights.

The right to be released on bail and bond, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released²² is among the rights an arrested citizen of Kenya has to freely enjoy. The natural rights theory allows one to freely enjoy this right within its' caps.

2.1.2 Legal Formalism.

The proponents of the legal formalism theory believed that judges should be bound by rules when making their decisions. According to this theory, legal rules are the Alpha and Omega, beginning and the end of a judicial decision.²³ Legal formalism suggests that judges should exclude any form of intuition in decision-making. According to legal formalists, judges should apply the governing law to cases in a logical way. Moreover, for the formalists, the judicial system is a "giant syllogism machine," and the judge acts like a "highly skilled mechanic."²⁴

²⁰ Hurtubise, M, "Philosophy of Natural Rights According to John Locke," Published M.A Thesis, Loyala University, Chicago, 1952, 30.

²¹ Tuckness A, " Locke's Political Philosophy," 2018, -<<https://plato.stanford.edu/entries/locke-political/>> on 6 September 2019.

²² Article 49, *Constitution of Kenya* (2010).

²³ Vitalius T, Legal Realism and Judicial Making, Mykolas Romeris University, 2012, 1362 -<www.mruni.eu/upload/iblock/b15/008_tumonis.pdf> on 11 February 2019.

²⁴ Guthrie C, Rachlinski, J, Wistrich A," Blinking on the Bench: How Judges Decide Cases," *Cornell Law Review*, 2007, 93.

This means that out of the laws provided the judge needs to link two premises to come up with a decision. This theory further proposes that judging is a rule-bound activity. Non-legal rules should have little or no bearing in the outcome of cases.²⁵ The idea behind this theory is that an outcome of a case should be able to indicate whether the judgement is correct or incorrect and not whether the judgement is sound or unsound.²⁶ This theory advocates for the application of legal rules provided in the deciding of cases. With this, most cases will have a similar outcome. It aims at narrowing the judicial discretion left at the hands of the court.

Corruption being a sensitive matter and grave crime needs to be handled at the same lens. This means that there should be a standard set in granting of bail and bond for corruption cases and Kenya is lacking clear law governing this. Legal formalism proves that Kenya needs a form of legislation that binds the courts in making decisions on bail and bound in corruption cases.

2.2 RESEARCH DESIGN AND METHODOLOGY.

This study will adopt the desk research and correlational research designs.

Firstly, desk research involves the collection of both primary and secondary data. The primary sources of data will involve the study of the Constitution of Kenya 2010, Criminal Procedure Code as well as the Guidelines of Bail and Bond 2015. It will further delve into the study of regional and international legislation Kenya has ratified concerning corruption. These include the United Nations Convention against Corruption and other forms of legislation governing the granting of bail and bond in Kenya. The secondary sources of data will involve the study of cases. These cases will be obtained from the www.kenyalaw.org website where they are reported. The study of these cases will shed light on the trends the Judiciary has set overtime in the granting of bail and bond in corruption cases. A keen study of books, articles, online journals from credited sites such as Jstor, that expound further on the issue of granting of bail and bond in corruption cases in Kenya and other jurisdictions will be done. Kenya Gazettes focusing on the question at hand will be studied. Newspaper commentaries made on the issue at hand will be used.

The correlational research design will entail a comparative study. The comparative study will be between different jurisdictions. There will be a keen study on South Africa as Kenya has

²⁵ Vitalius T, Legal Legal Realism and Judicial Making, Mykolas Romeris University, 2012, 1363.

²⁶ Posner R, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, Case Western Reserve University, 1986, 181- <
<https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2546&context=caselrev>> on 7 September 2019.

borrowed a lot of laws from South Africa. There will be a comparison between the two countries on how they handle the granting of bail and bond in corruption cases. Secondly, there will be a study on Uganda as a neighbouring country that shares a lot in common with Kenya. Lastly, there will be a study of New Zealand, a part of the common law system.

Kenya as a common law state and a part of the commonwealth has a lot to borrow from New Zealand. The comparative study will also show how the different jurisdictions have applied different international legislation that Kenya has ratified.

Reported focused interviews done to judicial officers such as the Chief Justice of Kenya will be studied as this will provide a detailed understanding of the current the position as well as future steps the Judiciary wants to take on granting bail and bond in corruption cases. Accurate statistics studies on corruption will be collected from the National Ethics and Corruption Survey and the World Fact Book.

2.3 LITERATURE REVIEW.

Corruption is the result of the dominance of power together with discretion in the absence of accountability.²⁷ The explanation to this is that due to the control that the executive has had together with the wide discretion left to the courts and lack of accountability, the Kenyan environment is conducive to corruption.²⁸ Where there is corruption, injustice is likely to be perpetrated because it is believed that those with an unethical orientation get privileged access to resources and services to which those who are not privileged are excluded. This aggravates social injustice which leads to class disharmony.

It has been noted that it has not been easy for the Judiciary in making decisions. In a typical legal system, judges have been expected to attain justice in a case then act as per the law.²⁸ This means that they should follow set rules to reach a decision. The rules however rigid are to be followed.

In most jurisdictions, the constitutional and statutory provisions relating to bail are broadly drawn leaving the amount to be set at the wide discretion of the trial judge.³⁰ A commentary was made by the President, Uhuru Kenyatta, "*Kenyans' spirits are dampened when we witness suspects released on ridiculously low bail terms, interference in the legislative process, and*

²⁷ The Point, Bulletin of Institute of Economic Affairs, '*Corruption in Kenya: Call to action*, 2000, 3. ²⁸ '*Corruption In Kenya: Call to Action*, ' 3.

²⁸ Pound R, 'The Theory of Judicial Decision,' 36 *Harvard Law Review* 8, 1923, 1. ³⁰ 'Judicial Discretion in Granting Bail,' 2.

the use of the court process to delay justice.”²⁹ The right to bail is a constitutional provision which makes it mandatory however there are exceptions to it when it is a capital offence or where the proof of guilt is evident.³⁰ This is what the current Kenyan constitution terms as ‘compellable reason’ for the accused persons not to be released.

Following the above statements made by different writers, there is indeed a gap in the courts even in other jurisdictions concerning curbing the issue in question, granting bail and bond in corruption cases. The gap has been caused by the lack of a clear judicial direction to guide the courts in issuing bail and bond for corruption cases.

²⁹ K Everlyne, ‘Eyes on Judiciary as corruption cases spark fierce debate,’ Standard digital, 5 January 2019, <<https://www.standardmedia.co.ke/article/2001308406/eyes-turn-to-courts-in-corruption-cases>> on 12 February 2018.

³⁰ ‘Judicial Discretion in Granting Bail,’ 2.

CHAPTER 3

This chapter aims to articulate the history of bail in the world and Kenya as well as the legislative framework that governs bail and bond in Kenya.

3.1 HISTORY OF BAIL AND PRETRIAL RELEASE.

The earliest history of bail and pre-trial release is traced to the Anglo-Saxon roots which was the bail system in the medieval England period. This process was put in place to curb bloody feuds that were used for the retribution of criminals. The bloody form of avenge often led to bloody wars. This is the reason as to why the bail system was put in place which involved capturing the offender and making them pay for their offence before hearing. The form of payments was referred to as ‘bots’.³¹ The Anglo-Saxons believed that making the offender pay this ‘bots’, the offender will not run away without at least ‘paying’ for their offence. Furthermore, the payment of bail had to be accompanied by a surety, who will ensure the appearance of the offender in court. The sheriffs advised the surety to be a family member or a neighbour who would stand in when the offender absconds court.³²

There are a few landmark cases that formed a precedent for bail.

i) *Stack v Boyle*³³

This case involved twelve accused persons who were charged with violating the Smith Act. The Smith Act criminalized the act of advocating for the overthrowing of the government in power. The District Court set their bail amounts at \$50,000 each. They then petitioned to the Supreme Court claiming that the bail amount was excessive and was contrary to the Eighth Amendment. The accused persons went ahead and submitted their financial history which the Supreme Court indeed agreed that the amount set was too high. The bail amount was overruled by the Supreme Court claiming that it was indeed ‘excessive’. The District Court’s ruling was overruled because they had placed a blanket amount of bail on the individuals without checking the financial history of each accused person. The Supreme Court further explained the need for bail and stated that it was a period in which the accused

³¹ Schnacke T, ‘The History of Bail and Pretrial Release’, *Pretrial Justice Institute*, 2010, 1 <https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf> on 27 September 2019.

³² Schnacke T, ‘The History of Bail and Pretrial Release’, *Pretrial Justice Institute*, 2010, 1 <https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf> on 27 September 2019.

³³ (1951) The Supreme Court of the United States.

can get a defense. This same period prevents the accused from getting any form of punishment before a judgement is passed.

This was the first case to shed light on the importance and means of granting bail to any accused persons.

ii) *Carlson v Landon*³⁴

The case involved four petitioners who were arrested under warrants for being aliens and being members of the Communist Party of the United States. They were to be held in custody, pending the determination of being deported. They then made an application for habeas corpus claiming that their detention without bond violated the Due Process Clause of the Fifth Amendment and the Eighth Amendment of the Constitution of the United States. The accused persons were denied bail eventually even after appealing to the Court of Appeal. The court outlined several reasons for the denial of bail including it was a matter of public interest. Nonetheless, this case highlighted that the right to bail is a fundamental right but not absolute right. This means that it can be limited but with compelling reasons as per given by the Attorney-General in this case.

Thereafter there was a federal Bail Reform Act that was formed in the 1960s that proposed that persons charged with capital offences cannot be released on bail. ³⁵However, in the 1970s, there was an aim to further reform the bail system. This was done through the set-up of a Pretrial Release Agency in Harris County, Texas which was to assist the courts in the pretrial release process. A mechanism on getting the background information of the accused was put in place before they are granted bail. ³⁶The Bail Reform Act was further perfected in 1984 and gave more suitable conditions on the granting of bail.

These are some of the few reforms which were steadily developed over time to form an administration for the bail system that different states have adopted. For Kenya, it adopted the right to bail and bond in the Bill of Rights.

³⁴ (1952) The Supreme Court of the United States.

³⁵ Schnacke T, 'The History of Bail and Pretrial Release', *Pretrial Justice Institute*, 2010, 1 <https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf> on 27 September 2019.

³⁶ Schnacke T, 'The History of Bail and Pretrial Release', *Pretrial Justice Institute*, 2010, 1 <https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf> on 27 September 2019.

3.2 HISTORY OF BAIL IN KENYA.

The post-independence constitution provided for the right to bail under Section 72 (5). If a person was arrested or detained for reasonably being in suspicion of committing a criminal offense and is not tried within a reasonable time unless he is charged with an offense punishable by death, be released unconditionally. Secondly, upon reasonable conditions, including in particular such conditions are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.³⁷ This provision did not make a distinction between bailable and non-bailable offences. It only highlighted if the offence was punishable by death.

This provision on the right to bail was further improved on in the Criminal Procedure Code, under Section 123. However, there was friction between the particular Section and Section 72 (5) of the then Constitution which was contested in court in the case of *Margaret Magiri Ngui v Republic*.³⁸ The accused person had been denied bail after being charged with murder. The court stated that Section 123 (3) of the Criminal Procedure Code was inconsistent with Section 72 (5) thus making it unconstitutional and the accused was denied bail. Nonetheless, the air was cleared with the passing of the new constitution in 2010 through Article 49 (1) (h).

3.3 LEGAL FRAMEWORK ON BAIL IN KENYA.

3.3.1 The Constitution of Kenya, 2010

The Constitution is the supreme law of the land and thus it binds all citizens of Kenya. The explicit right to be released on bail and bond has been established under Article 49 (1) (h) which states that an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

This right is further supported by the fact that every person has the right to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.³⁹

The High Court has jurisdiction, following Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.⁴⁰

³⁷ Section 72(5), *Repealed Constitution of Kenya* (1969).

³⁸ (1985) eKLR.

³⁹ Article 20 (2), *Constitution of Kenya* (2010).

⁴⁰ Article 23 (1), *Constitution of Kenya* (2010).

3.3.2 Criminal Procedure Code, Chapter 75, Laws of Kenya

Section 123 provides for persons accused of certain offenses and are arrested without a warrant by an officer-in-charge of a police station or appears before the court and is prepared to give bail, that person may be admitted to bail. The offenses are those that are not murder, treason, robbery with violence, attempted robbery with violence and any drug-related offense.⁴¹ It further provides that the amount of bail shall be fixed with due regard to circumstances and should not be excessive.⁴²

3.3.3. National Police Service Act, No.11A of 2011, Laws of Kenya

A police officer investigating an alleged offense (not being an offense against discipline) may require any person to execute a bond in such sum and such form as may be required, subject to the condition that the person shall duly attend court if and when required to do so.⁴³ The power conferred in the stated provision should be exercised following the Criminal Procedure Code.⁴⁴

3.3.4 The Penal Code, Chapter 63, Laws of Kenya

When an offender is apprehended on a warrant then brought before the court, the court may either remand the offender until their case is heard or admit to the offender bail with sufficient surety conditioned for their appearing for hearing or sentence.⁴⁵

3.3.5 International Crimes Act, No.16 of 2008, Laws of Kenya.

When an application for bail is made, the Minister shall notify the International Criminal Court (ICC) and thereafter, recommendations are made.⁴⁶ The High Court shall consider any recommendations made by the ICC including measures to prevent the escape of the person.⁴⁷ The ICC requests for periodic reports on the person's bail status if the bail is provided.⁴⁸

3.3.6 Bail and Bond Policy Guidelines 2015.

These guidelines define bail and bond, outline the objectives of bail and bond. It highlights the different legislation that provides for bail and bond. The offenders warranted to bail and bond.

It is a general outline on bail and bond. However, it is not specific to particular offences.

⁴¹ Section 123 (1), *Criminal Procedure Code* (cap. 75).

⁴² Section 123 (2), *Criminal Procedure Code* (Cap. 75).

⁴³ Section 53(1), *National Police Service Act* (No.11A of 2011).

⁴⁴ Section 53(3), *National Police Service Act* (No.11A of 2011).

⁴⁵ Section 34 (2), *Penal Code* (Cap.63).

⁴⁶ Section 36 (1), *International Crimes Act* (No 16 of 2008).

⁴⁷ Section 36 (2), *International Crimes Act* (No 16 of 2008).

⁴⁸ Section 36 (3), *International Crimes Act* (No 16 of 2008).

3.4 INTERNATIONAL LEGISLATION PROVIDING FOR BAIL.

The Constitution of Kenya provides for international law⁴⁹ and that any treaty or convention ratified by Kenya shall form part of the laws of Kenya.⁵⁰ Majority of the international instruments advocate for the right to liberty which can be linked with the right to bail. That is, an arrested person still has the right to be free through the payment of bail and bond and the conditions given by the court.

3.4.1 Universal Declaration of Human Rights (UDHR)

This is an important instrument when comes to matters of human rights. This is because it acknowledges that the foundation of freedom, justice and peace in the world is the inherent dignity and inalienable rights of members of the human family.⁵¹ The Declaration does not expressly provide for the right to bail but it recognizes that everyone charged with a penal offence has the right to be presumed innocent until proved guilty. It further articulates that everyone has the right to life, liberty and security of person.⁵²

3.4.2 International Convention on Civil and Political Rights (ICCPR)

The ICCPR attempts to highlight the rights of an arrested person above provided the right to liberty and security of person.⁵³ It further states than an arrested person ought to be informed, at the time of the arrest, reasons for the arrest and be informed of the charges against him.⁵⁴

An arrested person under the ICCPR should be taken before a court and shall be entitled to trial within a reasonable time. They should not necessarily be in custody as they await trial but may be released but subject to a guarantee that they will appear for trial.⁵⁵ This particular provision indirectly provides room for an arrested person to be granted the right to bail.

3.4.3 African Charter on Human People's Rights (ACHPR).

This Charter articulates that every individual shall have the right to have their cause heard⁵⁶ which has been broken down to include the right to an appeal,⁵⁷ the right to be presumed innocent until proven guilty by a competent court or tribunal,⁵⁸ the right to defence⁶¹ as well as

⁴⁹ Article 2(5), *Constitution of Kenya* (2010).

⁵⁰ Article 2(6), *Constitution of Kenya* (2010).

⁵¹ Preamble, *Universal Declaration of Human Rights*, 10 December 1948.

⁵² Article 3, *Universal Declaration of Human Rights*, 10 December 1948.

⁵³ Article 9 (1), *ICCPR*, 16 December 1966.

⁵⁴ Article 9 (2), *ICCPR*.

⁵⁵ Article 9 (3), *ICCPR*.

⁵⁶ Article 7 (1), *ACHPR*, 27 June 1981.

⁵⁷ Article 7 (1) (a), *ACHPR*.

⁵⁸ Article 7 (1) (b), *ACHPR*.

⁶¹ Article 7 (1) (c), *ACHPR*.

the right to be tried within a reasonable time by an impartial court.⁵⁹ Similar to the ICCPR, it indirectly provides that an arrested person can have their case heard which can include the application for bail and bond as they await trial.

3.5 INSTITUTIONAL FRAMEWORK ON FIGHTING CORRUPTION IN KENYA.

In the fight against corruption in Kenya, some bodies that have been set up to combat this giant called corruption. The aim of outlining the role of these institutions is for these institutions in conjunction with the Judiciary to form an explicit judicial policy to be used in the granting of bail and bond in corruption cases.

3.5.1 The Ethics and Anti-corruption Commission (EACC)

The Ethics and Anti-corruption commission is a constitutional commission set up under Article 79 together with chapter fifteen.⁶⁰ The establishment of this commission is specifically set up under Section 3 of the Ethics and Anti-corruption Commission Act.⁶¹ The EACC is mandated to:

- i) Promote high standards and good practices in integrity and anti-corruption
- ii) Establish a code of ethics for State Officers;
- iii) In a bid to promote high standards and practices in integrity and corruption, work with other State and public offices
- iv) Receive complaints on the breach of the code of ethics by public officers;
- v) Investigate any acts of corruption or violation of codes of ethics and propose to the office of the Director of Public Prosecutions appropriate action to be taken.
- vi) Monitor the conduct of public bodies to detect any form of corrupt practices.
- vii) Conduct proceedings in court to recover any proceeds of corruption.⁶²

Having outlined both the national and international instruments that have attempted to provide for the right to bail, there is an indication that they provide for the right to bail and bond generally but are not specific to bail and bond for corruption cases. Thus the need for an explicit judicial policy that will direct the courts on matters relating to bail and bond for corruption cases.

⁵⁹ Article 7 (1) (d), *ACHPR*.

⁶⁰ *Constitution of Kenya* (2010).

⁶¹ (No.22 of 2011)

⁶² Ethics and anti-corruption commission- < <https://www.eacc.go.ke/faqs/#>> on 30 September 2019.

CHAPTER 4

After looking into the legal framework governing bail and bond, it is clear there is no explicit framework that governs the law for bail and bond in corruption cases. This chapter aims to explore the different cases decided on in the courts and try and draw a structure that has been used. Also, highlight the challenges the courts are facing.

4.1 THE TREND IN THE COURTS IN GRANTING BAIL AND BOND FOR CORRUPTION CASES.

To begin with, most of the application for bail and bond for corruption cases begin at the Chief Magistrate's Court. If the accused is not satisfied by the bail and bond terms, one can apply for a revision at the High Court. The Criminal Procedure Code grants the High Court jurisdiction to review any decision made in the subordinate courts. The High Court may examine a record of a subordinate court to satisfy itself as to the legality, correctness of any finding or order made by a subordinate court.⁶³ This thus allows the High Court to revise bail and bond terms given in a subordinate court.

Ideally, bail and bond decision-making should be guided by other constitutional provisions i.e., the right to a fair trial which includes the right to be presumed innocent until the contrary is proved⁶⁴ and, the accused's right to liberty.⁶⁵

The courts have also been placed with a certain criterion which they should regard before settling to grant bail and bond. These reasons are subject to Article 49 (1) (h) of the Constitution. They include:-

- i) The nature or seriousness of the offence;
- ii) The character, antecedents, associations and community ties of the accused; iii) The defendant's record in respect of the fulfilment of obligations under previous grants of bail and;
- iv) The strength of the evidence of his having committed the offence.⁶⁹

⁶³ Section 362, *Criminal Procedure Code* (cap.75).

⁶⁴ Article 50 (2) (a), *Constitution of Kenya* (2010).

⁶⁵ National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, 2015, 8. ⁶⁹ Section 123A, *Criminal Procedure Code* (cap.75).

Over time, other reasons have been established by the judicial precedent set by the courts. In, *R v Danson Mgunya and Another*,⁶⁶ the courts established other reasons which have been applied over time in considering bail and bond applications. They include:-

- i) The weight of the punishment in the event of conviction
- ii) Any previous criminal record of the accused
- iii) The possibility that the accused may not surrender himself for trial;
- iv) The probability that the accused may interfere with witnesses or any evidence that may incriminate him;
- v) The possibility of further charges being brought against the accused;
- vi) The probability of guilty;
- vii) Detention for the protection of the accused;

However, these criteria have been termed as not and thus other means may be used to determine the grant or refusal of bail to an accused person.⁶⁷

It has been noted however, the process of granting of bail and bond for corruption cases in Kenya has varied based on the different circumstances of a particular case. Definitely, there has been a reliance on legislation which include the Constitution of Kenya 2010, the Criminal Procedure Code (CPC) as well as the Anti-Corruption and Economic Crimes Act (ACECA). Past judicial precedent has also influenced a lot of decisions on the granting of bail and bond. However, in a study of the cases that have been decided by the Kenyan courts, a lot of revision of cases on the granting of bail and bond has been done. Appeals have been made and the courts have been forced to revise bail terms given by lower courts.

In *Rodgers Nzioka & 10 others v R*,⁷² the court is faced with an issue of whether it should admit bail to the applicants who were facing various charges under the Anti-Corruption and Economic Crimes Act. This is because, at the Chief Magistrate Court's level, the accused persons had been denied bail. The Prosecution highlighted some reasons under Section 123 of the Criminal Procedure Code as to why the accused should not be granted bail including the likelihood of the accused interfering with witnesses. Justice Mumbi N dismissed the reasons and directed each of the accused persons to execute a bond of Kshs.5, 000,000 plus a surety of Kshs.2, 000,000 and to deposit cash bail of Kshs.1, 000,000 in court.

⁶⁶ (2010) eKLR.

⁶⁷ *R v Laban Omwaka* (2011) eKLR.

⁷² (2018) eKLR.

*Prof. Muhammad Abdalla Swazuri & 23 others v R*⁶⁸, is another case that highlights the revision of an application of bond. The accused had various counts under the Anti-Corruption and Economic Crimes Act⁶⁹ including corruption, abuse of office and unlawful acquisition of property. The accused were altogether charged with conspiracy to commit fraud that led to irregular payment of Ksh109, 763,363. The Chief Magistrate's Court had categorised the accused persons and given them bail terms based on the counts and the amount of the subject matter. A subject matter of Kshs.50,000,000 and above required one to pay a bail of Kshs.12, 000, 000 or in the alternative a bond of Kshs.30,000,000 and a surety of the same amount. The breakdown of amounts was made up to a subject matter that consisted of Kshs.5,000,000 and below which the accused were required to deposit a cash bail of Kshs.1,500,000 or bond of Kshs.5,000,000. The accused then proceeded to make an application to the High Court for the revision of the bail terms. Among the issues in the High Court was the question of whether the bail and bond terms were unreasonable and contrary to article 49 of the Constitution. The plea by the applicants was a downward revision of the bail terms which was eventually granted. Each accused person had their respective bail and bond amount was quoted. The highest cash bail amount being Kshs.7, 000,000 and Kshs.15, 000,000 for the bond. This indicates that the criteria applied even between the courts varied yet the case remained the same.

In *Reuben Marumben Lemunyete v R*⁷⁵, the public servant was charged with an offence of conspiracy to commit and act of corruption contrary to section 47A (3) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act⁷⁰. The particulars of the offence in the said count were leading to an alleged unlawful payment of Kshs.84, 695,996. The applicant was aggrieved by the bail terms of Kshs.10, 000,000 and claimed that the trial court had ignored the compelling reason relating to his terminal illness. He further argued that the amount was oppressive and excessive.

The court had to weigh the circumstances of the applicant concerning his terminal illness to revise the bail terms. After consideration, the bail terms were to range from Kshs.2, 000,000 to Kshs.200, 000 and the bond terms, with sureties of similar amounts to range from Kshs.500, 000 up to Kshs.5, 000,000.

⁶⁸ (2019) eKLR.

⁶⁹ (No.3 of 2003).

⁷⁵ (2019) eKLR.

⁷⁰ (No.3 of 2003)

In *Vincent Makonjio & 2 others v Republic*,⁷¹ the applicants were charged with counts of abuse of office as well as conspiracy to fraud contrary to the Anti-Corruption and Economic Crimes Act⁷² as well as the Penal Code⁷⁹. At the trial court level, the cash bail went as high as Kshs.10, 000, 000 and the bond term to Kshs.30, 000, 000 with a surety. The applicants aggrieved by the bail terms sought a revision of the bail and bond terms at the High Court level. The terms were revised downwards with the applicants requested to pay Kshs.15, 000, 000 as the highest bond term and Kshs.5, 000, 000 as the highest cash bail term.

The High Court was also faced with a similar grievance by 47 applicants in the case of *Ferdinand Odoyo Matano & 8 others v R*⁷³. The applicants were seeking a downward revision of bail terms that were provided at the Magistrate's Court level. The amount sought for review was the Kshs.2, 000, 000 which the court placed as surety and Kshs.1, 000, 000 which was cash bail. The applicants went to the extent of presenting their payslips in a bid to convince the courts of the unreasonability of the bail and bond that were placed at the trial court. The High Court considered the financial capability of the applicants and the bail and bond terms were lowered to what the court considered to be reasonable.

4.2 THE CHALLENGES KENYAN COURTS ARE FACING.

With regards to the cases highlighted above, this is an indication of the varied decisions in the court system and more so, the persistent revision issue of bail and bond that has been placed on the High Court. Ideally, through the different legislation that has been put in place, granting of bail and bond should not only be placed on the court system but also the police force should be involved. This is the first challenge that is posed to the court system. There has been a trend that police officers tend to only be involved in the bail and bond decision-making when it comes to minor offences such as being drunk and disorderly, loitering that causes disturbance among others.⁷⁴ Additionally, Section 123 of the Criminal Procedure Code enlists murder, treason, robbery with violence, attempted robbery with violence and any drug-related offense, as those that the police cannot grant bail, leaving no lucid policy concerning corruption offenses. This has forced the courts to take up the burden on decision-making for bail and bond for corruption cases. Placing the burden to the courts in decision making means that the courts have to perform

⁷¹ (2019) eKLR.

⁷² (No.3 of 2003). ⁷⁹
(Cap 63)

⁷³ (2018) eKLR.

⁷⁴ National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, 2015, 8.

a set of judicial and administrative functions which include determining whether or not an accused person should be granted bail; determining the amount of bail; weighing the suitable conditions to grant bail; approving sureties as well as reviewing the bail and bond conditions.⁷⁵ These judicial functions and lack of set direction for the courts have led to a lack of uniformity on how the courts make bail and bond application decisions.⁸³

The cases above have highlighted the varied decisions the courts make in granting bail and bond terms and the constant revision issue that has been placed on the High Court. The major reason that has led to a lot of revision matters is that the accused considers the bail and bond amount unreasonable and unaffordable. Discrepancies in the exercise of judicial discretion have had an effect on the decisions made regarding bail and bond which as observed, have shown some bail terms are unreasonably high and others unreasonably low.

Within the decision-making process, the courts are still faced with a dilemma. Firstly, the courts are expected not to lose sight of the prevailing economic situation of the country and the practicality of some of the bail terms. There is also the fact that the society ought to be protected from the corruption evil and the public has placed their confidence in the court that lenient bail terms will not be given to those charged with corruption. This was a position the court admitted in *Vincent Makonjio and 2 others v Republic*.⁷⁶ In *Reuben Marumben Lemunyete v R*, the court states that “*The legislature has failed to provide a penalty that is commensurate with the devastation it causes. The poverty and marginalization of many citizens and communities that some of the applicants before this court cite to justify lower bail terms are directly attributable to the unbridled corruption in our society.*”⁷⁷ This is an indication of another dilemma the court is left with as they determine what bail and bond terms to give the accused.

In *Ng’ang’a v Republic*,⁷⁸ the court admitted that the admission of bail is indeed a constitutional right if the trial is not going to happen soon alluding to the conclusion that was made that the primary purpose for bail is to secure the accused person’s attendance at court. However, the court is still to bear in mind an accused is innocent until proven guilty and therefore the accused should be granted bail if the trial will not be happening soon. This poses a challenge as the

⁷⁵ National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, 2015, 13. ⁸³ National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, 2015, 15.

⁷⁶ (2019) eKLR.

⁷⁷ (2019) eKLR.

⁷⁸ (1965) eKLR.

court is left to use the criteria given, as stated above and weigh if it is fair for the accused to be granted bail or not.

Furthermore, there was the acknowledgement that there was a gap in the legislative framework, policy and institutional framework in combating corruption.⁷⁹ Thus the Judiciary was tasked to propose reforms to ensure a coordinated and effective administration in the justice system.⁸⁰ This led to the birth of the Bail and Bond Policy Guidelines which have not been sufficient enough to direct the courts in granting of bail and bond for corruption cases. The Guidelines outline general provisions that are to be applied across all offences. The Guidelines analyse past situations and some of the challenges that have been highlighted above.

CHAPTER 5

⁷⁹ Republic of Kenya, *Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya*, October 2015, 16.

⁸⁰ Republic of Kenya, *Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya*, October 2015, 19.

This chapter aims to articulate the position of other jurisdictions that is Uganda and South Africa in the granting of bail and bond for corruption cases. Also, a way in which Kenya can use technology in bail and bond.

5.1 BAIL AND BOND IN UGANDA.

At the international and regional level, Uganda has ratified many treaties. Some of these treaties include the ICCPR, the ACHPR.⁸¹ These treaties enshrine the right to liberty and freedom from arbitrary arrest and detention. At the national level, there is the Constitution of Uganda which contains the bill of rights under chapter four amongst other provisions. Other relevant legislation include the Penal Code, Trial on Indictments Act, the Criminal Procedure Code, the Prisons Act, and the Anti-Corruption Act among others.⁸²

The right to bail and bond is provided for under Article 23 (6) (a) which articulates that where a person arrested in respect of a criminal offence is entitled to apply to the court to be released on bail which the court may grant on conditions which it considers reasonable.⁹¹ If the person has been remanded for one hundred and twenty days, they shall be released on bail on conditions which the court considers reasonable.⁸³ Additionally, in the case where an offence is only triable at the High Court level, the person shall be released on bail on conditions which are considered reasonable, if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.⁸⁴

This right is further provided for under Section 14 of the Trial on Indictments Act⁸⁵ where the High Court may at any stage in the proceedings release the accused person on bail on an amount the court finds reasonable depending on the circumstances of the case. Following up, if the court believes that for any reason the amount of bail should be increased, the court can issue a warrant of arrest for the person released on bail to execute the new bail or bond amount.⁸⁶ If

⁸¹ Segawa R, 'Pre-Trial Detention in Uganda,' *African Policing Civilian Oversight Forum*, 2016, 3, https://www.academia.edu/31294592/Pre-Trial_Detention_in_Uganda on 16 November 2019.

⁸² Segawa R, 'Pre-Trial Detention in Uganda,'³. ⁹¹ *Constitution of Uganda* (1995).

⁸³ Article 23 (6) (b), *Constitution of Uganda* (1995).

⁸⁴ Article 23(6) (c), *Constitution of Uganda*, (1995).

⁸⁵ Chapter 23, (Uganda)

⁸⁶ Section 14 (2) (1), Chapter 23, *Trial on Indictments Act* (Uganda).

the person fails to execute the increased amount, the court can commit the person to prison.⁸⁷ An accused person has the right to be released on bail or bond in Uganda.

The Magistrates Courts Act⁸⁸ further governs the procedure to be used in the granting of bail and bond for corruption cases. This same Act enlists the offences in which the Magistrate can grant bail and bond to the accused.⁸⁹ The High Court has also been granted powers concerning bail. The High Court can grant bail to an accused denied bail at the Magistrates Court. It can also engage in any form of revision of the bail and bond terms. A criterion has also been set up which the court can consider while making decisions on bail.⁹⁰ The courts moreover acknowledge that the right to bail stems from the presumption of innocence which is a constitutional right under Article 28 (3) (c) of the Ugandan constitution. This position was upheld in *Lahan Yahaya v Uganda*.⁹¹

Also, it should be noted that Uganda has gone to the extent of specifyingailable offenses and non-ailable offenses. Section 15 of the Trial on Indictments Act outlines the offences that the court may refuse to grant bail if the offender fails to prove that they deserve to be released on bond. These offences are; abuse of office contrary to section 87 of the Penal Code Act; embezzlement contrary to section 268 of the Penal Code Act; causing financial loss, contrary to section 269 of the Penal Code Act; corruption, contrary to section 2 of the Prevention of Corruption Act and bribery of a member of a public body, contrary to section 5 of the Prevention of Corruption Act;(now referred to as Anti-Corruption Act).

Uganda has criminalized corruption under its' Penal Code and Anti-Corruption Act. Any person employed in a public body or company in which the Ugandan Government has shares and does any act prejudicial to the interests of his or her employer in abuse of the authority commits an offence.⁹² Any form of embezzlement done by an employee of a public body, the Government, a corporation; member of a religious organization, is an offence.⁹³ Section 2 of the Anti-Corruption Act, defines corruption and its' attributes which are not limited to abuse

⁸⁷ Section 14 (2) (2), Chapter 23, *Trial on Indictments Act* (Uganda).

⁸⁸ Chapter 23, (Uganda).

⁸⁹ Section 75 (2), Chapter 23, *Magistrates Court Act* (Uganda).

⁹⁰ Section 77, Chapter 23, *Magistrates Court Act* (Uganda).

⁹¹ (2005) High Court of Uganda (unreported).

⁹² Section 87, Chapter 120, *Penal Code* (Uganda).

⁹³ Section 268, Chapter 120, *Penal Code* (Uganda).

of office, embezzlement of funds, fraudulent acquisition, use or concealment of property but also neglect of duty. Any form of direct or indirect bribery also amounts to an offence.⁹⁴

The focus of this paper being on corruption cases, it is explicit the direction in which Uganda has chosen to take. Their law clearly states that granting of bail and bond for corruption cases places the burden of proof to the accused to prove to the court why they ought to be released on bail or bond. Meaning that it is not guaranteed to those who commit the offence of corruption. The law has also further included all other forms of corruption including bribery, abuse of office, any form of embezzlement, which indicates that the statutory provision has guided the courts when they find themselves at a crossroads on whether to grant bail or not.

In comparison to Kenya, the practice in Kenya has been based on judicial precedent which has varied over time. Legislation has not directed the courts on whether those charged with corruption ought to be released on bail and bond yet there is the acknowledgment that it is a serious offence.⁹⁵ Nonetheless, there is a similarity in the criteria which the court can use in considering whether to grant bail, enlisted under Section 123 of the Criminal Procedure Code of Kenya.

5.2 BAIL AND BOND IN SOUTH AFRICA.

South Africa has ratified several treaties. At the international level, some of the treaties include, the UDHR which provides for the presumption of innocence of an accused; the ICCPR which enshrines the right to liberty and freedom from arbitrary arrest and detention. At the regional level, South Africa has ratified the ACHPR which provides for the right to be presumed innocent and not to be detained arbitrarily.⁹⁶ South Africa has also implemented the Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa which largely guide on how to handle arrested persons. At the national level, there is the Constitution of South Africa, the Criminal Procedure Act among others which protect the rights of an arrested person.

Under the Constitution of South Africa, everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to

⁹⁴ Section 5, *Anti-Corruption Act*, 2009 (Uganda).

⁹⁵ *Reuben Marumben Lemunyete v R* (2019) eKLR.

⁹⁶ Hardy K and Ruiter N, 'Study on the Use of Bail in South Africa', *African Policing Civilian Oversight Forum*, Research Paper Number 23, 2018, 6, www.apcof.org.za on 16 November 2019. ¹⁰⁶ Section 35 (1) (f), *Constitution of South Africa* (1996).

reasonable conditions.¹⁰⁶ Summarily, an arrested person has the right to bail. The interests of justice do not permit the release of the accused on when some grounds have been established.

Where there is a likelihood that the accused will endanger public safety, the accused when released on bail will evade trial or a likelihood that the accused will interfere with evidence among other reasons.⁹⁷ In *S v Dlamini*,⁹⁸ the court further reiterated that sufficient evidence should be established to permit the accused to be released from custody and if not, imprisonment should continue. Some of these grounds are likewise to this used in the Kenyan courts. Criminal Procedure Act⁹⁹ further provides that an accused person who is in custody other than for certain offences may be released on bail, before their first appearance in a lower court.¹⁰⁰ These ‘certain offences’ are enlisted under Schedule 2, Part II of the same Act, which includes, theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the amount or value involved in the offence exceeds R2 500. Both the police and the court can grant or deny bail. Similarly to the Kenyan jurisdiction, there are several factors that the court can consider while determining the granting or denial of bail.

Corruption is an offence in South Africa and is defined as a person who directly or indirectly receives or offers any form of gratification for the benefit of himself or herself to influence a certain decision¹⁰¹ which amounts to an abuse of office, breach of trust or violation of legal rules.¹⁰² Criminalization of corruption is a stand that both Kenya and South Africa have taken. Although South Africa is not explicit about bail and bond for corruption cases, it has enlisted some non-bailable offences as mentioned above. Fraud and forgery being a form of corruption,¹¹³ there is somewhat a stand that South Africa has taken which shows that they do not allow those charged with fraud and forgery involving more than a certain amount to be granted bail.

⁹⁷ Section 60 (4), *Criminal Procedure Act* (South Africa).

⁹⁸ (1999), Constitutional Court of South Africa.

⁹⁹ (South Africa).

¹⁰⁰ Section 59, *Criminal Procedure Act* (South Africa).

¹⁰¹ Section 3 (a), Chapter 2, *Prevention and Combating of Corrupt Activities Act* (South Africa).

¹⁰² Section (3) (b) (ii), Chapter 2, *Prevention and Combating of Corrupt Activities Act* (South Africa).

UNDP (2015), *Policy Against Fraud and Other Corrupt Practices*, 3.

¹¹³

A study was conducted showing the inclination of South Africa towards granting of bail and bond for corruption cases. It indicated that corruption cases are part of those cases where the accused is very unlikely to be released on bail.¹⁰³ This means that there is a particular direction that has been taken by South Africa, though not as clearly stated in the law like Uganda, but more directed than Kenya.

5.3 BAIL AND BOND IN NEW ZEALAND

New Zealand as a part of the Commonwealth and a country that has a common law system will be relevant to this study. Furthermore, it is a state that has been ranked as one of the top three least corrupt countries.¹⁰⁴ Therefore Kenya has something to borrow a leaf from. New Zealand just like Great Britain, has no written constitution but has several relevant statutes and conventions that form some sort of constitution that governs the country.¹⁰⁵ At the international level, New Zealand has ratified some treaties including The OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions.¹⁰⁶ At the state level, some of the statutes comprise of the Crimes Act, the Secret Commissions Act, but the relevant statute to focus on in this study will be the Bail Act of 2000.

To begin with, both the police and the court are empowered to grant or restrict bail to an accused. An accused, who is referred to as ‘defendant’, is bailable as of right if they are charged with an offence that is not punishable by imprisonment¹⁰⁷ or if they are charged with an offence in which the maximum punishment is less than 3 years imprisonment. However, there are exceptions to this, that is, if the person is charged with an offence concerning the assault of a child or assault on a person with whom the defendant is or has been in a family relationship.¹²⁰ Also, a defendant who has been charged with an offence that is punishable by imprisonment does not have the right to bail if the defendant had been convicted before of an offence

¹⁰³ Open Society Foundation for South Africa, *Between a Rock and a Hard Place’ Bail Decision in three South Africa Courts*, 2008, 20.

¹⁰⁴ Republic of Kenya, *Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya*, October 2015, 11.

¹⁰⁵ Greville M, ‘Access to New Zealand Law,’ January 2019
https://www.nyulawglobal.org/globalex/New_Zealand1.html on 18 November 2019.

¹⁰⁶ Upton B and Grierson S, ‘New Zealand’ in Pickworth J and Williams D (ed), *Bribery and Corruption*, 3ed, Global Legal Group, 173.

¹⁰⁷ Section 7 (1), *Bail Act 2000* (New Zealand).¹²⁰
Section 7 (2), *Bail Act 2000* (New Zealand).

punishable by death or imprisonment.¹⁰⁸ A similarity with Kenya is that the criteria set out for the grounds in which the court may take account when determining whether to grant bail. The considerations are not limited to the nature of the offence; the character and past conduct of the defendant; the strength of the evidence presented; the history of the defendant.¹⁰⁹ Section 9 of the Bail Act¹¹⁰ expounds on the offences in which bail is restricted. Treason, as defined in the Crimes Act, crimes related to espionage contrary to the Crimes, Act as well. Murder, attempted murder, manslaughter, sexual violation and conduct with a young person, robbery are also among the offences in which bail has been restricted.¹¹¹ Though there is room for the defendant to be granted bail but only by a High Court Judge or a District Court Judge.¹¹²

Under the Crimes Act,¹¹³ corruption and bribery have been termed as crimes affecting the administration of law and justice. These offences have been related majorly to a judicial officer, a law enforcement officer or official.¹¹⁴ Any person found liable including the state officers, either by giving or receiving or attempting to give or obtain is liable for imprisonment not exceeding 7 years or 14 years including depending on the veracity of the offence and the person involved in the offence which is listed in Part 6 of the Crimes Act. Bribery offences in the private sector have also been criminalized under the Secret Commissions Act.¹¹⁵ Bribery is a form of corruption, as concluded in the different jurisdictions hence one may wonder why the separation of the offences in New Zealand. In *Taito Phillip Hans Field v The Queen*,¹¹⁶ the Supreme Court opined that using the term ‘corruptly’ did not mean corruption only, it included bribery offences. It is seen in this case that Mr. Taito Phillip, a Member of Parliament, had been charged with 11 counts of corruptly accepting benefits contrary to Section 103 (1) of the Crimes Act.

Having outlined the framework that governs bail in New Zealand, it is observed that they opted to define the length at which one can be granted or denied bail through the imprisonment term that one would face. It is implied through the fact that an accused is bailable of right if the

¹⁰⁸ Section 7 (4), *Bail Act 2000* (New Zealand).

¹⁰⁹ Section 8(2), *Bail Act 2000* (New Zealand).

¹¹⁰ 2000 (New Zealand).

¹¹¹ Section 10 (2), *Bail Act 2000* (New Zealand).

¹¹² Section 10 (3), *Bail Act 2000* (New Zealand).

¹¹³ 1961 (New Zealand).

¹¹⁴ Section 99, *Crimes Act 1961* (New Zealand).

¹¹⁵ 1910 (New Zealand).

¹¹⁶ (2011), Supreme Court of New Zealand.

offence is punishable by less than 3 years imprisonment. It can, therefore, be deduced that corruption being punishable with imprisonment of not exceeding 7 or 14 years, there is a possibility that one's right to bail may be denied. This implication is made as there is a statutory provision that outlines the terms which are unlike Kenya.

5.4 CONCLUSION.

All the jurisdictions that are Kenya, Uganda, South Africa, and New Zealand have bail provisions for offenders. For Kenya, the right to bail is enshrined in the Constitution as well as the Criminal Procedure Code.

For Uganda, the right is articulated in the Constitution, Penal Code Act, and Trial on Indictments Act. Uganda has gone to the extent to specify that does corruption is a non-bailable offence unless the accused person proves the court otherwise.

In South Africa, the right to bail is also provided for in the Constitution and the Criminal Procedure Act. The law, however, is not lucid as it quotes some forms of corruption such as fraud, a forgery which only bailable to a certain extent. New Zealand does categorise bail for corruption cases in an implied manner. Nonetheless, it has a comprehensive Bail Act which outlines all the requirements and procedures for bail unlike Kenya, Uganda and South Africa who rely on their respective Constitutions and other forms of legislation to regulate bail.

CHAPTER 6

This chapter aims to conclude the findings of the study on the granting of bail and bond for corruption cases in Kenya. Additionally, provide recommendations which can be implemented to improve the current system granting bail and bond for corruption cases.

6.1 CONCLUSION

This study began by acknowledging that Kenya has criminalised corruption. Secondly, arrested persons are entitled to the right to bail and bond for arrested persons outlined under Article 49 (1) (h) of the Constitution of Kenya. This is concurrent with the right to a fair trial which is enshrined under Article 50 (2) of the Constitution. Granting or denial of bail and bond is a process that happens during the pre-trial period. The granting of bail and bond can be granted at the Chief Magistrate Court and the High Court. At the High Court, the accused can also request for the revision of the bail and bond terms given at the Chief Magistrates Court. The study further analysed the history of bail and bond in Kenya and it is clear that a lot had been borrowed from the Anglo-Saxon period, this was a part of the objective of the study. Kenya has applied both national and international legislation in the granting of bail and bond as well as judicial precedent. However, there is no clear legislative framework governing bail and bond for corruption cases. The practice in the courts has not been steady over time. It has been observed through the cases analysed in the study that the courts have not been consistent in the granting of bail and bond for corruption. A lot of revision has been sought by accused persons for the downward revision of their bail and bond terms. The Bail and Bond Policy Guidelines have not directed the courts in decision-making for bail and bond for corruption cases.

In chapter five, the comparative study with other jurisdictions been done and has indicated that Kenya can have a judicial policy that governs the courts in the granting of bail and bond for corruption cases. In Uganda, corruption is part of the offences which an accused cannot be granted bail unless they prove the court otherwise. South Africa has listed some of the forms of corruption that an accused cannot be granted bail. For New Zealand, there is a comprehensive Bail Act which applies to all offences and outlines on corruption as well.

Kenya is silent on its' position on bail and bond for corruption cases, yet this is a persistent economic offence.

6.2 RECOMMENDATIONS.

There should be the creation of a framework that governs bail and bond for corruption cases in Kenya. The legislature in conjunction with the Ethics and Anti-Corruption Commission (EACC) should come up with a clear legislative framework that governs bail and bond for corruption cases and largely how corruption cases should be handled.

Kenya can borrow from New Zealand and have a comprehensive Bail Act which articulates how each offence is to be handled from the pre-trial stage, the specific bail, and bond amount to be granted. The current Bail and Bond Policy Guidelines can be refined and be made comprehensive enough to guide the courts on the granting of bail and bond for corruption cases.

Kenya can implement the Electronic Monitoring Condition which is used in New Zealand and South Africa in its' bail and bond system. This will decongest the prisons and those involved in petty offences can still be monitored through this system. Kenya has room to improve in its' bail and bond framework and more specifically for corruption cases.

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