THE POISONED FRUIT OF PRETRIAL DETENTION: AN ANALYSIS OF THE REALIZATION OF THE RIGHT TO BAIL OF ACCUSSED PERSONS BY KENYAN COURTS THROUGH THE INTERPRETATION OF BAIL CONDITIONS

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By

[AGINGU, IRENE VANESSA AKINYI]

[134844]

Prepared under the supervision of

[MR. CECIL ABUNGU]

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DEDICATION

This project is dedicated to all disenfranchised persons who feel voiceless in the face of an injustice.

DECLARATION

I, AGINGU IRENE VANESSA AKINYI, 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.

Signed: 

Date: ……**14/ 03/ 2024**……

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

Signed: 

Date: ……**16/03/2024**……

[MR. CECIL ABUNGU]

ABSTRACT

Every accused person's anthem is Article 49(1)(h) of the Constitution of Kenya 2010. It states that an accused person is entitled to bail pending trial. This fundamental right is acknowledged under Section 123(2) of the Criminal Procedure Code that states that bail amounts should not be excessive and ought to be fixed regarding the circumstances of the case. In interpreting the constitutional provision on bail, Kenyan courts have manifested a disparity in what ought to be a reasonable bail amount. Although not expressly mentioned, it is possible to invoke a remedy to pretrial detention. Kenya adopts pretrial detention that criminalizes poverty by endorsing pretrial detention for indigent indicted persons who lack the capacity to raise the bail amounts determined by Kenyan courts. This study was sparked while drafting a petition on a recent case of *Issac Opiyo Onyango v Republic* where the accused being a man of modest means was unable to raise the set bail amounts of a sum of Ksh. 300,000/= and was hence sentenced to languish in pre-trial detention.

Consequently, this study examines the current interpretation of Section 123(2) of the Criminal Procedure Code by the Kenyan courts and whether it interferes with their duty to protect the realization of the right to liberty of accused persons vis-à-vis the presumption of innocence. This is achieved through exploring the origin and rationale behind bail and the criteria currently used by Kenyan courts in the dispensation of justice in the determination of bail terms. The study concludes by giving recommendations to the judges in Kenyan courts by presenting an inclusive and equitable viewpoint through identifying a socioeconomic measure which Kenyan courts ought to implement when determining bail amounts. An additional recommendation is the amendment of the Section 123 (2) of the CPC through the inclusion of the consideration of the socio-economic status of the accused when determining bail amounts.

LIST OF ABBREVIATIONS

CPC	Criminal Procedure Code
US	United States of America

LIST OF CASES

DOMESTIC CASES

Aboud Rogo Mohamed & Another (2011) eKLR

Issac Opiyo Onyango v Republic (2022) eKLR

Ng'ang'a v Republic [1981] eKLR

Republic v Margaret Nyaguthi Kimeu [2013] Eklr.

Republic v Joseph Wambua Mutunga & 3 others [2010] Eklr.

Cosmas Mututa Muvia v Republic (2016) Eklr.

Kulo v Republic (Miscellaneous Criminal Application E025 of 2023) [2023] Eklr.

Cyril Kipruto Serem v Republic [2020] Eklr.

James Kibet Chirchir v Republic [2022] eKLR

Andrew Young Otieno v Republic (2017) eKLR

Nelson Opido Mulati v Republic [2016] eKLR.

Republic v Danson Mgunya & another [2010] eKLR

Job Kenyanya Musoni v Republic (2012), Eklr

Ramadhan Iddi Ramadhan & 5 others v Republic [2019] eKLR

Issac Opiyo Onyango v Republic (2022) Eklr.

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

INTERNATIONAL CASES

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

Carlson v Landon (1951), The Supreme Court of the United States

United States v. Madoff (2009), The Supreme Court of the United States

United States v. Ciccone (2002), The Supreme Court of the United States

Gerstein v. Pugh (1975), The Supreme Court of the United States

Coffin v. United States (1895), The Supreme Court of the United States

Taylor v. Kentucky (1978), The Supreme Court of the United States

Hudson v. Parker (1895), The Supreme Court of the United States

Bearden v Georgia, The Supreme Court of United States, 1983.

Van Royeen v The State, The Appellate Court of South Africa, 2002.

LIST OF LEGAL INSTRUMENTS

DOMESTIC LEGAL INSTRUMENTS

Constitution of Kenya (2010)

Criminal Procedure Code (2015)

The Bail and Bond Policy Guidelines (2015)

The Penal Code of Kenya, Cap 63 (2014)

INTERNATIONAL LEGAL INSTRUMENTS

The Universal Declaration of Human Rights (1948)

Federal Rule 46, Criminal Procedure, United States

Bail Reform Act, United States, 1966

Bail Reform Act, United States, 1984.

Bail Reform Act, Canada, 1972.

Eighth Amendment, Constitution of the United States of America (1971).

Petition of Right, United States, 1627.

Habeas Corpus Act, United States, 1769.

Judiciary Act, United States, 1789.

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

The right to bail is accorded to an accused person in pursuit of the criminal justice process. Bail is the release from custody, pending a criminal trial, of an accused on the promise that money will be paid.[1] The primary objective of bail is to guarantee the presence of the accused at trial while granting him liberty based on the presumption of innocence.[2] This right is fundamental in safeguarding an accused person's freedom and rights through protection from unlawful detention or deprivation.[3] This right is heavily pillared on the presumption that an individual is innocent of any criminal charge until proven guilty.[4] Therefore, under this presumption, pretrial detention ought not to amount to punishment, especially keeping in mind that the accused are not inmates hence this ought to be reflected in their treatment and management.[5]

Likewise, the liberty of an individual is invaluable and is to be jealously safeguarded by the Constitution. The anthem of every accused person is Article 49 (1)(h) of the Kenyan Constitution 2010 which posits the entitlement of every accused person bail pending trial.[6] It is now beyond peradventure that bond and bail is a constitutional right that should be fulfilled unless there exists compelling reasons not to release the person on bond or bail.[7] Furthermore, Section 123 (2) of the Criminal Procedure Code envisages that "the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive".[8] Its objective was to bar worldwide pre-trial confinements by deliberately setting unaffordable bail. Section 123 of the CPC further empowers the court with the discretionary power to determine what amounts to excessive.[9] Furthermore, The Bail and Bond Policy Guidelines were established to provide guidance

[1] Gary S and Cavendish D K, *The English Legal System,* 6th ed, Routledge Publisher, United Kingdom, 2003, 445-450.
[2] *Aboud Rogo Mohamed & Another (2011) Eklr.*
[3] Chapter 4, *Constitution of Kenya* (2010).
[4] Paragraph 3.1(d), *The Bail and Bond Policy Guidelines*, 2015, 9.
[5] Article 11(1) of the *Universal Declaration of Human Rights*, 1948.
[6] Article 49 (1)(h), *Constitution of Kenya* (2010).
[7] Section 123*, Criminal Procedure Code* (2012).
The Bail and Bond Policy Guidelines, 2015.
[8] Section 123 (2), *Criminal Procedure Code* (2012).
[9] Section 123, *Criminal Procedure Code* (2012).

to courts and the police in bail decision making.[10] These guidelines recognize the need for a balanced approach in preserving the public interest and the right of an accused person to fair trial.[11]

The interpretation of Section 123 of the CPC by Kenyan courts has however constantly infringed on the realization to accused person's right to liberty.[12] Statistically, Kenyan courts have principally imposed bail and bond terms which are noncongruent with the accused's financial circumstances, which has resulted in pre-trial detention for impecunious people becoming the rule and not the exception. Amidst the ascending cost of living, the bail amounts granted by some courts have consistently increased over time hence people of modest means are more likely to be detained pretrial.

Courts must guarantee bail conditions are sound and not excessive, as this would result in de facto imprisonment and hence a violation of Article 49(2).[13] In *Aboud Rogo Mohamed & Another v Republic,*[14] the primary consideration was affirmed by the court being whether an accused will voluntarily and readily present himself to court and the determination of each case is to be *sui generis*. The court further stated that the key consideration when deciding the issue of bail is whether the accused will attend trial or whether there is a likelihood of absconding.[15] There however exists vagueness and a lack of uniformity in courts on how to determine what is excessive due to the lack of specific guidelines on how the courts should approach bail determination. The different interpretations and inadequate legislation on what amounts to sound bail conditions have mainly been predominantly granted on monetary bail.[16]

[10] *The Bail and Bond Policy Guidelines*, 2015.

[11] Paragraph 3.1(c), *The Bail and Bond Policy Guidelines*, 2015, 9.
"Bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial…amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and consider the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case."

[12] Friedland M, 'Detention before trial: A study of criminal cases tried in Toronto Magistrates' courts' 202.

[13] Lumumba P, '*Criminal Procedure in Kenya'* 1(1) lawAfrica Publishing, 2008, 23.
Article 49(2), *Constitution of Kenya* (2010).
Section 123, *Criminal Procedure Code* (2012).

[14] *Aboud Rogo Mohamed & Another (2011) Eklr.*

[15] *Aboud Rogo Mohamed & Another (2011) Eklr.*

[16] Kiage P*, Essentials of Criminal Procedure in Kenya*, 5th ed, lawAfrica Publishers, 2010, 113-138.

Bail amounts are determined with minute to no regard for the accused's economic capability to afford the bail terms. According to statistical data in the year 2022, approximately 8.9 million Kenyans were residing in abject poverty, the majority being in remote areas.[17] In accordance with this, a substantial number of people, if arrested, would have difficulty settling bail. The World prison Brief has estimated the pretrial detainee's population to be 41% of the prison's population.[18] Accused in pretrial detention are subjected to cramped, insanitary and overcrowded conditions, at the risk of violence and mistreatment.[19]

This predicament was illustrated in several cases, an example is demonstrated in a more recent case, *Issac Opiyo Onyango v Republic* (2022),[20] where the court granted the accused, charged with defilement, a sum of Ksh.300,000/= with three sureties of the same sum. According to the Honorable Learned Chief Magistrate, the above bail terms were appropriate because defilement is a serious criminal sexual offence under the Penal Code and in turn deserves the said amount. The accused being a man of modest means was unable to raise the same and hence sentenced to languish in pre-trial detention.

It is important for courts to consider one's socioeconomic status when granting bail because it promotes equal access to justice. Additionally, it is crucial to recognize the negative impacts of pre-trial detention and its consequences. Prolonged detention due to the inability to raise bail may result in negative effects such as housing instability, disruption to family life and job loss, among others. Essentially, it comes down to ensuring a balance between equal access to justice whilst upholding public safety.

The courts are expected to ensure the practicability of granted bail terms and keep in mind the predominating financial situation of the country, especially persons of modest means. The court admitted in *Ng'ang'a v Republic*,[21] that the admission of bail is indeed a constitutional right where trial might not be concluded in the near future. This insinuates that the main objective for bail is to guarantee the accused's attendance at court. The court should, however, take into consideration an accused person's presumption of

[17] < https://www.statista.com/statistics/1229720/number-of-people-living-in-extreme-poverty-in-kenya-by-area/ >.
[18] < https://www.statista.com/statistics/1229720/number-of-people-living-in-extreme-poverty-in-kenya-by-area/ >.
[19] < https://www.prisonstudies.org/news/kenya-finding-kafka-criminal-justice-system >
[20] *Issac Opiyo Onyango v Republic* (2022) Eklr.
[21] *Ng'ang'a v Republic* [1981] Eklr.

innocence. Therefore, the court is left to grapple with the criteria provided and weigh if a certain bail amount granted to an accused is fair.

1.2 STATEMENT OF THE PROBLEM

Despite the averments in the CPC there has been gross violations in both the past and present times due to different interpretations and inadequate legislation on what constitutes equitable bail conditions which have mainly been predominantly accorded on a monetary bail basis with little to no regard for the accused's economic ability to afford the bail terms. It serves no purpose, therefore, to acknowledge the right of an accused person to be released on bail then proceed in the same breath to inflict terms that are beyond the capabilities of the accused hence denying that right and technically denying him bail and subjecting him to pretrial detention. My research will therefore investigate whether the current interpretation of Section 123(2) of the Criminal Procedure Code by Kenyan courts interferes with their duty to protect the realization of the right to liberty of accused persons vis-à-vis the presumption of innocence.

1.3 RESEARCH QUESTIONS

1. What is the origin of bail and what is its intended purpose in the Kenyan Criminal Justice system?

2. What gaps exist with the current criteria used by Kenyan courts when determining the bail amounts?

3. What are the existing alternatives to determine bail where the socio-economic status of the accused comes to the forefront?

1.4 RESEARCH OBJECTIVES

1. To examine and understand the origin and relevance of the right to bail in the Kenyan Criminal Justice system.

2. To assess the criteria used by courts in Kenya courts in their dispensation of justice through the determination of bail amounts and in ensuring the protection and realization of the right to bail.
3. To determine the best approach in the determination of bail amounts especially in relations to accused persons of modest means.

1.5 HYPOTHESIS

1.6 JUSTIFICATION

This study will be unique as it will conceivably proceed to present an inclusive and equitable viewpoint through establishing a socioeconomic measure which courts ought to consider when determining bail amounts. Addressing this vagueness will further be beneficial to accused persons who fall prey to pretrial detention due to the excessive bail amounts they are granted. This would be a great step towards streamlining the interpretation of the law by the courts and will be crucial to judges who are drafting policies to address similar gaps in bail determination. Furthermore, it will be helpful to adjudicators who must deal with cases arising from the realization of the right to bail and provide guidance in the exercise of their discretionary powers on the same.

1.7 THEORETICAL FRAMEWORK: THE THEORY OF DISTRIBUTIVE JUSTICE

Scholars such as Maiese define distributive justice in relation to the just distribution of resources among diversified players in community.[22] Others such as Armstrong define it as the methods in which the burdens and benefits of our lives are shared among society's members.[23] The distributive justice theory is therefore about fairness and justice in the allocation of social goods and services in a community. Additionally, the theory asserts

[22] Maiese M, 'Distributive Justice' *Beyond Intractability*, 2003, https://www.beyondintractability.org/essay/distributive_justice in June 2003.
[23] Armstrong C, *Global Distributive Justice: An Introduction*, 1, Cambridge University Press, England, 2012, 5-24.

that common resources should be dispensed in a reasonable manner which assures every individual a fair share of the dispensed resource.

What amounts to a fair share has constantly been a very contentious issue. Michael Strevens claims there are deep conflicts immersed in our way of thinking about distributive justice hence we are internally divided on the regulations we ought to consider in determining who is entitled to what in resource allocation.[24] The resource distribution criteria has been governed by three principles; equality, need and, equity.[25] Nonetheless, there are restrictions on each criterion. For example, if goods are to be dispensed among all given persons, according to the equality criterion, each person should receive equivalent number of resources.[26] Accordingly, individuals with unlike degrees of needs wind up acquiring similar amounts of assets and this often results in an unjust distributive effect.

The espousal of the equity criterion ensures that interests are divided in a balanced method to the individuals' contribution.[27] Those contribute more would wind up securing greater benefits irrespective of needs.[28] Therefore, this criterion is inclined to perpetuate and reinforce social imbalance in the community. This undermines the impecunious' capability to compete in the same financial system. Lastly, in the application of the needs' criterion, an equitable distribution would arise because the individuals who require more would receive more.[29] However, the criterion, disregards inconsistencies in effort and talent which serves as a deterrent to efficiency and production. Those who make greater contributions to the production process would feel discouraged if less productive people enjoy benefits to the same degree.

A system of resource allocation has been recommended by some philosophers like Maiese, that encompass protections for members of community incapable to compete.[30]

[24] Strevens M, 'Depth. An account of scientific explanation' 1(1), Harvard *University Press*, 2009, 2-15.
[25] Strevens M, 'Depth. An account of scientific explanation', 2-15.
[26] Strevens M, 'Depth. An account of scientific explanation', 2-15.
[27] Strevens M, 'Depth. An account of scientific explanation', 2-15.
[28] Strevens M, 'Depth. An account of scientific explanation', 2-15.
[29] Strevens M, 'Depth. An account of scientific explanation', 2-15.
[30] Maiese M, 'Distributive Justice' *Beyond Intractability*, 2003, https://www.beyondintractability.org/essay/distributive_justice in June 2003.

This system merges the principle of need with the principle of equity and further endeavors to honor individuals for their industry while still guaranteeing that their basic needs are satisfied. Additionally, resource distribution might be according to the best interest of society or social utility.[31] Folger et al have asserted the resource allocation criterions are adopted principles to endorse an advancement of some social goal rather than for their own sake.[32] The principle of equality emphasizes the importance of a sense of belonging among society members and a positive interpersonal relationship.[33] Meanwhile, the need criterion is inclined to warrant that individual's essential and basic needs are satisfied.[34] Given that these three principles are often in tension with one another, one of them is usually taken as the primary criterion of resource allocation.[35]

Although it has been argued in favor of strict equality or egalitarianism by some writers in resource sharing, some favor the "needs criterion" in resource allocation among members of the community. An adequate illustration is through, John Rawls who recommended that all basic and social goods ought to be be allocated equitably unless an unequal distribution of all or any of the goods is to the advantage of the minorities in society.[36] Thus, favourable deliberations in interests ought to be conducted towards the minorities in the society in relation to distribution of resources.

Fleischacker maintained that a standard of equality is represented by distributive justice which avers that all individuals are compensated proportionately to his or her merit such that it is unjust for unequals in merit to be treated equally or equals in merit to be treated unequally'.[37] With the application of his view to resource allocation, it could be argued that it is inequitable to allocate the same amount of resources to individuals who are

[31] Maiese M, 'Distributive Justice' *Beyond Intractability*, 2003, https://www.beyondintractability.org/essay/distributive_justice in June 2003.
[32] Folger R, Cropanzano R and Konovsky M, 'Relative effects of procedural and distributive justice on employees attitudes' 17(1) *Representative Research in Social Philosophy*, 1987, 15-24.
[33] Maiese M, 'Distributive Justice' *Beyond Intractability*, 2003, https://www.beyondintractability.org/essay/distributive_justice in June 2003.
[34] Maiese M, 'Distributive Justice' *Beyond Intractability*, 2003, https://www.beyondintractability.org/essay/distributive_justice in June 2003.
[35] Maiese M, 'Distributive Justice' *Beyond Intractability*, 2003, https://www.beyondintractability.org/essay/distributive_justice in June 2003.
[36] Lamont J, 'Distributive Justice, Stanford Encyclopedia of Philosophy, 1996, https://plato.stanford.edu/entries/justice-distributive on 22 September 1996.
[37] Fleischacker S, 'A Short History of Distributive Justice' 32(1) *The Journal of Sociology and Social welfare*, 2005, 2-3.

unequal, for example, distributing same level of resources to a rich and a poor person. Likewise, it is unjust and unfair to distribute different amounts of resources to persons who are equal. Both arguments by Fleischacker and Rawl seem to bankroll the view that in the distribution of resources, consideration should be based on the social-economic differences of members of the society. Fleurbaey[38] and Roemer[39] have asserted that distributive justice facilitates the interest of the least advantaged in the society by justifying a resource distribution mechanism that directs more benefits to the least privileged groups as a fair distributive system. Inequalities or differences in society are only permitted to the extent that they benefit the least advantaged.[40]

Distributive justice thus demands that those of modest means ought to be favoured in resource distribution, hence the need for government intervention to ensure justice and fairness in the distribution of resources. Likewise, in the determination of bail amounts the distributive justice theory should apply with the aim to ensure affordability of bail amounts for persons of modest means.[41] The essence of this study is to offer an elaborate resolution on means to ensure the affordability of bail affordable to indigent accused persons in the absence of release on one's recognizance. This will be through establishing a socioeconomic measure that courts should consider when determining bail amounts. The courts in their determination ought to jealously protect the realization of the right to pretrial liberty vis a vis the presumption of innocence. It is required by the theory of distributive justice that every accused person's circumstances should be made just and fair in accordance with the unique standards regarding their socioeconomic status without discrimination.

1.8 LITERATURE REVIEW

There are several scholarly works on the right to bail both in Kenya and other jurisdictions, especially on its realization. Although the right of bail is automatic, it is not

[38] Fleurbaey M, '7 Normative economies and theories of distributive justice 1(1) *PhilPapers*, 2004, 2-7.
[39] Roemer J, 'Theories of Distributive Justice' 92(1) *Harvard University Press*, 1996, 203 -207.
[40] Lamont J, 'Distributive Justice, Stanford Encyclopedia of Philosophy, 1996, https://plato.stanford.edu/entries/justice-distributive on 22 September 1996.
[41] Lamont J, 'Distributive Justice, Stanford Encyclopedia of Philosophy, 1996, https://plato.stanford.edu/entries/justice-distributive on 22 September 1996.

absolute.[42] The subject of bail belongs to a blurred area of law and is largely dependent on the bench otherwise known as judicial discretion. Kiage recognizes the inequalities in the Kenyan Criminal Justice system in granting bail putting into consideration that most of the accused persons are poor and thus unable to meet the bail terms.[43] He however fails to provide circumstances to be considered to ensure appropriate bail conditions. P.L.O Lumumba further discusses the need for consideration of each accused person's bail terms on its own merit.[44]

Muchera recognizes that the purpose of bail is to serve the interest of justice and therefore courts are required to balance the accused person's right to release on bail while considering the interest of justice.[45] He however fails to address the challenges faced by accused persons in their attempt to meet bail terms. Additionally, Akech and Kinyanjui observe that Kenya lacks a bail supervision system that can ensure accused persons granted bail are properly monitored and that they adhere to the bail terms.[46] B.D Chipeta argues that the decision should not be made mechanically or capriciously as the accused person may be innocent. He notes that this rests on the magistrate who must exercise his judicial discretion judicially. Although he states that bail fixed should not be excessive, he does not discuss how bail can be made affordable to reduce the financial burden placed on indigent persons in meeting bail terms.[47]

1.8.1 On the extent to which courts protect or undermine the right to liberty

Krishna highlighted that if the right to bail is denied it would mean that an accused although presumed innocent, would be subjected to psychological and physical deprivation as a pre-trial detainee.[48] Mapaure and others[49] argue that judicial officers should ensure they are equipped with sufficient facts to empower them to exercise their

[42] Omondi D, 'In Kenya, is the right to bail open to all?' *Strathmore Law Clinic Criminal Justice Website*, 2021, 1 < In Kenya, is the right to Bail open to all? (slccriminaljustice0.wixsite.com)> on 24 July 2021.
[43] Kiage, *Essentials of Criminal Procedure in Kenya*, 111-114.
[44] Lumumba P, '*A Handbook on Criminal Procedure in Kenya'* 33(1) PLO Foundation Publication, 1998.
[45] Muchera J, 'Rights of an Arrested Person to Bail/Bond: The Kenyan Legal Perspective' SSRN, 2011, 6.
[46] Akech M & Kinyanjui S 'Pre-trial detention in Kenya: Balancing the Rights of Criminal Defendants and Interests of Justice,' 19 (1) *East African Journal of Peace and Human Rights* ,2013, 1-25.
[47] Chipeta B, '*A Handbook for Public Prosecutors'* 3(1) Mkuki na Nyota Publishers, 2009.
[48] Krishner J,'The right to bail under Indian criminal laws' <https://www.readcube.com/articles/10.2139%2Fssrn.1437977 >.
[49] Mapaure C and others, 'The Law of Pretrial Criminal Procedure in Namibia' *University of Namibia Press*, 2014.

discretion in making bail decisions in a judicial manner. They further argue that it is vital for judicial officers to determine the bail amount after they have a conclusion because the amount granted sometimes defeats the entire purpose of bail. Additionally, they argue that bail ought to be viewed as security to ensure the appearance of the accused in trial without hampering the administration of justice. Klare recognizes the importance of this discretionary power in the ability of judges to reason and make sane decisions within the laws of the country while considering extra-legal considerations but maintaining the system's value. [50] Bail insinuates that an accused is already under some form of restraint and his freedom is subject to taking security for his appearance when and where required by the court.[51]

Mitchell argues that although courts ought to interpret the purpose of bail as one to ensure the appearance of the accused person, they have instead exercised their powers as though it is punishment for the alleged charges the accused is facing.[52]

1.8.2 On excessive bail terms undermining the right to liberty

Friedland argues that the practical challenge that exists in bail determination is the setting of cash deposit, as well as the fairness it produces.[53] Furthermore, he argues that systems that require security in advance produce an insoluble dilemma as it may be impossible to pick a figure high enough to ensure the accused's appearance in court and yet moderate enough for him to raise.[54] Although the bail amounts are conditioned upon the accused's appearance in trial if higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.[55] It is widely acknowledged that bail determination is frequently anchored on an unarticulated desire to imprison an

[50] Klare K, 'Legal Culture and Transformative Constitutionalism' *South African Journal on Human Rights*, 1998,146-188 <https://www.tandfonline.com/doi/epdf/10.1080/02587203.1998.11834974?needAccess=true&role=button >on 23 March 2017.

[51] Das B, 'Bail: Judicial Discretion' 9(1) *Cochin University Law Review*, 1985, 350-361.

[52] Tribe Laurence, 'An Ounce of Detention: Preventive Justice in the World of John Mitchell' 56(3) *Virginia Law Review*, 1970, 397.

[53] Friedland M, 'Detention before trial: A study of criminal cases tried in Toronto Magistrates' courts' 1(1) University of *Toronto Press*, 1965, 202.

[54] Friedland M, 'Detention before trial: A study of criminal cases tried in Toronto Magistrates' courts' 202.

[55] Eighth Amendment, Constitution of the United States of America (1971).

accused to prevent them from committing crimes before trial. [56] Leslies argues that the public appears to equate bail with a trial, and links bail with a judgment on someone's presumed guilt or innocence.[57]

Arthur Goldberg discusses that an example of justice denied is an instance where a man is imprisoned for no other reason than his incapability to meet the monetary and property bail terms.[58] The need to examine the economic standing of the accused before granting bail is acknowledged by Mpaure and others but fail to discuss and highlight actual instances where excessive bail terms are granted to these accused persons hence enringing on their right to liberty.[59]

Saikumar argues that granting of exorbitant and unsound bail and bond terms amounts has resulted from India's courts insensitivity to the economically disadvantaged. He proposes the accused socio-economic condition to have considered before granting bail.[60] He additionally argues that more compassion should be shown towards accused persons by the courts when granting bail and it ought to consider their history, financial status and their employment status. Saikumar also argues that the monetary based bail system is discriminatory against indigent accused persons and that the thin line that distinguishes accused persons who enjoy their right to pretrial liberty from the accused subjected to pretrial confinement is their economic status.[61]

On the contrary, Justice J supports that bail cannot be deemed excessive simply because it exceeds the financial ability of the accused, so long as no lesser amount could reasonably assure his presence at trial. [62]

[56] ABA Project Report on Minimum Standards for Criminal Justice: Standards Relating to Pretrial Release; Proceedings of The National Conference on Bail and Criminal Justice Report ,1031, 1038-43.
[57] Leslie R, 'Bail and Remand Detention' 1(1) *University of the Witwatersrand Press*, 2010.
[58] Goldberg A, 'Equality and Governmental Action' 39(1) *New York University Law Review*, 1964, 218- 222.
[59] Mapaure C and others, 'The Law of Pretrial Criminal Procedure in Namibia', 2014.
[60] Saikumar U, 'Indian System of Bail: Anti Poor' accessed 17 April 2015.
[61] Saikumar U, 'Bail and its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform' 9(1) *Valparaiso University Law Review*, 167.
[62] Tribe Laurence, 'An Ounce of Detention: Preventive Justice in the World of John Mitchell' 56(3) *Virginia Law Review*, 1970, 397.

Contribution

Notwithstanding the contributions made by the authors on the issue of pretrial confinement and the burden linked to a monetary bail system, they fail to offer an elaborate resolution on how to ensure bail amounts set are affordable to indigent accused persons in the absence of release on one's recognizance.

My research intends to establish a socioeconomic measure that courts should consider. This will be by amending the current provision of Section 123(2) of the CPC through the incorporation of the consideration of the socio-economic status of the accused considering Saikiumar's argument,[63] when exercising their discretionary power on bail determinations. My research is unique as it intends to do so in the Kenyan jurisdiction through the lens of the principle of equity and inclusivity, which has not been written on before, to make bail affordable to all persons.

Furthermore, this study will form part of literature in this field of study and thus guide further associated research and will contribute to the furtherance of cognizance in this area by underscoring and suggesting methods of addressing the gaps between the law and its practice in relation to pretrial liberty in an effort to guarantee that the right to bail is enjoyed by all citizens including the economically disadvantage. Consequently, criminal law practitioners, judicial officers, judges and accused persons will find this study useful in pointing out the loopholes and contentious issues in the award of bail.

1.9 METHODOLOGY

The conducted in this study will be qualitative in nature. A desk study will be carried out using available information from both primary and subsidiary sources about the subject. The primary sources of information incorporate domestic legislation such as the Constitution of Kenya,[64] and any important statutory provision that address pretrial detention. Additionally, judicial decisions form part of the main source of information of the research. On the other hand, subsidiary sources of information encompass books, journal articles, reports, book chapters and other internet resources or electronic

[63] Saikumar U, 'Bail and its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform', 167.
[64] Constitution of Kenya (2010).

databases. In general, I expect to arrive at my findings through a deductive approach, which will be preferred with the chapters thus setting up a premise, from which the claim will be derived. Moreover, I will attempt to prove my hypothesis through the finding of the research questions outlined in section 1.4. Following this, the first chapter seeks to explain the origin and rationale behind rationale. This rationale will thus be the basis in analyzing the court's interpretation in determining the reasonable bail amounts and whether it aids the realization of pretrial liberty.

I intend to analyze the origin and rationale behind bail through a historical analysis i.e., by examining the history of bail, the importance and the purpose accredited to the realization of the right to liberty. This will mainly be done through articles, books and other scholarly sources that have a gradational account of this history. This study will then proceed to showcase the factors considered by Kenyan courts when fixing bail amounts and the court's interpretation of the term "excessive bail amounts". It will further showcase whether the courts undermine or protect the right to liberty through the criteria currently used. To do so, a doctrinal analysis will be utilized. This will entail an analysis and critique of the determined cases where the courts exercised the factors considered in the determination of bail amounts and the outcomes resulting from this reliance. Additionally, scholarly interpretations of the said cases will be analyzed to showcase the gaps and shortcomings of the criteria in relation to pretrial detention. Furthermore, this study utilizes the descriptive design to lay out an analysis of the different interpretations on what would amount to an "excessive bail amount".

Finally, the study will assess whether the Kenyan courts can adopt a best approach to the determination of bail amounts especially in relations to accused persons of modest means. In so doing it will gauge whether the proposed approach is justifiable in ensuring the realization of the right to liberty of accused persons awaiting trial. To do so I will primarily depend on critical analysis which will aid to establish a socioeconomic measure that courts ought to consider when determining bail amounts especially in regards to accused persons of modest means and highlights the need for courts to contemplate other feasable methods of bail determination.[65]

[65] Kiage, *Essentials of Criminal Procedure in Kenya*, 111-114.

1.10 CHAPTER BREAKDOWN

Chapter one is an introductory part of the study which will form the first chapter of this study. It lays down the research objectives, the subsequent research questions, theoretical framework, and the justification of the study and thus sets the foundation for the subsequent chapters. Chapter two will then assess the rationale behind the bail and will seek to bring out the importance of the realization of the right to bail in the Kenyan Justice system.

Chapter three will be dedicated to the assessment of the criteria currently used by Kenyan courts in their disbursement of justice in the determination of bail amounts and in ensuring the protection and realization of the right to bail. In depth, this chapter will analyze the degree to which the right to liberty is undermined or safeguarded by the Kenyan courts. Likewise, this chapter will be governed by jurisprudence developed by the Kenyan courts.

Chapter four will thus seek to suggest a better approach in the determination of bail amounts, especially in relations to accused persons of modest means. Under this chapter, the study will conceivably proceed to present an inclusive and equitable viewpoint through establishing a socioeconomic measure which courts ought to consider when determining bail amounts.

CHAPTER TWO: ORIGIN AND RELEVANCE OF THE RIGHT TO BAIL IN THE KENYAN CRIMINAL JUSTICE SYSTEM

2.1 INTRODUCTION

In this chapter, the study will examine the origin of bail and its intended purpose in the Kenyan Criminal Justice System because by doing so it will assess the rationale of bail which is important in the realization of the right to bail in the Kenyan Justice System. It will begin by analyzing the history and origin of bail in Kenya then examining the rationale behind bail then after the history of the presumption of innocence and its relevance to the right to bail.

2.2 HISTORY AND ORIGIN OF BAIL IN KENYA

2.2.1 Origin of bail in the United Kingdom

i) The Anglo-Saxon period

Historically, the concept of bail is rooted in Anglo-Saxon law (410 – 1066) which was a substitute to blood feuds to avenge the wrongs committed during war.[66] Bail was considered a means of settling disputes peacefully.[67] Crimes being a private affair afforded the state to seek remuneration as a criminal penalty and this was a transition towards a financial system where the offenders were to pay the victims.[68] This payment was called "wergild" which was considered equal to the injured party's value which was assigned according to the victim's social status, among other things.[69] In the late 17th century, there was the establishment of courts of arbitration which adjudicated and heard complaints between the Englishmen.[70] The Anglo-Saxons were concerned with the

[66] Martin J, *The English Legal System* (7th Ed, Holder Education Publishers, United Kingdom 2007).
Cardone J, '*In Turn, Cites To E. De Haas, Antiques Of Bail (1940), As Well As To Pollock & Maitland For Additional*' < https://www.pretrial.org/> accessed on 2 February 2024.
Donovan B, *The Law of Bail: Practice, Procedure and Principles* (Legal Books, Sydney), 1981, 23.
[67] Ducker W, *'William, The Right to Bail: A Historical Inquiry'* (1977) 42 Albany Law Review, 33.
[68] Seibler J and Snead J, 'The History of Cash Bail' < https://www.heritage.org/courts/report/the-history-cash-bail>.
[69] Encyclopedia Britannica, https://www.britannica.com/topic/wergild#ref31625 (accessed 2 February 2024).
[70] Duker W, '*The Right to Bail: A Historical Inquiry'*, Yale University Press 42 Ala. L. Rev. 33 (1977); Note, *Bail: An Ancient Practice Re-examined*, 70 Yale L.J. 966 (1961).

flight risk of the accused who might flee to avoid paying the penalty.[71] This transition to a court-centred justice presented a challenge on how to prevent the accused from fleeing to avoid punishment.[72] Therefore, the accused's appearance in court was guaranteed by the formulation of a system.. The substantive worth pledged was called bail which was equated to the amount or the substantive worth of the penalty.[73]

ii) The Norman conquest and Medieval English period

Then came the Norman conquest where bail was categorized into bailable and non-bailable offences.[74] Additionally, bail was granted based on the seriousness of the offence.[75] In medieval England the magistrates handled the cases. The sheriffs were empowered not only to release any accused of bailable and non bailable offenses under his judicial discretion but also had the authority to decide how much the amount should be.[76] This however opened doors to corruption as they tried to extort accused persons through payment.

This corruption resulted in the parliament passing the Statute of Westminster in 1275 which not brought together the 51 existing laws that mainly originated from the Magna Carta but also regulated the granting and refusing of bail.[77] The Westminster statute commanded the release of certain individuals, by sheriffs, deemed by law as bailable once they produced a "sufficient surety".[78] The statute defuncts from the traditional Anglo-Saxon customs by enacting a three part criteria that ought to govern the availability of an offense.[79] These were the likeliness of conviction, the accused's criminal history and, nature of the offense.

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[71] Schnacke T, Jones M, and Brooker C, 'History of Bail and Pretrial release' *Pretrial Justice Institute*, 2010, 1-27 < https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf> on 2 February 2024.
[72] Vendantun T, 'Bail in Criminal Law' 34 Canadian Law Times 7, 1914, 660 -675.
[73] Vendantun T, 'Bail in Criminal Law', 660 -675.
[74] Shuruna R, Human Rights and Bail' 1 *A.P.H Publishing Corporation* 1, 2000, 33.
[75] Shuruna R, Human Rights and Bail' 1 *A.P.H Publishing Corporation* 1, 2000, 33.
[76] Schnacke T, Jones M, and Brooker C, 'History of Bail and Pretrial release' *Pretrial Justice Institute*, 2010, 1-27 < https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf> on 2 February 2024.
[77] Simpson R, Bail in New South Wales (NSW Parliamentary Library Research Briefing Paper No.25/97 1997) 2.
[78] Seibler J and Snead J, 'The History of Cash Bail' < https://www.heritage.org/courts/report/the-history-cash-bail>.
[79] Seibler J and Snead J, 'The History of Cash Bail' < https://www.heritage.org/courts/report/the-history-cash-bail>.

iii) The 1966 Bail Reform Act

A presumption in favour of releasing non-capital defendants on their own recognizance was contained in the 1960s Bail Reform Acts. This included contingent interim release pending trial with circumstances inflicted to minimize the threat of non-appearance; limitations on monetary bail, which could be inflicted by the court only where non-monetary release alternatives were insufficient to guarantee an accused's appearance; a deposit cash bail alternative, permitting accused persons to pay the court a 10% deposit of the monetary bail sum in lieu of the complete cash sum of a surety bond; and re-evaluation of bail for accused persons incarcerated for a day or more.[80] In 1628, The Petition of Right prohibited the imprisonment of individuals without any accompanying charge.[81] In 1679 The Habeas Corpus Act accelerated the bail setting process prior to trial and the release of an accused under certain conditions.[82]

Additionally, the language of the Constitution under the Eighth Amendment, supports that excessive bail shall not be required.[83] Bail was considered excessive where it was set to an amount that outweighs the purpose of bail. The Bail Reform Act of 1966 listed the factors a judge should consider for setting a bail.[84] These included the defendant's flight risk as well as his financial resources to permit the setting of a reasonable amount of bail. Bail is not excessive merely because the defendant may be financially unable to post the amount.[85] The financial status of the defendant is certainly something that should be taken into consideration however should not be the only factor considered by the court is setting bail. This is because the measure of adequacy is to ensure appearance and not the defendant's pocketbook.

[80] Schnacke T, Jones M, and Brooker C, 'History of Bail and Pretrial release' *Pretrial Justice Institute*, 2010, 1-27 < https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf> on 2 February 2024.
[81] Section 1(a), *Petition of Right*, 1627.
[82] Section 2, *Habeas Corpus Act*, 1769.
[83] Sandblom R, 'Constitutional Law: Right to Bail' 51 *Michigan Law Review* 3, 1953, 389-408.
[84] Sandblom R, 'Constitutional Law: Right to Bail', 389-408.
[85] Hayward C and Fradella H, 'The Origins and History of Bail in Common Law Tradition' in Christine and Henry's (ed) Punishing Poverty, 1ed, University of California Press, United States, 2019, 1-15.

iv) Commercialization of bail

Furthermore, there was a rise of commercial money bail bondsmen and the structure of their operations.[86] Here an accused person who was seeking to be released pretrial but could not find a surety would pay an agent to act as a surety. The agent would then pledge the amount necessary and guarantee the appearance of the accused in court. The money pledged would then be returned. This would present the agents with a profit but however resulted in corruption.

Stack v Boyle supported that bail amounts should be based on an individualized assessment in regard to each defendant.[87] The bail should be set upon the relevant purpose of assuring the accused's presence in court. Additionally, in *Carlson v Landon*, it was highlighted that bail is not afforded in all cases but merely provided that bail should not be excessive in the cases where the court found it proper to grant bail.[88] These two accesses played a major role in the establishment of the right to bail which is not at all an absolute right and one with its parameters determined by state legislation and federals.

2.2.2 Origin of bail in Kenya

The common law system was embraced by Kenya at independence and the inclusion of the Bill of Rights under Section 72(1) which provided for the individual right to liberty.[89] The Anglo-Saxon law then developed into a right recognized by international instruments such as the United Nations International Covenant on Civil and Political Rights.[90] Consequently, many national constitutions provide for bail as a constitutional right such as Kenya. The Kenyan High Court, until 1978, had unrestricted power to release an

[86] Schnacke T, Jones M, and Brooker C, 'History of Bail and Pretrial release' *Pretrial Justice Institute*, 2010, 1-27 < https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf> on 2 February 2024.
Hayward C and Fradella H, 'The Origins and History of Bail in Common Law Tradition', 1-15.
[87] *Stack v Boyle* (1951), The Supreme Court of the United States.
[88] *Carlson v Landon* (1951), The Supreme Court of the United States.
[89] Nduru L, 'Right To Bail in Kenya: Exploring Alternative Non-Financial Bail Terms' University of Nairobi, 662/69002, 2011, 24-28 < http://erepository.uonbi.ac.ke/bitstream/handle/11295/105774/Nduru,Louis%20T%20M_Right%20to%20Bail%20in%20Kenya-%20Exploring%20Alternative%20Nonfinancial%20Bail%20Terms.pdf?sequence=1> on 2 February 2024.
[90] Nduru L, 'Right to Bail in Kenya: Exploring Alternative Non-Financial Bail Terms', 24-28.

accused on pre-trial bail in all cases regardless of the offenses.[91] This however changed with amendments made through the Constitution of Kenya 2010 which made crimes like treason and murder non bailable offenses however subject to judicial discretion.

2.3 THE RATIONALE OF BAIL

The objective to the right of bail is to minimize the interferences with an accused's liberty and evade pre-trial detention as security of appearance of an arrested person.[92] The aim of bail is to guarantee the attendance of trial by the accused and not to prohibitt him from committing additional crimes. [93] The accused is released once the recognizance is entered. If the accused fails to appear before the competent court at the specified date and time, then that sufficient sum is lost and surrendered to the court.[94] The principle of bail is not a question as to the innocence nor the guilt of the detainee rather its solely to ensure that the accused is committed to attend his court hearing. Additionally, the object of bail is to save a man from imprisonment before conviction where there is only a reasonable doubt of his guilt. [95]

Additionally, an accused could only be released once they produced a surety before the court.[96] Therefore, bail was not refused grounded on absolutions of dangerousness and public safety presented by these accused and was only refused when the court was not assured that the accused would appear at trial. [97] Thus, an accused may be admitted to bail as the purpose is as an assurance to court and in the same light provide an allowance for the accused party his liberty.[98]

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[91] Muchera N, 'Rights of an Arrested Person to Bail Bond the Kenyan Legal Perspective' University of Nairobi, 2011, 5.
[92] Haas E, 'Concepts of the Nature of Bail in English and American Criminal Law' 6 *The University of Toronto Law Journal* 2, 1946, 385-400.
[93] Baughman S, 'Restoring the Presumption of Innocence' 1 *University of Utah* 1, 2011, 10.
[94] Vedentam T, Bail in Criminal Law, 660.
[95] Vedentam T, Bail in Criminal Law, 660.
[96] Baughman S, 'Restoring the Presumption of Innocence', 10.
Hayward C and Fradella H, 'The Origins and History of Bail in Common Law Tradition', 1-15.
[97] Seibler J and Snead J, 'The History of Cash Bail' < https://www.heritage.org/courts/report/the-history-cash-bail>.
[98] Sandblom R, 'Constitutional Law: Right to Bail', 389-408.

2.4 THE PRESUMPTION OF INNOCENCE

The presumption of innocence guides the realization of the right of bail. The principle of the presumption of innocence supports that an accused should remain at liberty before trial. Furthermore, the determination of the accused's guilt should be at trial where prosecution is required to prove guilt beyond reasonable doubt.[99] It had been supported by the US Supreme Court that the presumption of innocence only required the prosecutor to show proof beyond a reasonable doubt.[100] Despite the existence of this presumption, the quantity of accused persons held pretrial has gradually grown. The Due Process Clause is examined by Baughman as the constitutional cornerstone for the presumption of innocence and how it is secures the right opposed pretrial imprisonment, in the absence of serious flight risk.[101] Historically, this and its constitutional roots, began at primeval periods and has continuously developed under common law with a fix on bail and pretrial rights.

The presumption of innocence has deteriorated in meaning due to the lack of consistent principles to apply under common law hence resulting in inconsistencies by some courts.[102] There are three principles that govern the application of this presumption.[103] First was that pretrial restrictions of liberty ought to be limited to instances where there exists a proper basis. This proper basis for limiting an accused's liberty would be based on the accused person's appearance at court, in instances where doing so would protect the judicial process from disturbance by the accused, and when such restriction would protect the security of the society.[104] Secondly, pursuant to the Due Process Clause an individual can only be punished where there was a conviction of guilt hence the focus on pretrial ought not be on the determination of guilt.[105] Third, the emphasize on pretrial protections for accused persons ought not be on acquiring the truth of an accused's innocence or guilt however should safeguard the accused's liberty until proven innocent or guilty at trial.[106]

[99] Re Winship, The United States, 1970, 361–363.
[100] Re Winship, The United States, 1970, 361–363.
[101] Baughman S, 'Restoring the Presumption of Innocence', 5-58.
[102] Baughman S, 'Restoring the Presumption of Innocence', 5.
[103] Baughman S, 'Restoring the Presumption of Innocence', 5-58.
[104] *United States v. Madoff* (2009), The Supreme Court of The United States, 252–253.
[105] *United States v. Ciccone* (2002), The Supreme Court of The United States, 543.
[106] *Gerstein v. Pugh* (1975), The Supreme Court of The United States, 123–125.

The due process clause and the presumption of innocence are intertwined especially since the main objective of bail is to guarantee an accused's presence at trial.[107] The presumption of innocence therefore prohibited judges to confine accused persons because they were likely to commit a crime. Guilt could not be determined pretrial during the determination on whether to grant bail or not since all the evidence was presented by then. Additionally, the guilt of an accused could only be determined at trial hence ought not to control the bail determination.[108] The presumption of innocence came into effect when an accused was arrested and charged. Therefore, the constitutional right to pretrial release through bail provided for one of the most important safety nets that backed the presumption of innocence.

When an accused was denied bail only to later be determined innocent it was considered far worse than the risk presented to the public by releasing the accused.[109] Some ancient English laws banned pretrial confinement even in murder cases because of the presumption. There exist different legislatures that played different roles regarding the presumption. The Judiciary Act of 1789 provided that all offenses were bailable, noncapital being automatically bailable whereas the capital offense were bailable under judicial discretion.[110] In the 19th century it was supported that denying bail violated the presumption of innocence. A London treatise stated every man is presumed innocent of a crime till found guilty hence banning confinement without bail.[111] It was emphasized by courts that guilt must be determined at trial, because of the Due Process Clause and presumption.[112] Additionally, accused persons-maintained innocence until proven guilty with evidence at trial, so judges did not weigh evidence against defendants in determining bail.

[107] Baughman S, 'Restoring the Presumption of Innocence', 5-58.
[108] Natali L and Ohlbaum E, 'Redrafting the Due Process Model: The Preventive Detention Blueprint', 62 *Law Review* 1, 1225.
[109] Morenas F, 'The Presumption of Innocence in the French and Anglo-American Legal Traditions', 58 *Law Review* 107, 2010, 126.
[110] Judiciary Act, United States, 1789.
[111] Chitty J, 'A Treatise on The Game Laws, and on Fisheries, 1812, 188.
[112] Baughman S, 'Restoring the Presumption of Innocence', 5-58.

The Federal Rule 46 of Criminal Procedure supports that setting bail amounts was to guarantee the accused's attendance in court, despite the weight of the evidence against him. The Due Process Clause sought release on bail for accused persons charged with non-capital crimes and called for the determination of guilt until trial.[113]

The presumption protected individuals from detainment unless there was confession in open court or proof of guilt beyond a reasonable doubt. It was to ensure that the merit of beyond reasonable doubt was met hence it could only be determined at trial. Due process emphasized on legally proving guilt of defendants at trial and preserving innocence pretrial.[114] Coffin focused on the presumption as a legal burden and especially held that the presumption was separate and distinct from the fundamental principle that the burden of proof beyond a reasonable doubt is bore by the prosecution. [115]

There existed a problem with viewing the idea of due process based on the prosecutor's burden of proof at trial. Despite the two concepts being separate and distinct they were merged into the prosecutor's burden at trial.[116] The separation of the two principles was crucial for the application of the presumption of innocence pretrial and later cases ignored the presumption because they tied it to the prosecutor's burden.[117] Through this shift in the understanding of the two principles, there was an increase of pretrial detention by allowing judges to make predictions about an accused's guilt. The question became whether to release an accused on bail rather than ways to release the accused on bail.

The factors that judges considered in releasing an accused was expanded by the 1966 Bail Reform Act.[118] The Act led to a further expansion of judicial discretion on weighing evidence against defendants before trial which was a violation of due process principles. The court emphasized the import of the presumption and due process at trial, rather than before trial and robbed it of its initial goal of ensuring bail.[119] Later, the 1984 Bail Reform

[113] Federal Rule 46, Criminal Procedure, United States.
[114] Baughman S, 'Restoring the Presumption of Innocence', 5-58.
[115] *Coffin v. United States*, The United States, 1895.
[116] Baughman S, 'Restoring the Presumption of Innocence', 5-58.
[117] Baughman S, 'Restoring the Presumption of Innocence', 5-58.
[118] *Bail Reform Act*, United States, 1966.
[119] *Taylor v. Kentucky*, The United States, 1978.

Act restricted pretrial liberty based on communality.[120] It was held by the court that although the objective of bail was to ensure the accused appeared in court, it was still important that the court considered whether the release would allow the defendant to tamper with evidence or was a threat to the life of the victim.[121]

The focus of the presumption had become a focus on trial rights like proving the guilt-determination of the accused and the courts found a lack of violation of due process by pretrial detention. The Due Process Clause banned limitations on an accused's liberty without proper guilt-determination.[122] In conclusion, there are three principles that ought to be taken into consideration on the restriction of an accused person's liberty which are guilt determination by weighing pretrial evidence, witness tampering or disturbance with the criminal process and lastly, prediction of the possible danger of the accused to the community.[123]

2.5 CONCLUSION

This chapter sets out to analyze the origin of bail and what its intended purpose is under the Kenyan Criminal Justice system. It has done so by analyzing the history and origin of bail in Kenya, the rationale behind bail and the history of the presumption of innocence and its relevance to the right to bail. In doing so, this chapter has examined and highlighted the origin and relevance of the right to bail in the Kenyan Criminal Justice system. In the chapter that follows, the study will assess the criteria currently used by courts in Kenya in their disbursement of justice through the determination of bail amounts and in ensuring the protection and realization of the right to bail.

[120] *Hudson v. Parker*, The United States, 1895.
[121] *Bail Reform Act*, United States, 1984.
[122] Laufer W, The Rhetoric of Innocence, 70 Washington Law Review 1, 1995, 329-404.
[123] Baughman S, 'Restoring the Presumption of Innocence', 5-58.

CHAPTER THREE: THE GAPS IN THE CURRENT CRITERIA USED BY KENYAN COURTS IN THE DETERMINATION OF BAIL AMOUNTS

3.1 INTRODUCTION

In this chapter, the study will examine the gaps that exist with the current criteria used by Kenyan courts when determining the bail amounts because by doing so it will assess how some courts in Kenya in their disbursement of justice fall sort of guaranteeing the safeguarding and realization of the right to bail. It will begin by analyzing the laws and guidelines followed by Kenyan courts when making bail decisions then examine how judges in some Kenyan courts determine bail amounts where the accused is a person of modest means then after, analyze the insights gained from the analysis.

3.2 LAWS AND GUIDELINES GOVERNING BAIL DETERMINATIONS IN KENYA

Article 49(1)(h) of the Constitution of Kenya explicitly yields the right to bond and bail regardless of the type of offence executed.[124] It affords an apprehended individual the right to be released on pre-trial bail subject to sound conditions, except in the presence of compelling reasons denying the release. The CPC under section 123 further provides that "The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive."[125]

Additionally, The Bail and Bond Guidelines sets out the structure within which the discretion of the court is guided in determining bail in Kenya.[126] The regulation purports to govern both the police and courts in bail determination while weighing the accused's right with the public interest. It defines bail as an agreement between an accused person or his/her sureties and the court that the accused person will appear in court when required, and where the accused abscond, in addition to the court issuing warrants of arrest, a sum of money or property deposited to the court will be forfeited to the court.

[124] Article 49(1)(h), *Constitution of Kenya* (2010).
[125] Section 123, *Criminal Procedure Code* (2012).
[126] The Bail and Bond Policy Guidelines, 2015.

Furthermore, it defines pretrial confinement as imprisonment of an indicted or arraigned person in custody awaiting investigation, hearing and resolution of their cases. The guidelines state that the` primary objective of bail is to guide both judicial and police officers in the application of laws that provide for bail and bond. Moreover, it advocates for sound bond and bail terms to be accorded by both courts and police.

These guidelines outline that bond and bail decisions ought to be governed by the following principles: the right to be presumed innocent, the right to liberty of an accused, obligation of the accused to attend trial, bail determination must balance the rights of the accused persons and the interest of justice, consideration for the rights of victims.[127] Additionally, the guidelines support that the primary factor courts ought to consider in bail determination is the accused's appearance for trial if accorded bail.[128] The guidelines also outline the compelling reasons courts ought to consider in the bail determination of the accused. Therefore, the court is given the responsibility to decide whether the prosecution satisfied a compelling reason or more to subject the accused to pretrial detention. The compelling reasons that the court ought to consider are as follows;

3.2.1 The nature of the charge or offense

Where the accused is facing serious charges, bail or bond may be denied. However, a high bail may be set where the court finds no reason to deny bail to an accused despite the nature of the offence.

3.2.2 Likelihood of interfering with witnesses

To rely on this to oppose bail, the circumstances surrounding the case ought to be disclosed to the court on the grounds that investigations are still underway.

3.2.3 Fear of committing further offences

The public should be protected by denying the accused bail where he is susceptible to commit more crimes.

[127] The Bail and Bond Policy Guidelines, 2015.
[128] Kiage P, *Essentials of Criminal Procedure in Kenya*, 5th ed, lawAfrica Publishers, 2010, 113-138.

3.2.3 Likelihood that the accused is a potential absconder

The rationale behind granting bail is guaranteeing the appearance of the accused in court when required therefore when that cannot be guaranteed it becomes void. The risk of absconding ought to be weighed considering factors such as mobility of the accused and his access to overseas travel facilities.[129]

3.2.4 Prosecution's case strength

Bail should not be denied to an accused where the evidence against him is insubstantial despite the seriousness of the offence. Where the accused is conscious of the prosecutor's case being substantial, it is presumed that there is an existence of an incentive to abscond.[130]

3.2.5 Character and antecedents of the accused person

This might give grounds for bail denial when enjoined with other unfavorable considerations.

3.2.6 Protection of the victim

The protection of the victim or victims of an offense from the accused person is vital.

3.2.7 The relationship between the potential witnesses and accused person

Courts consider whether the accused is in a position of influence that could possibly impact the potential witnesses.

3.2.8 Failure to abide by bond or bail terms

This is adequate reason to deny bail where the indicted fails to abide by bond and bail terms.

3.2.9 Child offenders

Where an accused is a minor, denial of bail is against the greatest interest of the child.

[129] *Section 34(2)*, The Penal Code of Kenya, Cap 63.
[130] Republic v Margaret Nyaguthi Kimeu [2013] Eklr.

3.2.10 Gainful employment of accused

The courts consider if an accused is employed gainfully to facilitate the possible attendance at trial.[131]

3.2.11 Protection of the accused person

On the basis that pretrial imprisonment is essential to safeguard the accused.

Lastly, the guideline highlights that there is a lack of uniformity in the procedures for bail determination hence some courts grant bail sums which are unaffordable or unsound sometimes, for many indicted persons.[132] Although the Bail and Bond Guidelines set out rules that govern how judges and judicial officers grant bail, it fails to explicitly set out the bail sum that ought to be accorded. Furthermore, they fail to set out what qualifies as sound bail and bond.

3.3 BAIL DETERMINATIONS FOR ACCUSED OF MODEST MEANS

Primarily, Kenya's bail system is monetary based where bail amounts are awarded by court rooted on the nature of the offence while the accused's financial status and ability to pay is completely ignored.[133] Justice Kiage states that often, individuals in breach of the law are unemployed or from humble backgrounds.[134] Therefore, they are subjected to pre-trial detention in instances where they lack the capacity to jack up the monetary bail amounts set in court. Some Kenyan courts have granted bail to accused persons of modest means with little to no consideration of their socio-economic status hence this right to bail safeguarded by the COK is of minute to no assistance to individuals of modest means.

This predicament is illustrated in several cases, for example in *Cosmas Mututa Muvia v Republic*,[135] where the charge against the accused was murder and there being no compelling reasons was accorded a bail amount of Kshs 150,000/= with a surety of the same sum. The court's suitability of the bail sum was founded on the nature of the offence.

[131] Republic v Joseph Wambua Mutunga & 3 others [2010] Eklr.
[132] The Bail and Bond Policy Guidelines, 2015.
[133] Bail and its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform (1971) 9:1.
[134] Kiage P, *Essentials of Criminal Procedure in Kenya*, 113-138.
[135] *Cosmas Mututa Muvia v Republic (2016) Eklr.*

Being a '*shamba boy*', the accused earned only Ksh 6,000/= per month, had two children, and was the sole breadwinner. Despite the soundness of the amount of Kshs 150,000/= as bail, the accused's income of Kshs 6,000/= a month would require him to work for 25 months to raise the bail amount. Consequently, in the failure to raise the bail sum, the accused is subjected to pre-trial detention which not only adversely affects his dependence but also infringes on his right to liberty.

The same predicament was seen in *Kulo v Republic*[136] where the arrested applicant was charged with 8 counts of various offenses. The accused pleaded guilty and was issued with a cash bail of Ksh 1,500,000. She then pleaded for a reduction of the bail amount and had since been incarcerated due to her inability to pay. Her claim was that the bail terms were extreme, excessive, unreasonable and punitive averse to her. Bail is to guarantee the accused's attendance and it ought not be set at an extreme amount that it beats its objective. The court took into consideration the subject matter of the charges and the fact that she was facing a myriad of offenses. The court did not consider the socio-economic status of the accused but instead set an amount that they felt was fitting for the charges. The appellate court however found that the bail was excessive and gave an order for it to be reduced to a sum of three hundred thousand shillings (Ksh 300,000/-).

Likewise in *Cyril Kipruto Serem v R* [2020],[137] the charges were resisting arrest, fraudulent disposal and obtaining by false pretences. The accused was a public servant teacher and was provided a Ksh.600,000/- bond with a surety. The court solely focused on whether the accused posed a flight risk when granting his bail terms. The trial court failed to consider an alternative of monetary bail after it was satisfied that the accused was not a flight risk. Being a man of modest means, the set bail amounts were on the higher end. Therefore, in the circumstances of the case the high bail term amounts to the denial of bail. The appellate court, however, reduced the sum to Ksh.200,000/- with one surety of an equal sum; or a cash bail of Ksh.100,000/-.

Additionally, in *James Kibet Chirchir v Republic,*[138] bail terms that were placed at Kshs. 5,000,000. It was the applicant's submission that he was a man of modest means hence

[136] *Kulo v Republic (Miscellaneous Criminal Application E025 of 2023)* [2023] Eklr.
[137] *Cyril Kipruto Serem v Republic* [2020] Eklr.
[138] *James Kibet Chirchir v Republic* [2022] eKLR.

the set bail sum occasioned him hardship due to his incapacity to afford it hence continued to stay in custody despite the deterioration of his health. The nature of the offence was considered by the trial court when granting the above bail terms. No consideration was given to his economic status and the capability to afford the bail.

Under *Andrew Young Otieno v Republic,*[139] the applicant was facing charges on two counts of robbery with violence. He pleaded not guilty. He applied and was set free on a cash bail of Kshs.2 million. He stated that he was unable to afford the bail because he is from a humble background. Hence was in remand custody for more than 2 years. The prosecutor stated that the court should focus on the seriousness of the offense when setting the bail. The state rejected the consideration of the applicant's financial status and focused on the seriousness of the offense. The Chief Magistrate court however reduced the cash bail to Kshs.200,000/-.

Likewise, in the case of *Nelson Opido Mulati v Republic,*[140] the Applicant had two pending hearings. In the first, he was released on a cash bail of Kshs. 200,000/= and in the second, he was released on a cash bail of Kshs. 2 million. He was charged with different alternative counts of handling stolen goods and two counts of robbery with violence. He pleaded for one surety being that he was incapable to furnish the court with the set cash bail hence was incarcerated. The seriousness of the charge was a pillar in the determination of the bond and bail amounts in the separate courts. The trial court heed no attention to the financial status of the accused. After review in an appellate court, the bail terms were consolidated, and the applicant was released on a cash bail of Kshs. 1 million.

The same predicament was seen in the case of *Republic v Danson Mgunya & another,*[141] where the accuseds are Kenyans and elderly members of society who are married with children. The 1st accused was an administration police officer while the 2nd accused was a chief. The accused were charged with murder and had since been in remand for almost two and a half years as the prosecution built a case. During the time they were arrested and detained they were employed. The court considered whether the accused would

[139] *Andrew Young Otieno v Republic* (2017) eKLR.
[140] *Nelson Opido Mulati v Republic* [2016] eKLR.
[141] *Republic v Danson Mgunya & another* [2010] eKLR.

pose a flight risk, which they found not possible since they were elderly and would have nowhere to abscond to. Additionally, the court considered whether their release would interfere with the ongoing investigation. They were granted a Kshs.3, 000,000/- bond each with two sureties of a similar sum in the absence of compelling reasons to deny them bail. Despite the accused being elderly men and unemployed after their incarceration of about two and a half years, the court did not consider their current financial status and granted bail based on the criteria discussed.

Additionally, in *Job Kenyanya Musoni v Republic*,[142] the charges were breaking and committing a felony and robbery with violence. A cash bail of Ksh 1,000,000 was granted by the court. The court's reasoning was that the burden of proving compelling reasons to deny bail was not satisfied by the prosecution. Despite this, the granted bail sum was solely grounded on the nature of the offence. Bail was granted, the court disregarded the accused's economic status nor their capability to afford it. Being a man who did not have a permanent employment he was unable to raise the granted bail amounts rendering him a pre-trial detainee.

Another example is *Ramadhan Iddi Ramadhan & 5 others v Republic,*[143] where the applicants were charged with conspiracy to defraud and were granted a Kshs. 20, 000,000.00/= bond alongside two sureties of a similar sum. The counsel for the applicant stated that the accused are farmers of humble means who own the disputed land. The court found that they were not flight risk through their reliance of the pre-bail report. The appellate court found the bail terms excessive and reduced it to a cash bail of 50 000/=. There was no regard to their financial status but focused on the seriousness of the crime.

Lastly, in *Issac Opiyo Onyango v Republic,*[144] a sum of Ksh.300,000/= with three sureties of the same sum was granted to the accused, charged with defilement. According to the Honourable Learned Chief Magistrate, the above bail terms were appropriate because defilement is a serious criminal sexual offense under the Penal Code and in turn deserves

[142] *Job Kenyanya Musoni v Republic* (2012), Eklr.
[143] *Ramadhan Iddi Ramadhan & 5 others v Republic* [2019] eKLR.
[144] *Issac Opiyo Onyango v Republic* (2022) Eklr.

the said amount. The accused being a man of modest means was unable to raise the same and hence sentenced to languish in pre-trial confinement. The seriousness of the offense was considered when determining the bail amounts and no regards were given to his financial status.

3.3 INSIGHTS

Courts have often voiced that the mere listing of the compelling reasons by the prosecution is not sufficient.[145] These compelling reasons ought to be clearly outlined and expounded to compel the court. Although courts and police grant bail, in the absence of any compelling reasons, the accused are in many instances unable to furnish the bail amount set out thus leading to pre-trial detention. Therefore, the inability to meet the bail and bond terms defeats realization of the accused's constitutional right to liberty.

Essentially, the bail process in Kenya is a hastened exercise where bond and bail terms are granted with no regard to the accused's financial status. Unable to meet the set terms, the indigent accused person's attendance in court is guaranteed through pretrial detention. Many accused persons subjected to pretrial detention are from humble economic backgrounds or lack a stable source of income. Many accused individuals lose their jobs once jailed even for short periods. Consequently, it exposes such individuals to the inability to meet basic needs, loss of income and inability to sufficiently care for their children and ultimately is a threat resulting to the dissolution of the family.

All Kenyan courts therefore ought to emulate the criteria used in the case of *Republic v Peter Muia Mawia*[146] where a 21-year-old accused of murder. applied for bail and the court acknowledged the lack of evidence produced to show that there was a likelihood of interference by the accused with the witnesses. The court set bail terms for two sureties of Kshs 500,00/=. This is because it considered that the accused was 21 years old and had just completed high school and was awaiting admission to university hence restrained from granting a cash bail which he probably would not be able to afford.

[145] *Republic v Peter Muia Mawia* (2015) Machakos HC Criminal Case No 48 of 2015.
[146] *Republic v Peter Muia Mawia* (2015) Machakos HC Criminal Case No 48 of 2015.

Therefore, the bail decision making process ought to be with the intention of guaranteeing an accused's attendance in court when required.

3.4 CONCLUSION

This chapter sets out to analyze the gaps that exists in the criteria used by Kenyan courts in determining bail amounts. It has done so by analyzing the laws and guidelines followed by Kenyan courts when making bail decisions, how judges in some Kenyan courts determine bail amounts where the accused is a person of modest means and the insights gained from the analysis. In doing so, this chapter has examined and highlighted the criteria used by courts in Kenya in their disbursement of justice through the determination of bail amounts and in ensuring the protection and realization of the right to bail. In the following chapter, the research will examine the most beneficial approach in the determination of bail amounts especially in relations to accused persons of modest means.

CHAPTER FOUR: BEST APPROACH IN THE DETERMINATION OF BAIL AMOUNTS REGARDING ACCUSED PERSONS OF MODEST MEANS

4.1 INTRODUCTION

In this chapter, the study will examine the existing alternatives to determine bail when the socioeconomic status of the accused is at the forefront because by doing so it will determine the best approach in the determination of bail amounts especially in relations to accused persons of modest means. It will begin by analyzing the weight given to the economic status of the accused when determining bail amounts by judges in other jurisdictions then examining the differences and similarities with how they tackle this then after, analyze insights gained from the analysis.

4.2 ECONOMIC STATUS OF THE ACCUSED AT THE FOREFRONT OF BAIL DETERMINATION

Under pretrial release, courts in US consider the economic status of the accused. The consideration of their ability to pay when determining pre-trial release differs from state to state as follows; states such as Alaska require courts to consider the "employment status" as well as "the assets available to the accused to meet the monetary conditions of pre-trial release".[147] Whereas in states such as Arizona, the accused's economic resources, family relations, as well as their employment status are considered when determining the method of pre-trial release or the amount of bail required.[148] Other states such as Connecticut have a statute that requires a uniform weighted pre-trial release criteria to include the accused's financial resources, which is to be established by the Court Support Services Division.[149]

[147] Pretrial Release: Financial Conditions of Release < https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-financial-conditions-of-release> on 10th February 2024.
[148]Pretrial Release: Financial Conditions of Release < https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-financial-conditions-of-release> on 10th February 2024.
[149] Pretrial Release: Financial Conditions of Release < https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-financial-conditions-of-release> on 10th February 2024.

Furthermore, in Georgia, the court considers the accused's financial resources and other assets which includes whether these assets are jointly controlled and whether there exist any financial obligations, including to dependents.[150] This is clearly illustrated in the case of *Bearden v Georgia*[151] where the accused was charged with burglary and theft to which he pleaded guilty. The trial court failed to pass judgment averse to the accused and alternatively deferred him to more advanced court proceedings and assigned him probation with the condition that he pays a fine of $500 and restitution of $250. The accused was expected to furnish 200 dollars instantly, and the remainder of 550 dollars in the next quarter of the year. The accused was a man of modest means and borrowed the initial payment of $200 from his parents, who were also poor. On the set date of payment, the accused was unable to pay the remaining amount therefore the court revoked his probation and arrested him.

The Supreme Court, however, found that an accused's mere inability to pay restitution or a fine does not justify the revocation of probation without evidence of this failure being without efforts of good faith or wilful refusal. The case established a two-part test for judges to consider before revoking bail when there is a delinquency to clear a fine or redress. First, the court ought to consider the accused's wilful refusal to pay which addresses the intention and deliberate non-payment despite the means or ability to do so. Secondly, the judges must evaluate whether there were reasonable efforts made by the accused to abide by the financial conditions considering the individuals financial resources and circumstances.

Despite the requirements of the consideration of financial status set out above, nearly half a million people in the United States are incarcerated pre-trial due to their inability to afford bail.[152] Specifically, advanced bail laws were passed in New York and were effective in January 2020 which supported that judges ought to regard the accused's ability to afford the bail amount when fixing the same and also whether setting the bail

[150] Pretrial Release: Financial Conditions of Release < https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-financial-conditions-of-release> on 10th February 2024.
[151] *Bearden v Georgia*, The Supreme Court of United States, 1983.
[152] Liu P, Nunn R, and Shambaugh J, 'The Economics of Bail and Pretrial Detention' *1 Washington, DC: The Brookings Institution and The Hamilton Project* 1, 2018, 14.

would cause "undue hardship" if granted.[153] An accused's capacity to afford bail in the absence of disproportionate deprivation is founded on two underlying principles. The first being that their destitution ought not to conclude in pretrial detention merely due to the inability to afford bail and secondly, where bail is settled, an individual should have the ability to do so in the absence of having to forgo affording rent, foodstuffs, childcare, or other common financial obligations.[154]

Therefore, a Bail Assessment Pilot was developed by the Vera Institution to deliver solid, personalized information on an accused's economic circumstances in the course of the bail hearing. This provides courts with; the form of bail affordable to the accused and the sum of bail the accused can soundly settle. This is founded on the computation of the accused's earnings, any communal aid they obtain, occurring expenses, and assets.[155] The project by Vera came up with about 30 questions as a "calculator" tool to determine an accused's capacity to afford bail and employed a bail expert to carry out interviews with the accused prior to the bail hearing for the purpose of fashioning the court with information on the amount and type of bail affordable to the accused.[156]

4.2.1 The process

The Vera Institute sets out a three-step process to be followed during Bail Assessment.

i) Referral stage

Under this stage, the Vera Institute refrained from influencing the judges to consider bail in cases where they otherwise would have released the accused on their own recognizance. This was resulting from recent data that reflected that New York City courts release 68 percent of all individuals arraigned citywide on their own recognizance and 3 percent on supervised pre-trial release programs.[157] Here, defense attorneys serve as gatekeepers and can refer specific cases to the Bail Assessment Pilot where they think bail will

[153] Rahman I, 'New York: Highlights of the 2019 Bail Reform Law' 1 *New York: Vera Institute of Justice* 1, 2019, 13.
[154] Heuvel S, Robinson A, and Rahman I,'A Means to An End: Assessing the Ability to Pay' 1 *Vera Institute of Justice* 1, 2019, 1-7.
[155] Heuvel S, Robinson A, and Rahman I,'A Means to An End: Assessing the Ability to Pay', 1-7.
[156]Heuvel S, Robinson A, and Rahman I,'A Means to An End: Assessing the Ability to Pay', 1-7.
[157] NYC CJA, Annual Report 2017, 2019, 23.

possibly be set. This is a crucial safeguard to evade net widening and overreach.

ii) Interview stage

To interview people awaiting trial, bail specialists utilize the bail calculator developed by the Vera Institute. An estimated amount of bail which would be affordable is provided by the bail calculator. Additionally, it recommends the most feasible form of bail for the accused. Where the accused is unable to pay but has a family member or friend who can, a bail specialist would reach out to the individual and inquire on the amount of money they can come up with and relay the details to the court and defense attorney.

iii) On-the record assessment stage

Upon the request of a judge or a defense counsel, the public defender is joined by the bail specialist in a bail application. Here an accused's ability to pay assessment on the record report is presented by the bail specialist in court prior to the judge's final bail decision. This includes the type of bail they can afford and the amount of bail affordable. In respect to the avoidance of net widening, the assessment is shared with the court by the bail specialist only when requested by the public counsel and where it is evident that bail will be set. A specialist's assessment will, however, not be provided where the indicted might be emancipated on his recognizance.

4.2.2 The 'calculator' tool

The 'calculator' queries address four aspects of economic assessment: an accused's earnings from employment, their assets from savings or accessible money or property,

and any earnings from aid, minus their occurring maintenance expenses.[158] The courts in New York calculate the financial status of an accused person using the formula below:

= (Income from employment + assets from saving/available cash + income from benefits) - ongoing living expenses

A negative sum stipulates that the accused's expenses are more than their earnings hence lack the capacity to settle the amount. The calculator assesses the form of bail the accused has admission to. The inclusion of an accused's ability to pay on the record corners the court into individually addressing each of the accused's cases and examining whether pretrial detention is intended.

4.3 DIFFERENCES AND SIMILARITIES ACROSS THE GLOBE

4.3.1 Canada

In Canadian courts, an accused's economic status plays a vital role in the determination of bail amounts. Canada made an intentional effort, through the 1972 Bail Reform Act, to deviate from requiring cash deposits at the bail stage on the basis that individuals ought not to buy their freedom.[159] Although there is a general recognition that the bail amount should be in accordance with an accused's means, other factors closely associated with poverty can work to systematically prevent an accused's pre-trial release on bail.[160] Some of these considerations include, whether the accused has a reliable network of family and friends that can act as sureties, whether he has a job, and whether there exists a criminal record. [161]

4.3.2 Australia

In Australian Courts the criteria for granting bail are outlined in the relevant Bail Acts which are split into three classifications; the likelihood of the accused showing up in

[158] Rahman I, 'New York: Highlights of the 2019 Bail Reform Law' 1 *New York: Vera Institute of Justice* 1, 2019, 13.
[159] Bail Reform Act, Canada, 1972.
[160] Deshman A, 'Set Up to Fail: and the Revolving Door of Pre-trial Detention' 1 *Canadian Civil Liberties* 1, 2014, 73-74.
[161] Deshman A, 'Set Up to Fail: and the Revolving Door of Pre-trial Detention', 73-74.

court; the interests of the accused; the community's protection.[162] Australian courts pay great heed to an accused's socioeconomic status through setting the factors to consider to ensure the reappearance of an accused.[163] These are: the background and community ties of the accused indicated by the nature of their home environment, their employment status, and their prior criminal record.[164] Consequently, bail amounts are set in the scope that would be appropriate to the accused based on their employment status among the other factors. This is at the discretion of the authorized authority; and an examination of any previous failures to attend court pursuant to a bail undertaking.

4.3.3 South Africa

South African courts hold that there is a need to inquire about the accused's ability to pay during bail determination. This inquiry requires an individualized approach to the capability of the accused to afford bail amounts.[165] This individualized assessment is established by a rights-based lens in deciding a suitable bail sum for the accused's situation and should on no account be predetermined by a schedule of sums fixed based on the type of the charge or other relevant factors.[166]

An illustration is the case of *Van Royeen v The State*[167] where the accused was convicted on various counts of theft and the unlawful ownership of a weapon and ammunition. He challenged the constitutionality of bail provisions under the Magistrate Courts Act under the claim that it violated his right to be pretrial release due to the excessive amounts set beyond his means. It was sustained by the court that the right of bail is guaranteed in South Africa's Constitution, emphasizing that bail amounts ought to be set within the accused's financial realities. In South Africa, the case established a legal precedent for

[162] Bamford D, King S and Sarre R, 'Factors Affecting Remand in Custody: A Study of Bail Practices in Victoria, South Australia and Western Australia' 1 *Australian Institute of Criminology* 23, 1999, 20-29.
[163] Bamford D, King S and Sarre R, 'Factors Affecting Remand in Custody: A Study of Bail Practices in Victoria, South Australia and Western Australia', 20-29.
[164] Bamford D, King S and Sarre R, 'Factors Affecting Remand in Custody: A Study of Bail Practices in Victoria, South Australia and Western Australia', 20-29.
[165] Hardy K and Ruiter N, ' Study On The Use of Bail In South Africa' < https://apcof.org/wp-content/uploads/023-apcof-research-study-on-the-use-of-bail-in-south-africa-nicola-de-ruiter-and-kathleen-hardy-.pdf>.
[166] Hardy K and Ruiter N, ' Study On The Use of Bail In South Africa' < https://apcof.org/wp-content/uploads/023-apcof-research-study-on-the-use-of-bail-in-south-africa-nicola-de-ruiter-and-kathleen-hardy-.pdf>.
[167] *Van Royeen v The State*, The Appellate Court of South Africa, 2002.

guaranteeing the consideration of affordability in bail settings which in turn promoted fairer access to pre-trial release.

4.4 PRESCRIPTION FOR THE FUTURE

Drawing precedence from the above, the personalized approach of computing bail is a distinctive and crucial step to ensure the realization of the right to pre-trial liberty across the globe, especially for persons of modest means. Courts in different jurisdictions tend to utilize the "means test". This means that they rely on the consideration of the accused's financial status through assessing their income (if employed) or their financial background and way of life when determining bail conditions. The assessment is done before the accused appears in court for their bail hearing but once they have already been arrested. Some scholars in different jurisdictions recommend what exactly should be considered, how to go about that procedure and even how to calculate the "inability" to afford the bail terms.

Naturally, any prescription made must be geared towards ensuring the realization of the right to bail for accused individuals of modest means. The approach presented creates a backdrop for a prescription for the future criteria to be used by Kenyan courts during bail determination. The calculator tool would benefit the Kenyan courts by avoiding the setting of excessive bail terms by judges and instead will not only provide bail amounts which are affordable to the accused person of modest means but also provide for appropriate bail conditions tailored to the accused.

This paper therefore agrees with scholars like Mpaure and Saikumar, that courts ought to be more empathetic towards the accused when assigning bail and ought to consider their history, financial status and employment status. This stems from the necessity to recognise the rationale of bail being to guarantee the appearance of an accused in court when required. Hence the best approach to be taken by Kenyan courts when determining bail amounts would be to adopt this clear and transparent socio-economic measure.

4.5 CONCLUSION

This chapter sets out to examine the existing alternatives to determine bail when the socioeconomic status of the accused is at the forefront. It has done so by analyzing the weight given to the economic status of the accused when determining bail by judges in other jurisdictions, examining the differences and similarities with how they tackle this, and the insights gained from the analysis. In doing so, this chapter has examined and highlighted the best approach in the determination of bail amounts especially in relations to accused persons of modest means.

CHAPTER FIVE: CONCLUSION

5.1 SUMMARY OF FINDINGS

The study sought to examine the current interpretation of Section 123(2) of the CPC by Kenyan courts along with the interference it has with their duty to protect the realization of the right to bail of indicted persons vis-à-vis the presumption of innocence. The right to bail of an accused person is jealously protected by the Constitution of Kenya under Article 49(1)(h). The realization of the right is achieved in the absence of compelling reasons to deny it. As brought out in this study, the rationale of bail is to ensure that the accused person appears in court when required. Kenyan courts are empowered under Section 123 of the CPC to determine reasonable bail amounts and moreover determine what is excessive.

Findings of this study have shown that despite the averments in the CPC, gross violations are evident both in the past and present due to different interpretations of the provision and inadequate legislation on what constitutes reasonable bail conditions. Additionally, although the right to bail is resounded by the Bail and Bond Policy Guidelines, it is clearly illustrated through case law that some Kenyan courts have granted financial bail amounts with little to no regards for the accused's economic capability to meet the bail terms. By doing this, although granting the right to bail, the setting of bail amounts beyond the accused's financial capability subjects him to pretrial detention. Consequently, this study has clearly brough out the gap that exists in the current criteria used by Kenyan courts in the determination of bail amounts.

The distributive theory relied on herein supports that distribution of services and social goods within a community ought to be guided by fairness and justice. The theory demands that those of modest means ought to be favored regarding resource distribution. Similarly, the theory applies in the determination of bail amounts with the aim to ensure affordability of bail amounts for persons of modest means.

The study does not seek to diminish the current criteria used by Kenyan courts when determining bail amounts but instead offers an elaborate remedy on how to ensure bail is affordable to indigent accused persons in the absence of release on one's recognizance.

5.2 RECOMMENDATIONS

The primary aim of my study is to establish a socioeconomic measure that Kenyan courts should consider, through the lens of the principle of equity and inclusivity, when exercising their discretionary power in the determination of bail amounts. This will enable bail amounts to be accorded to an accused person in relation to their unique socioeconomic circumstances, hence curb pretrial detention of indigent persons due to the mere fact of their inability to raise funds. Moreover, it will reduce overcrowding in prisons and prevent accused individuals from inhumane and undignified conditions of pretrial detention they may be subjected to. This study therefore seeks to make two possible recommendations.

The first recommendation is the introduction of a standard measure in Kenyan Courts for bail hearings that will set out relevant information to compute the accused's financial status through their analyzing their financial obligations, income, employment status, assets, place of residence, whether they are attending either any training program or a school, or other information that may be relevant. Courts should aim to set bail amounts more directly to the financial resources of an accused person. This would serve to curb the granting of sums which they recognize the accused is incompetent to settle.

Therefore, Kenyan judges should emulate the 'means test' when determining bail amounts. This test ensures the socioeconomic status of the accused is considered at the forefront when determining the amount. This is possible through the application of the 'calculator tool' as used in New York courts. As mentioned in the previous chapter, the formula that Kenyan judges would utilize to calculate the appropriate amount to grant bail to an accused person considering their socio-economic status is as below.

= (Income from employment + assets from saving/available cash + income from benefits) - ongoing living expenses

If this calculation results in a negative amount, the accused's financial expenses are more than their earnings hence they possess "no ability to pay". The calculator tool would then assess the form of bail the accused has access to. The measure suggested is suitable in so far as it is rationally connected to the aim and rationale of bail which guarantees the attendance of court by the accused person. By providing a clear and transparent socioeconomic measure in relation to the determination of bail amounts, the courts will openly aid the realization of pretrial liberty as a right of an indicted individual, especially those of modest means.

The implementation of the 'calculator tool' in Kenyan courts seeks the participation of different legal actors. These include the judges, prosecutors, defense attorneys, bail specialists, investigation officers together with pretrial detention services. These actors play a vital role in the three-step bail assessment process and framework, developed by the Vera Institute, by providing the courts with more accurate information relating to the accused's socioeconomic status through diligent investigation. This will call for prompt and effective steps taken pre-trial to ensure the dispensation of justice and the fulfilment of the right to pre-trial freedom in Kenya.

Under the referral stage, the prosecutor can sieve out the specific cases after plea-taking that ought to be afforded bail in the lack of compelling reasons to deny bail to the accused. The second stage, the interview stage, would require the investigation officers to conduct thorough and transparent interviews of the accused persons together with their friends or relatives. This is geared towards assessing their financial status. Lastly, under the on-the-record assessment stage, the relevant actor (investigating officer or police) will present an on-the-record report in court that states the accused's ability to pay. Here the judge can then subject the information obtained to the 'calculator tool' to establish the amount of bail affordable to the accused or the type of bail affordable.

As such, the second recommendation is the implementation of this best approach by amending Section 123(2) of the CPC through the inclusion of the consideration of the socio-economic status of the accused when Kenyan courts are exercising their discretionary power on bail determinations. Therefore, the amended section ought to read as, "*The amount of bail shall be fixed with due regard to the circumstances of the case,*

the accused's socio-economic status*, and shall not be excessive*." Consequently, this would propel the utilization of the socioeconomic measure set forth in Kenyan courts when determining bail amounts.

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