

**TOWARDS A LIMITATION OF JUDICIAL
DISCRETION ON BAIL IN KENYA: A FOCUS ON
THE CRIME OF TERRORISM**

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**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE BACHELOR
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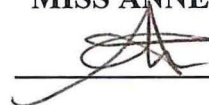
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DISSERTATION DECLARATION FORM

I, **LESLY MILLSCENT PINTO** declare that this dissertation is my original work and has not been submitted for the award of a degree in another University.

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This dissertation has been submitted for examination with my approval as a university supervisor.

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LIST OF ABBREVIATIONS

CPC	Criminal Procedure Code
CoK	Constitution of Kenya
eKLR	Kenya Law Reports
ICCPR	International Covenant on Civil and Political Right
NCAJ	National Council for Administration of Justice
PTA	Prevention of Terrorist Act
PLO	Palestine Liberation Organization
PKR	Pakistani Rupees
SLA	Security Laws (Amendment) Act
UN	United Nations
WPA	Witness Protection Act

ABSTRACT

Under Kenya's Constitution 1962, terrorism, and treason were not grounds for being granted bail, but its new 2010 Constitution makes all offences bailable. There are no guidelines to govern the grant or denial of bail in the new constitution. This is clearly a challenge in the prosecution of terrorists, which have grown in numbers for the past years. The High Court has not taken advantage of legal instruments which would permit denial of bail to terrorism suspects on a consistent basis. Terror suspects are increasingly committing deadly attacks while released on bail, the ability of High Court Judges to make bail decisions that are in the public interest is questionable. There is therefore a need for legislation or constitutional review for restricting the right to bail for suspects of serious offenses in order remove these decisions from the hands of Kenya's judges. This paper discusses reasons why there is a need to deny bail to suspected terrorists.

CHAPTER 1: INTRODUCTION

Bail is the security given by the accused that he will appear and answer before the proper court the accusation brought against him and includes a bail bond or a personal bond. Bail is one of the rights protected by the constitution based on the notion that one is innocent until proven guilty.¹ Bail is generally reviewed at a preliminary hearing within twelve to twenty-four hours after the issuance of a complaint. At this preliminary hearing, the judge will ask the prosecutor to make a statement with respect to bail. The prosecutor will provide the judge with a brief description of the case, and then give an opinion on whether bail should be set, and how much the bail should be. After the prosecutor is finished, the judge will ask the defense lawyer to respond. This is the defense lawyer's chance to challenge statements made by the prosecutor or add information that the prosecutor may have left out. In this argument the defense lawyer may request outright release, or if that seems unlikely, an amount of bail likely to be made by the defendant. After hearing from both sides, the judge will make a decision about bail.

BACKGROUND

Kenya has been the scene of various attacks attributed to terrorist elements. In 1980, the Jewish owned Norfolk Hotel was attacked by the Palestine Liberation Organization (PLO). In 1998, the US Embassy in Nairobi was bombed, as was the Israeli owned Paradise Hotel and in 2013 the militant Al-Shabaab killed over 80 people at Nairobi's Westgate Shopping Mall². With that brief analysis on terror attacks in Kenya, a question should be asked on whether these alleged terrorists should be granted bail or should they have that kind of right given to them. Bail as we have seen, is the temporary release of an accused person awaiting trial. Will this right interfere with the fight against terrorism in Kenya? This paper will seek to answer this question.

A person charged with a crime is entitled to be released on bail pending trial in most cases. Bail is a mechanism used to ensure the attendance to court by an arrested person.

The justification of the process of bail is essentially a practical one, keeping in mind the principles of Justice. With regard to police bail, it is important that the police are given time to

¹ Article 17, *Criminal procedure Code* (2012)

² Stanford University, *Terrorism in Kenya*

investigate the criminal allegation and then to try to ensure the defendant returns to the police station so they can question them after the investigations.³

Article 49(1) (h) of the Constitution provides that an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial⁴. Under Kenyan law, an arrested person can be granted bail either by the police or the court. The right to bail is not absolute. According to Section 123 (1) of the Criminal Procedure Code(CPC), a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is not entitled to bail. It is true that the Criminal Procedure Code attempts to show that bail is not an absolute right but the Constitution states otherwise and in fact the CPC does not address the crime of terrorism. The accused person's right to bail also includes the right not be required to provide excessive bail.⁵

In exercise of its discretionary power, the High Court may direct that an accused person be granted bail or that bail set by a subordinate court or a police officer be reduced. In cases where the amount of bail is excessive, the advocate for the accused may make a motion for the reduction of the bail amount. Alternatively, he can make a motion for the accused to be released on his own recognizance. To increase the chances of being released on his own recognizance, counsel for the accused should investigate and bring forth all evidence that presents the accused in the best possible light.

This paper focuses on bail for terrorist suspects and the legislative framework governing this kind of bails internationally and nationally. With different questions being asked on areas which are necessary for the government of Kenya to answer.

Topics such as bail jurisprudence particularly in terrorism cases more often than not conjure up emotions about those who need to be put off the streets and forget about the cardinal principle of the presumption of innocence in Criminal Justice. Terrorism is currently a crime without borders. It would definitely fit into the definition of organized crime, however prescribed. Its reach is global. However, the execution of the ills of terrorism is boundary specific. Kenya has played

³ Findlaw.co.uk/law/criminal/yourrights/what-is-bail.html (19 July 2013)

⁴ Article 49 Constitution of Kenya 2010

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

host to various heart-rending episodes of acts of terrorism. The state of Kenya currently faces a security challenge probably never experienced before. Security apparatus in the institutional framework of the Republic of Kenya are now required to interrogate the existing paradigms of dealing with the security situation and forge new paradigms. Unfortunately, threats to security do not give room to these apparatus to conceptually design the paradigm shift, test it before they strike. The greatest of these security threats has been the global problems of terrorism⁶.

One of the proposals, whose origin is the executive arm of government, has been to urge the judiciary not to grant bail to terrorism suspects. Whereas the executive has made this proposal in the form of roadside declarations,⁷ there has been no corresponding policy and legal guidelines to direct the judiciary on how to implement these declarations.

It is evident from some cases that courts in Kenya have suffered serious difficulties in evolving a coherent jurisprudence on guidelines that will fill the gap of a lack of legislative guidelines on determining "compelling reasons" warranting deprivation of bail which is why there is an urgent need for policy relating to this matter.

Before enacting the new constitution, Kenya ratified the International Bill of Human Rights, which includes the Universal Declaration of Human Rights (UDHR).⁸ Following that, it also ratified the regional African Charter of Human and Peoples' Rights (African Charter)⁹ which contains a limitations clause in Article 27(2), that states, "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interests."¹⁰ Kenya maintains legal responsibilities under all these instruments, and its courts are obliged to adhere to these instruments when prosecuting terror suspects. In addition to that the High Court of Kenya has unlimited original jurisdiction in criminal matters under Article 165(3) under the 2010 Constitution of Kenya.¹¹ This judicial provision gives courts an

⁶ 'Elisha Zebedee Ongoyaa, *Legal and Policy Dilemma in The Fight Against Terrorism: The Bail Question In Terrorism Cases In Kenya.*' *National Council for Law Reporting* (2013) Kenya Law, www.kenyalaw.org/kenyalawblog

⁷ Moses Chelanga, *Terrorist Suspects too have a right to be released on Bail*, 16, June 2014, ilaw.co.ke/blawg/terrorist-suspects-too-have-a-right-to-released-on-bail/

⁸ Peter Onyango O, *Kenya Entangled in Proscribed Crimes of Terrorism and Violations of Human Rights Law*, 3(1) *Sociology and Anthropology* 5, 2 (2015)

⁹ Peter Onyango O, *Kenya Entangled in Proscribed Crimes of Terrorism and Violations of Human Rights Law*, 3(1) *Sociology and Anthropology* 5, 2 (2015)

¹⁰ Art. 27(2) June 27 *African (Banjul) Charter on Human and Peoples' Rights*, 1981, OAU

¹¹ Article 165(3), *The Constitution of Kenya*, (2010)

opportunity to deal with terror cases brought before the specific court for determination and adjudication.

1.1 STATEMENT OF THE PROBLEM.

The Constitution of Kenya under Article 50 gives rights to arrested persons, and one of these rights includes the right to be granted bail or bond. Although this is so, the Constitution only states that an accused person may be denied bail if the prosecution gives compelling reasons on why an arrested person may be denied bail. Terrorism, in the eyes of many, is a grave crime and it could be argued that people who have been arrested because of terrorism activity should not be granted bail. The fact that the constitution is silent on what compelling reasons are has led to a lot of controversy between judges who have taken it upon themselves to address what compelling reasons should be. Judges believe that they swore an oath to uphold the Constitution which means that all discretion lies with them and that they are entitled to grant bail to these suspects. This has led to instances where justice has not been served. In addition it has led to tension between the judiciary and the executive whereby the executive is in total disagreement with judges who grant bail to suspected terrorists¹²

¹² Dr. Scholastica Omondi, 'Balancing the Constitutional Rights to Bail and State Security in the context of Terrorism Threats and Attacks in Kenya' Volume 3, Issue 2 (2015).

1.2 WHAT ARE THE OBJECTIVES

1. Providing the current situation of granting bail to suspected terrorists in Kenya and what impact it has had on the country because of lack of clarity.
2. An analysis of the ways in which judges are finding it hard to address this issue because the constitution does not make it easy for judges
3. Demonstrating a clear picture on the impact that granting bail to suspected terrorists may have on the country.
4. Analyzing the different ways how Kenya has opted to use International Instruments to interpret the law.

1.3 RESEARCH QUESTIONS

Firstly what is the current structure and situation of handling bail in Kenya? Secondly, Kenya's constitution insists that prosecutors give compelling reasons for denying bail to terror suspects, and the new constitution is silent on what compelling reasons are, whether this will in fact reward judges and magistrates to use this discretion in bail decisions. Thirdly, what constitutes a compelling argument for the denial of bail? In addition, how do other jurisdictions deal with this issue of bail for suspected terrorists and what international instruments is Kenya guided by.

1.4 SCOPE OF LIMITATIONS OF THE STUDY

There may be challenges like media reporting inaccuracies. Government censorship and disinformation may also affect results. In addition, time may be a limitation while trying to carry out research.

1.6 CHAPTER BREAKDOWN

Chapter 1- Introduction

There will be an introduction the problem in this chapter followed by the background of the problem, statement of the problem, research questions in regards to the topic, objectives of the study, scope and limitation of the study and chapter summary

Chapter 2- Theoretical Framework and Methodology

Chapter 2 will entail a theoretical framework; this is a framework that guides the logical structure of this topic and study. One of the key concepts is to do with human rights. Therefore the theoretical framework is to do with a theory of human rights.

The research methodology will also be expounded in this chapter of the dissertation.

Chapter 3- Granting of Bail in Kenya

This will be an analysis and discussion of the research questions and objectives in this chapter.

Chapter 4- The Dilemma

This chapter entails case law and court decisions that have to deal with my topic. In addition, a demonstration of the research questions and objectives through case law and the dilemma in which the judges face.

Chapter 5- The position in other jurisdictions

This chapter is to show how different jurisdictions go about the issue of bail for terrorists and to also lay down the international instruments adopted by Kenya to interpret the law.

Chapter 6- Conclusion

This will be the breakdown of the whole dissertation.

CHAPTER 2: THEORETICAL FRAMEWORK AND METHODOLOGY

2.1 THEORETICAL FRAMEWORK

The natural rights theory was propounded by John Locke, Jean Rousseau and Thomas Hobbes. The theory suggested that everyone is born with an equality of certain rights, regardless of their nationality. Since they come from the divine being, natural rights cannot be justly taken away without consent. As the Declaration of Independence asserts, rights include; life, liberty and pursuit to happiness¹³. Other rights are protected in the Bill of rights, including the right to be released on bail or bond which is incorporated in the Kenya Constitution under Article 49.

John Locke expressed the radical view that government is morally obliged to serve people, namely by protecting life, liberty, and property. He explained the principle of checks and balances to limit government power. He favored representative government and a rule of law. He denounced tyranny. He insisted that when a government violates individual rights, people may legitimately rebel.¹⁴ The question should be asked is whether there is any violation by the government when it does not issue bail to suspected terrorists. To some, this may be seen as a good thing because the impact that these terrorists leave on people after they are captured by the authorities is of a great loss.

Thomas Hobbes in his account of human psychology identifies the first law of nature: "*by which no man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit that which he thinketh it may be best preserved,*" Hobbes speaks of individual liberty in exchange for some Social contract that people would need to uphold. For example, the constitution of Kenya is a form of social contract in which the government grants you freedoms and rights but so long as you abide by the laws. Failure to do so leads to arrest.

The founders of the natural rights theory believed that it is an important purpose of government to protect peoples' natural rights. James Madison included protections from government abridgement of natural rights in the Bill of Rights. It is true that the Bill of rights is meant to protect peoples' natural rights and, in this case, the rights of an arrested person who is to face

¹³ R Sharman, *Human Rights and Bail*, (2003) page 219

¹⁴ John Locke, *Natural Rights to life, liberty and Property*, Jim Powel, (1996)

trial¹⁵. This person, therefore, has the right to bail, but in cases of terrorists where is the line drawn on whether or not to give that right to those people who have declared war on another country. Is denying bail denying them their fundamental right or is it protecting innocent people from these dangerous people.

Secondly Legal Realism which argues that the real world practice of law is what determines what the law is; the law has the force that it does because of what judges do with it.

The scholarly analysis of judging has historically revolved around the central question; how much judicial decision making depend on legal reasoning? Do judges after finding the relevant facts of the case consult the legal rules and then arrive at their decisions? Or maybe the equation that judicial decision making is composed of the mere facts and legal rules as just an illusion?

Any discussion of decision making in contemporary courts whether national or international would be incomplete without the two ground theories of judging; formalism and realism, but focus in this matter is more on realism.

Legal Realism was arguably the most important and controversial theory of judging in history. There are few intellectual developments in the law that have been as influential, controversial and misunderstood.

Realism is a diverse school of thought and any attempt to homogenize it will distort more than simplify. When it comes to judicial decision making, realists have two general themes. First judges have a preferred outcome of a case even before they turn to legal rules; that preferred outcome is usually based on some non legal ground, concepts of justice, ideology, public policy preferences, and judges' personality and so on. Second judges usually will be able to find a justification in the legal rules for their preferred outcome. This is possible because the legal system is complex and often contradictory. Normally judges will find some cases, statutes, maxims, canons, authorities, principles that will justify their preferred outcome.¹⁶

On the other hand, there is a group that rejects realism: philosophers of law. To them realism is dead, mercifully put to rest by H.L.A Hart's decisive critique. H.L.A Hart rejected two forms of

¹⁵R Sharman, *Human Rights and Bail*, (2003) page 210

¹⁶VitaliusTumons, *Legal Realism and Judicial Decision Making*

rule skepticism by the realists whose view on the one hand talks about how law consists simply of the decisions of the courts and the prediction of them. He adds that decisions cannot be all there is to the law, for courts deciding cases are guided by the law and by legal rules that can be found in constitutions, statutes, regulations and past judicial opinions. Hart took rule-skepticism as a theory of adjudication more seriously.

According to this theory, statutes and the like may be law, but they are too indeterminate to be significant influences on or predictors of judges' decisions. This is because the law is indeterminate; judges actually decide cases on the basis of non legal considerations. Hart did not argue that this theory was incoherent, but he thought it was a great exaggeration.¹⁷

This theory brings up the argument of judicial decision making. On whether all discretion should be placed in the hands of the judges or whether a legislative policy should be implemented so as to guide judges in coming up with decisions to grant bail to suspected terrorist. There is a need for an air tight policy to avoid any sort of mistake regarding this crime. It is a grave crime and therefore needs to be addressed with utmost aggressiveness. Since judges may or may not grant bail to suspected terrorist. There is a need for clarity on this matter.

2.2 RESEARCH METHODOLOGY

Firstly, selection of research questions came from searching for the relevant and applicable laws that are governing acceptance and denial of bail for terror suspects, secondly through reading the part of Kenya's Constitution entailing the issue of bail, observing that it was silent on what constitutes what reasons are compelling to deny bail.

By using sufficient secondary data relevant to this topic by reading through articles and books. In addition, through relevant case law relating to the issue of bail for suspected terrorists which have been incorporated therein.

In addition collection of data from existing literature that is relevant to this topic, the sources include: Kenya Law Reports, The Kenya Gazette, The Judiciary of Kenya and their relevant books and articles, Kenya Case Law from the website like kenyalaw.org, Communications Authority of Kenya, Social Science Research Network, The World Fact book, and various

¹⁷ William and Mary Law Review: Legal Realism as Theory of Law

secondary data sources. In order to locate documents contained in internet database, through use of Boolean search logic available on reputable scholarly databases.

The deductive research came into place by finding the problem regarding this specific topic, like the lack of legislative guidelines governing the granting of bail to terrorist suspects, and demonstrating how judicial discretion on this matter should not only be limited but also backed up by a good legislative framework.

The research hypothesis from in which this research departs is that the rights of those suspected terrorists are protected by Kenya's new constitution excessively. In addition, the constitution is very vague with regards to the issuing of bail it does not state any specific crimes that bail rules may not apply, and furthermore demonstrating this through case law in Chapter four of this paper how judges have taken it upon themselves to determine what constitutes compelling reasons not to grant bail to suspects. This shows a clear indication of a need for a constitutional review and legislative policy on the matter.

Although judicial discretion is implied in Kenya's 2010 Constitution, and it is a constitutional right of suspects to be freed on bail pending a trial, bail should, in turn, be withheld if releasing a suspect will do more harm to others than good to the individuals of the country and the public. Primarily, this discretion to make bail decisions on a case-by-case basis for persons arrested on the terror offences should be taken out of the hands of judges and magistrates, and denied indiscriminately by statute to all such suspects.

2.3 LITERATURE REVIEW

In an article by the NCSL on the principles of effective sentencing and corrections policy says that legislatures should be able to convey a clear and purposeful sentencing and corrections rationale. The criminal code should seemingly articulate the purpose of sentencing, and related policies and practices should be reasonable, logical, and transparent to stakeholders and the public. Provide for agency mission statements that reflect the goal of recidivism reduction and the intended balance of surveillance, incapacitation, rehabilitation and victim restoration.¹⁸ In addition it should also express corresponding requirements of agencies and expectations of courts, include in stated objectives that programs and practices be research-based, and provide appropriate oversight. Furthermore, it should encourage collaboration among criminal justice, health and human services, and other relevant government agencies with intersecting (not conflicting) missions and goals. Include criminal justice system stakeholders in planning and deliberations. Lastly through a coordinating council or other structured body to facilitate policy development that includes input from a broad array of stakeholders and educate the public by providing meaningful and accurate messages about issues and approaches.¹⁹

With regards to terrorism in the United States, Michael Hardt in his article speaks about the changes in the criminal process. The convergence of police and military activities that Hardt and Negri describe, maps to the choice between traditional and new criminal process, and the acceleration of the convergence results from the perception of emergency created by the 11th of September attack in the United States of America. Consider the assertion that everything changed after 11th of September attack. The aspects of the new criminal process that relate to terror provide a legal structure for implementing the idea that everything has changed. Many of the new processes were carefully planned as stated in this article. The perception of emergency should not be equated with panic. This article also says that after the terrorist attack in the United States life still moved on and people still went back to their usual lives²⁰. Does this mean that the

¹⁸ National Conference of State Legislature (NSCL): Principles of Sentencing and Corrections Policy: A report of the NSCL Sentencing and Corrections Policy pg 11 2013

¹⁹ National Conference of State Legislature (NCSL): Principles of Sentencing and Corrections Policy: A report of the NSCL Sentencing and corrections policy, pg 13,2013

²⁰ Michael Hardt and Antonio Negri: Empire and Multitude, pg 28, paper no. 2007-5

new criminal process as a response to terrorism is an over exaggeration? Due to the recent terror attacks in 2014, Kenya came up with proposed laws on security.

Following the proposed security laws recently introduced in Kenya, there were a number of issues raised regarding bail for terrorist suspects. A lobby group comprising victims of terrorism said it would move to the Court of Appeal to challenge the High Court ruling on Security Laws (Amendments) Act, 2014. Terror Victims Support Initiative (TVSI) complained that the High Court's declaration that two sections of the laws were unconstitutional had left a void that could have far-reaching ramifications on Kenya's ability to fight terror. The lobby specifically raised concern with the striking out of two sections of the law regarding the rights of an accused person, specifically Section 20 of the Act on the right of an accused person to be released on bail person until trial time. Ben Mulwa, TVSI's convenor said that the court's ruling was skewed in favor of suspects at the expense of victims. Victims of the Westgate attack said laws should have been maintained to ensure that terror suspects are held in custody while their trial progresses. He said that terrorism is not a petty crime. By the time a suspect is arrested by law enforcers as a terror suspect and taken to court, there must be some high degree of evidence linking him or her to the offence. Letting such a person loose only grants him more time to hit again and we have seen this in the past where suspects have been bailed. This new Security Amendment Bill shows that Parliament is trying to speak on the matter but what impact would it have on the public.

Hypothesis:

The hypothesis moves towards the issue raised by the TVSI who think that these security laws on bail for terrorists may allow them to hit again.

Chief Justice Willy Mutunga in an article 'New Bail rules on the way for terror suspects said that courts should not act on emotions and prosecutors must do a comprehensive job and present the facts and evidence before the courts. He noted that judicial officers should grant bail on evidence and facts. Article 49 of the constitution does not use the word 'compelling' for the ornamental purpose. This, therefore, is one of the reasons why there is a need for legislative policy to avoid judges to act on emotions.

CHAPTER 3: OVERVIEW OF TERRORISM BAIL IN KENYA

There has been a high threat of terrorism in Kenya. The main threat is from the extremists linked to Al-Shabaab, a militant group in Somalia opposed to the Somali government. Al-Shabaab in the past few years has issued threats against Kenya because of its military intervention in Somalia. The Kenya authorities have increased security in the country in order to counter potential reprisal attacks. There have been large-scale terrorist attacks in Kenya, for example, the Westgate attack that killed dozens of Kenyans and the attack on a University in Garissa.²¹

This issue of terrorism raises many questions regarding the issuance of bail to these suspects, firstly the question of public safety and public opinion. The government of Kenya has had to increase the security laws of the country because of terrorism and terrorist attacks which has, in turn, led to some rights of citizens being taken away. In addition, the constitution of Kenya has recognized the right to bail of an arrested person, which then begs the question on whether this right should be adhered to even if it would mean that citizens will not feel safe knowing that these people are not in custody.

On August 4, 2010, Kenyan people participated in a national referendum which then resulted in the adoption of the new constitution of Kenya.²² The 2010 Constitution of Kenya replaced the previous constitution of 1963 which was negotiated and adopted by the British.²³ The 1963 Constitution ensured that capital offences such as treason, murder and terrorism were not crimes in which bail was acceptable. On the other hand, Kenya's new Constitution of 2010 makes all offences, irrespective of their gravity acceptable for bail.²⁴ One will wonder whether this constitution was keeping in mind human rights of people or whether it was a provision that was bluntly ignored by the state.

According to the Article 49(1) (h) of the 2010 Constitution, an arrested person has the right the right to be released on bail or bond, on reasonable conditions, pending a charge or trial, unless

²¹ www.gov.uk/foreign-travel-advice/kenya/terrorism (5th April 2015)

²² Eric Kramon & Daniel N Posner, *Kenya's New Constitution*, *Journal of Democracy*, April 2011, 89-103

²³ *The World Fact Book*, U.S Cent Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> (last updated 20 June 2014); see also International Legal Assistance Consortium & International Bar Ass'n Human Rights Institution, *Restoring Integrity: An assessment of the needs of the Justice system in the Republic of Kenya* (2010)

²⁴ Section 72(1)(e), *Constitution of Kenya*, (1963)

there are compelling reasons not to be released.²⁵ It should be noted that there is absence in Kenya's Constitution guidelines to govern the granting of bail. It would seem that this is a clear defect in the prosecution of terror suspects which has grown in number in the past few years when Kenya attained its independence. Kenya's Chief Justice appointed the Task Force on Bail and Bond to formulate Bail and Bond Policy Guidelines²⁶ in order to cure this defect. On 20 March 2015, these guidelines were released and they fall short of recommending an amendment strategy of the 2010 Constitution, or any legislation, that would be able to remove the discretion on bail and bond decision making from judicial officers in cases of crimes such as terrorism.

3.1 WHAT IS THE CURRENT STRUCTURE OF GRANTING BAIL TO SUSPECTED TERRORISTS?

It is important to know the structure on who grants bail to terrorists. The current structure of the High Court is controlled by the presumption of innocence, whereby every person will be presumed to be innocent until that person is proven to be guilty, contained in Article 50(2) of the 2010 Constitution, which states that an accused person should be released on bail or bond.²⁷ Following that, the International Covenant on Civil and Political Rights (ICCPR) states that such presumption signifies that pretrial detention should not be a punitive exercise and the fact that accused persons are not convicts should be reflected in their treatment and management.²⁸ Secondly and accused person has the right to liberty, but consideration must be given to the state's duty to ensure public safety.²⁹ Lastly, judicial officers should consider the victims before making decisions that affect them³⁰

With regards to the law making body, Parliament is the institution that is responsible for representation, law making and oversight which is guaranteed by the Constitution of Kenya.

²⁵ Article 49, *Constitution of Kenya*, (2010)

²⁶ National Council on the Administration of Justice KENYA, *Bail and Bond Policy Guidelines*. The Judiciary, March (2015) 6 para, 1-11

²⁷ Article 50(2), *constitution of Kenya*, (2010)

²⁸ Section 10(2)(a), *International Covenant on Civil and Political Rights*, (1996)

²⁹ *The United Nations Standard Minimum Rules for Non-Custodial Measures adopted by the General Assembly (GA) Resolution 45-110 of 4 December (1990)* U.N GAOR, 4Session, supp. No.49A

³⁰ Mark T Resmini, 'Limiting Judicial Discretion in Kenya's High Court: Towards a statutory framework for the denial of bails for persons arrested on suspicion of crimes of terror', St. John's University, School of Law John's University, School of Law

Parliament acquires its mandate from Kenyan citizens, and it is charged with the responsibility of their protection accordingly.³¹ The National Assembly passed the Security Laws (Amendment) Act (SLA) in 2014.³² The Security Laws (Amendment) Act amended various state legislation relating to the issue of bail for terrorists. Most specific, section 15 of the SLA amended section 36 of the Criminal Procedure Code (CPC) and in turn also adopted a language contained in the Prevention of Terrorism Act 2012 (PTA).³³ The Criminal Procedure Code was amended by inserting section 36A (1): "pursuant to Article 49(1) (f) and (g) of the [2010] Constitution, a police officer shall present a person who has been arrested in court within twenty-four hours after being arrested." However, under 36A(2), it states that where "a police officer has reasonable grounds to believe that the detention of a person beyond the twenty-four hour period is necessary, the police officer shall—produce the suspect before a court; and apply in writing to the court for an extension of time for holding the suspect in custody." Furthermore, section 36A(5): "[a] court shall not make an order for the remand in custody of a suspect unless—there are compelling reasons for believing that the suspect shall not appear for trial, may interfere with witnesses or commit an offense while on release; it is necessary to keep the suspect in custody for his protection, or, where the suspect is a minor, for his welfare; the suspect is serving a custodial sentence; or the suspect, having been arrested in relation to the commission of an offense, has breached a condition for his release." ³⁴

The Executive, which is headed by the President, attains authority from the people of Kenya. The Executive is under an obligation or is obliged to the national values and principles of governance when it enforces laws that are enacted by Parliament, implements public policy decisions.³⁵ In essence, any executive action that is directed at eradicating any form of terrorism should be in line with these principles.³⁶ The Executive has over the past years faced challenges when trying to balance the rights of individuals suspected of terrorism acts with the responsibility to protect the citizens of Kenya.³⁷ The Executive has criticized court judges for their handling issues of

³¹ Article 94(5), *Constitution of Kenya*, (2010)

³² The Security Law (Amendment) Act, No.167 (2014)

³³ Scholastica Omondi, *Balancing the Constitutional Right to Bail and State Security in the context of Terrorism Threats and Attacks in Kenya*, 22-32 (2015)

³⁴ Article 129-30, *The Constitution of Kenya*, (2010)

³⁵ Article 10(1) (2), *Constitution of Kenya*, (2010)

³⁶ Scholastica Omondi, *Balancing the Constitutional Right to Bail and State Security in the context of Terrorism Threats and Attacks in Kenya*, 22-32 (2015)

³⁷ Bomb attacks: Kenya Deputy President blames Judges, 5 May 2014. www.dailymail.co.ke

bail for terror suspects.³⁸ This led to the establishment of a taskforce formed in May of 2014, by Chief Justice of the Supreme Court of Kenya Willy Mutunga, for the generation of bail and bond policy guidelines.³⁹ The task force was able to produce policy may improve the inconsistency of issues relating to bail. Nonetheless, the team responsible for setting up these guidelines struggled to harmonize the policy and to check the disparities in bail and bond terms granted in courts." The guidelines have led to Executive criticism of judicial discretion on bail and bond decisions where the guidelines are not intended to fetter the discretion of police officers and judicial officers in bail and bond decision-making.⁴⁰

The Judiciary interprets the laws in Kenya, and it derives its authority from the people of Kenya just like the Executive and legislative arm of government.⁴¹ The courts and tribunals are guided by the principles of justice, while exercising their authority irrespective of status, and without delay, administered without undue regard to procedural technicalities; and the protection of the purpose and principles of the 2010 Constitution.

Sections 123 and 124 of the Criminal Procedure Code approves bail and bond whereby when a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any drug related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail, provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance. Secondly, the amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive. Thirdly, the High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.⁴² But, "before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on

³⁸ Mark T Resmini, 'Limiting Judicial Discretion in Kenya's High Court: Towards a statutory framework for the denial of bails for persons arrested on suspicion of crimes of terror, St. John's University, School of Law John's University, School of Law

³⁹ Willy Mutunga launches policy to guide bail, bond, Daily Nation, 20 March 2015, www.nation.co.ke

⁴⁰ Willy Mutunga, Policy to guide police bail, 20, March 2015, www.nation.co.ke

⁴¹ Article 159(1), *The Constitution of Kenya*, (2010)

⁴² Section 123 (1)-(3), *Criminal Procedure Code*, (2012)

bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer."

Following that, the penal code allows for bail and bond just like the CPC, it states that an offender when apprehended on any such warrant shall be brought forthwith before the court by which the warrant was issued, and the court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned for his appearing for hearing or sentence; and the court may, after hearing the case, pass sentence.⁴³ Lastly, it should be noted that in Kenyan law, bail can be issued to a detained person by the court or the police.⁴⁴ The Police Act states that—"a police officer investigating an alleged offence may require any person to execute a bond in such sum and in such form as may be required, conditioned on his due attendance at court if and when required so to attend.

3.2 HOW TO LIMIT JUDICIAL DISCRETION ON GRANTING OF BAIL FOR TERRORISTS

This part of the chapter seeks to inform the creation of a framework to guide judicial officers in the application of laws that provide for bail and bond. It is intended that any forthcoming structure be used to generate law that reduces, or does away with judicial discretion in bail and bond decisionmaking.

With regards to the qualifications of judges, it is important that all these judges are vetted before any power is vested in them. The minimum qualifications for appointment to the High Court of Kenya are: ten years' experience as a superior court judge or professionally qualified magistrate; or ten years' experience as an academic or legal practitioner; or an aggregate of ten years' from the above mentioned experience.⁴⁵ Before the 2010 Constitution, appointments of Judges were less rigorous. Appointments to the High Court are extremely important, especially where corruption within the Kenyan Judiciary is pervasive. The East African Bribery Index 2009 shows that the Judiciary is the third most public institution in Kenya that is prone to bribery. The Bangalore Principles of Judicial Conduct articulate the values that determine judicial behavior at

⁴³ Section 34(2), *Penal Code*, (Cap 63 Kenya)

⁴⁴ Section 23(1), *The Police Act*, (Cap 84 Kenya)

⁴⁵ Article 166, *The Constitution of Kenya*, (2010)

the international level: a Judge and members of the Judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favor in relation to anything done or to be done or omitted to be done by the Judge in connection with the performance of judicial duties."Judicial independence, therefore, acts as a "shield behind which judges have the opportunity to conceal possible unethical behavior"⁴⁶

Whereby a judge is corrupt and can easily be paid off to look the other way, this would be very dangerous for the country especially regarding the prosecution of terrorist. Where a judge believes that a suspect poses a threat when released on bail and goes ahead to grant bail for the terrorist, due to some form of bribe, he or she should be held responsible. This is one of the reasons why there should be a limit on judicial discretion.

3.3 IMPACT OF GRANTING BAIL TO TERRORISTS

Some of the impacts of granting bail to these terrorists can be seen from a perspective of another jurisdiction other than Kenya. This paper will demonstrate the findings in India and then demonstrate in Kenya.

Zakiur Rehman Lakhvi, a suspected mastermind of the 26/11 Mumbai attack and top Lashkar-e-Taiba (LeT) commander was released on bail by a Pakistani court. His release was the third time in less than four months that dreaded United Nations (UN) designated terrorist had been granted bail by the Pakistani courts. It was on 18 December 2014 when a Pakistani anti-terror court granted bail to Lakhvi for the first time. The bail had been granted to Lakhvi against a bond of Pakistani Rupee (PKR) five hundred thousand by an anti-terrorism court just two days after the Peshawar school massacre wherein 132 children and nine staff were killed by Tehrik-i-Taliban Pakistan. This led to protests from India forcing Pakistan to reorder his detention the very next day. Thereafter on 8 January 2015, he was granted bail in a six-year old kidnapping case by an Islamabad court against a surety of bond of Pakistan Rupees of two hundred thousand. However, he could not be released then as he was detained in Adiala Jail under Maintenance of Public

⁴⁶ Mark T Resmini, 'Limiting Judicial Discretion in Kenya's High Court: Towards a statutory framework for the denial of bails for persons arrested on suspicion of crimes of terror, St. John's University, School of Law John's University, School of Law

Order (MPO) for a month.⁴⁷ This can be a clear example of why the law should be clear on this crime. Such crimes should not be bailable.

The 2010 Constitution has made it increasingly difficult for state prosecutors to convince judges to deny bail applications to capital offenders and persons charged with terrorism related offenses. The constitution of Kenya stipulates that every arrested person has a right to be released on bail unless there are compelling reasons on whether one shouldn't be released⁴⁸. This is very difficult when it comes to achieving any form of justice. Compelling should mean people who have engaged in acts of terrorism. Why then should an individual who has killed dozens of people walk around freely pending his trial.

⁴⁷ Deepak Parvatiyar, 'Bail to Lakhvi and its impact on India' 13 April 2015, www.elections.in/blog/bail-to-Lakhvi-and-its-impacts-on-india/

⁴⁸ Article 50, *Constitution of Kenya* (2010)

CHAPTER 4: COURTS' DILEMMA IN BAIL APPLICATIONS FOR CAPITAL OFFENCES

In *Aboud Rogo Mohammed & Another v Republic at High Court of Nairobi*, the High Court reiterated that where a crime suspect seeks to be released on bail or bond pending his trial, the primary consideration is whether he will voluntarily and readily present himself to the trial court, and each case is to be determined in its own circumstances. However, in the context of the new Constitution, there seems to be emerging two different approaches by the courts on the issue whether the seriousness of the crime with which a suspect is charged should be a consideration and if so, how much weight should be given to it.⁴⁹

In interpreting the new Constitution, is Kenya's criminal legal system to make a sharp departure from this historical link and what significance, if any, is to be given to the gravity of the offence charged in considering an application for bail? Recent decisions of the High Court highlight two different approaches.

Most recently, in *Aboud Rogo Mohamed & another v Republic*, The High Court (Justice F. Ochieng) considered an application for bail pending trial filed by two persons charged with engaging in organized crime by being members of Al-Shabaab, an outlawed organized criminal group, contrary to section 3(3) and 4(1) of the Prevention of Organized Crimes Act, 2010. The offence carries a maximum term of fifteen years imprisonment or a fine not exceeding Kshs. 5 million or both the fine and the imprisonment. However, if the commission of the offence results in the death of a person, a convicted person would be liable to life imprisonment. The charge, in this case, related to the apparent suicide bombing in Nairobi on December last year of a passenger bus belonging to the Kampala Coach Bus Service in which the police reportedly recovered a notebook belonging to the bomber.⁵⁰

Reiterating the applicant's constitutional right to a fair trial which includes the right to be presumed innocent until the contrary is proved, the High Court refrained from making any conclusions about the guilt or innocence of the applicants. As the Judge observed, it was only the court that was conducting the trial that could determine whether or not the applicants had any

⁴⁹Micheal Murungi & Andrew Halonyere, 'Court's Dilemma in Bail Application,' *Kenya Law Reports* (2011)

⁵⁰*AboudRogo Mohammed & Another v Republic* [2011] eKLR

connection with the alleged suicide bomber and whether the record of a mobile phone number associated with the applicants in a note-book allegedly linked to the suicide bomber was sufficient to render the applicants criminally liable as charged. The only question that the High Court was concerned with at this stage was whether there were compelling reasons not to release the applicants on bail.⁵¹

In considering this issue, the Court referred to its previous decisions. In *Danson Mgunya & another v Republic* (Justice M. Ibrahim), while releasing two murder suspects on bond, the Court had observed that the Constitution was to be interpreted in a manner that enhances rather than curtails the fundamental rights of the individual and that each case is to be decided on its own facts⁵². Earlier in January last year, before the promulgation of the new Constitution, in the case of *Republic v Muneer Harron Ismail & 4 others* which involved a charge of being in possession of a large cache of firearms, the Court (Justice M. Warsame) released the principal suspect on ‘strict and stringent conditions’ and noted that one paramount consideration would be whether the release of the suspect would endanger the security of the public and public interest⁵³.

According to the most recent cases, Justice Ochieng stated that in the event that confidential matters are to be mentioned or discussed in court, it could jeopardize national security and the public interest. However, if it is left to the persons responsible for security to decide what matters constituted national security, state officers might hide behind the cloak of confidentiality even in a case in which the need for such confidentiality does not arise. A possible solution to this, the Judge further observed, would be to establish a procedure by which the court could privately look into the State’s evidence. The State would then have the opportunity to demonstrate to the court the danger that would be posed if bail was granted without the fear that by presenting its evidence the State was disclosing sensitive national security information. However, in order for this procedure to be applied and, even more importantly, in order to exempt the court from having to disclose the sensitive information when giving its reasons for its decision, the Judge stated that it would be necessary for parliament to pass enabling legislation.

⁵¹AboudRogo Mohammed & Another v Republic [2011] eKLR

⁵² Danson Mgunyu & Another v Republic [2011] eKLR

⁵³ Republic v Muneer Harron Ismail & 4 others [2010] eKLR

The case of *Republic v. Issa Timammy*,⁵⁴ the respondent was arrested in connection with a murder, and other terrorism related offenses in the county of Lamu. The applicant in this case was the state and was seeking a grant that would last them fourteen days to be able to investigate reports given by intelligence which observed that the crimes were previously planned and systematically executed. They were seeking more time of detention of the Respondents the state argued that if the respondents were given the chance at bail, they would manage to interfere with the investigation at hand and would also threaten the witnesses who would be able to testify against them. The Judge who was handling the matter concluded that the States' reasons were not compelling and decided not to prolong the detention of the respondents and in fact granted bond. The judge also noted that the State did not show that the respondents were a flight risk, and the Witness Protection Act (WPA) could provide necessary protection to potential witnesses, the State had the resources to ensure the security of society at large, and stated that the state had enough time to carry on the appropriate investigations on the Respondents.

These above cases demonstrate why there is a need for clear legislative policy and guidelines to govern the issue of bail for terrorist suspects. The decision should not only be left in the discretion of the judges who are increasingly finding it hard to form what is meant by 'compelling reasons' as stated in the constitution to grant bail for arrested persons. Courts have had to decide on their own what amounts to compelling reasons on the refusal of issuing bail to suspects which include the following:

In the case of *Mahadi Swaleh Mahadi v. Republic*,⁵⁵ the applicant was charged with sixty counts of murder in attacks which happened in Lamu county. The prosecution, in this case, argued against the accused being granted bail and said that if the accused was granted bail, it would encourage other terrorists who have escaped arrest to continue their acts of terrorism. Furthermore, the prosecution also stated that the court must balance the rights of the individual against the rights of society. In its rejection of the bail application, the High Court relied on specific grounds found in the affidavit of the investigating officer. The Court was in deep satisfaction that the charges facing Applicant were very "grave" and that the penalty for those grave crimes was death, which in the eyes of the court was incentive enough for the accused to

⁵⁴ Republic v IssaTimammy [2014] eKLR

⁵⁵MahadiSwalehMahadi v Republic [2014] eKLR

disappear and avoid trial if faced with the penalty of death. The Court also took judicial notice of the fact that a number of accused persons who had previously been granted bail by Mombasa Law Courts subsequently died under suspicious circumstances. Putting into account of these facts, the Judge concluded that detention of Applicant for his own protection is a compelling reason to reject bail.

In the case of *Abdikadir Aden Alias Tullu & 2 others v. Republic*,⁵⁶ the applicants were charged with the offense of possessing audio and visual materials used to "influence people ideologically, in order to commit terrorist attacks. The magistrate handling the matter refused to grant bail to the accused persons and by the motion of the High Court, they sought to be admitted to bail. Prosecution for the state went against the application stating and arguing that bail is not an absolute right, the severity and the circumstances of the offense, the fact that the application was rejected by the lower courts and the threat that it would pose to the public when a terror suspect will be released on bail. The court then found that there was nothing "cogent or tangible" was established, and therefore, the reasons given were not sufficiently "compelling" to deny the applicants bail. The judge, therefore, granted bail to the applicants.

*Republic v. Ahmad Abolafathi Mohamed & another*⁵⁷, the judge noted that article 49(1) (h) of the constitution vests discretion in the court to consider whether the reasons advanced amount to compelling reasons, upon which an applicant may be denied bail.⁵⁸ The applicants, in this case, were Iranian nationals who were responsible for the shipment dangerous explosive material through the Mombasa Port into Kenya. The prosecution argued against granting bail to the terrorist suspects stating that this would mean risking lives of the Kenyan people, and also argued that in the previous cases against the applicants who were the accused, the lower courts had denied them bail on two separate occasions before finally granting it. The prosecution also stated that the applicants were at flight risk because of the fact that they are foreign citizens, they also lacked a fixed place of residence, and inconsistencies related to their identities. The judge in this case, saw these as compelling reasons enough and indeed believed that if they were granted bail would pose a risk to the general public.

⁵⁶ *Abdikadir Aden Alias Tullu & 2 Others v Republic* [2014] eKLR

⁵⁷ *Republic v Ahmad Abolafathi Mohamed & another* [2013] eKLR

⁵⁸ Article 49(i)(h), *The Constitution of Kenya*, (2010)

Republic v. Francis Kariko Kimani,⁵⁹ the advocate representing the accused applied to the Nakuru High Court for his client to be released on bail while waiting for his trial to take place. The Judge relied on section 123 of the Criminal Procedure Code that states the no accused charged with the capital offenses of "murder, treason, robbery with violence, and attempted robbery with violence, and any drug related offense" may be released on bond or bail. The Judge opined that mass murder, and acts of terrorism should be added to this list of compelling reasons to deny bail. Following those reasons mentioned above, the judge refused to grant the accused person bail.

From the above analysis of the cases, it should, therefore, be noted that whether the accused will attend his trial informs judges' opinions of what are compelling reasons. As a practical matter, the above cases show that courts make this evaluation by considering the following factors: firstly it should consider the nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty; secondly the strength of the prosecution's case; third the character of the accused; fourth failure of the accused to observe bail or bond terms on a previous occasion; fifth the potential for interference with witnesses; sixth protecting the victims of the crime; seventh the relationship of the accused to any witnesses; eighth if the accused is a flight risk; ninth whether the accused is employed; tenth preservation of public order, and peace and security; and lastly protection of the accused. These have been incorporated by the National Council of Administration of Justice (NCAJ). This is to help judges in their future decisions.

⁵⁹ Republic v Francis Kariko Kimani [2014] eKLR

CHAPTER 5: POSITION IN OTHER JURISDICTIONS

5.1 LEGISLATIVE FRAMEWORK IN UGANDA

Uganda is subject to various laws at the international, regional and national level in relation to pre-trial detention. At the international level, the applicable law includes the universal human rights treaties, which Uganda has ratified. This is in addition to the regional instruments including the African Charter on Human and Peoples' rights. Uganda is also subject to the human rights standards contained in instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the United Nations Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), among others.

Uganda is also subject to a range of African regional instruments including the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on the Rights of Women in Africa, the Protocol to the African Charter establishing the African Court on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child (ACRWC), among others. At the national level, the applicable law includes the Constitution of the Republic of Uganda, Penal Code Act, and Trial on Indictments Act, Criminal Procedure Code, Police Act, Prisons Act, Uganda Peoples' Defence Forces Act and the Children's Act, among others. These prescribe the rules for the treatment of detainees.⁶⁰

Accused persons are entitled to apply to the court to be replaced on bail and the court may grant bail on such conditions as it is reasonable. The constitution further provides that persons shall be released on bail for cases which are tried by the High court, as well as subordinate courts. If they have been remanded in custody for 180 days, in practice, however, there are many cases of persons remaining for long periods before trial. If bail were applied in terms of the law, the number of pre-trial detainees in Uganda would significantly reduce.⁶¹

⁶⁰Roselyn Karugonja Segwa, APGOF Policy Paper No.4: Pre-trial Detention in Uganda pg 3

⁶¹Roselyn Karugonja Segwa, APGOF Policy Paper No.4: Pre-trial Detention in Uganda pg 4

The President of Uganda, Mr Yoweri Museveni, recently made statements to the effect that bail should not be provided for certain categories of crime. The President stated that bail should be scrapped for demonstrators and economic saboteurs. He also said that bail for capital offences such as treason, terrorism, murder and rape should be denied until after 180 days on remand. Furthermore, he stated that rioting should be added to a list of offences which should not be granted bail.⁶² These calls have been opposed on the grounds that such an application of bail would be unconstitutional and discriminatory.

The Constitution does not recognize that bail an automatic right. In *Foundation for Human Rights Initiative v. Attorney General* the Constitutional Court held that the objective and effect of bail are well settled. They are to ensure that an accused person appears to stand trial without the necessity of being detained in custody. The Court further noted that an accused person charged with a criminal offence is presumed innocent until proved guilty, or pleads guilty, and that if an accused person is remanded in custody but subsequently acquitted s/he could suffer gross injustice. According to the Court, however, this does not make bail automatic. The effect is to merely release the accused person from physical custody while he or she remain under the jurisdiction of the law and is bound to appear at the appointed time and place to answer the charge or charges against him or her.⁶³

From the above analysis of Uganda, it is evident that the Constitution of Uganda does not specifically address offences that are not bailable. It should be noted that like Kenya, the President of Uganda does not condone to the release of suspected terrorists. Issues like human rights have come up because of this. Furthermore, Uganda and Kenya are seen to share the same sentiment on this matter.

5.2 THE POSITION IN THE UNITED KINGDOM

The Bail Act 1976, the act instructs courts to start with the presumption that an accused should be granted bail unless there is justified reason to refuse it. In deciding whether or not to grant bail, a number of factors, including

⁶²Roselyn Karugonja Segwa APGOF Policy Paper No.4: Pre-trial Detention in Uganda pg 4

⁶³Roselyn Karugonja Segwa, APGOF Policy Paper No.4: Pre-trial Detention in Uganda pg 6

- The nature and seriousness of the crime
- The character of the defendant, his past criminal record, associations and ties with the community
- The defendants recorded in regard to his previous commitments to bail conditions
- The strength of the evidence against the defendant

If the defendant is charged with a defense that is not punishable with a prison sentence, then bail can only be refused if the defendant has failed to surrender to bail in the past and there are grounds for reasonably believing the defendant is likely to do the same again.

If a person is charged with the crime of terrorism in this jurisdiction, the Anti Terrorism, Crime and Security Act 2001, allows foreign nationals who have been arrested on suspicion of some kind of terrorist offence, can be detained without the right to trial, if this occurs then inevitably there is no right to bail.⁶⁴

The current-counter terrorism of the U.K allow the police, under certain specified circumstances, to arrest individuals without a warrant who are reasonably suspected of being terrorists, once arrested, these terrorist suspects may be detained, without charge, for up to twenty eight days to allow the police to obtain, preserve, analyze or examine the evidence for use in criminal proceedings. This power of the police to arrest and detain individuals based on reasonable suspicion only, has been one of the most important powers available to the police to fight terrorism, the principal usefulness of the power is that it allows arrests to be made at an earlier stage than it was a requirement for suspicion of a specific offence. This may have both a disruptive and preventive impact on any terrorist plans that may be in process.⁶⁵

Generally in the United Kingdom, whereby a person is suspected to have committed any form of terrorism crime, this person is not eligible for bail because he or she is then detained by the police, without any chance of having a trial.

⁶⁴ How do the courts decide whether or not to grant bail: www.inbrief.co.uk/court-proceedings/bail, 19 April 2009.

⁶⁵ How do the courts decide whether or not to grant bail: www.inbrief.co.uk/court-proceedings/bail, 19 April 2

5.3 INTERPRETION OF THE RIGHTS OF SUSPECTS UNDER INTERNATIONAL, STATE AND REGIONAL LEGAL INSTRUMENTS

The Government and the citizens of Kenya have borne witness to an increase in terror attacks in the recent years, examples include an attack on one of the biggest shopping malls in the country known as Westgate Shopping Mall, an attack at a University known as Garissa University and the most recent attack which was on one of the Kenya Defense Force headquarters, there have been increasing concerns that people accused of acts of terrorism have fled the country after being granted bail.⁶⁶ This has in turn led to the undermining of the criminal justice system that has led to the negative effect in the country.⁶⁷ The following provisions of the Constitution of Kenya (2010), statutory laws, and policies sought to regulate the administration of the right to bail and pretrial detention of terrorism suspects. With regard to the administration of these laws, Kenya's three branches of the Government have recognized that a balance had to be struck between the rights of "suspects and accused persons to liberty and the presumption of innocence, and the public interest. Thus, an evaluation of the legal instruments that protect the rights of suspected terrorists is critical to locating this balance.⁶⁸

⁶⁶ United Nations Standard Minimum Rules for Non-Custodial Measures (adopted by General Assembly Resolution 45/110 of 14 December 1990) U.N GAOR, 45th Session, Supp. No.49A, UN, Doc, A/49/197.

⁶⁷ Mark T Resmini, 'Limiting Judicial Discretion in Kenya's High Court: Towards a statutory framework for the denial of bails for persons arrested on suspicion of crimes of terror, St. John's University, School of Law John's University, School of Law

⁶⁸ Mark T Resmini, 'Limiting Judicial Discretion in Kenya's High Court: Towards a statutory framework for the denial of bails for persons arrested on suspicion of crimes of terror, St. John's University, School of Law John's University, School of Law

5.3.1 INTERNATIONAL LEGAL INSTRUMENTS

No one international instrument sets out all the human rights standards on pretrial detention.⁶⁹ However, bail and bond decision-making is guided by principles derived from "international best practices." The UDHR protects all persons from "arbitrary arrest, detention, and exile." The right to bail is also recognized by the ICCPR, to which Kenya is a State Party.⁷⁰ Under Article 9(3) of this convention, "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should the occasion arise, for execution of the judgement." And further, Article 14(1) stipulates that "[a]ll persons shall be equal before the courts and tribunals." And that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The United Nations Human Rights Committee (HRC) is charged with monitoring state compliance with the ICCPR, and it has stated that the right to be tried by an independent and impartial tribunal is an effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."⁷¹

Additionally, there are relevant standards contained in the following non-binding instruments.⁵¹ The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) protect accused persons' right to liberty As a general rule, therefore, every accused person should not be detained, but should be released subject to a guarantee to appear for trial. However, terror

⁶⁹ Kristin Hausler and Robert McCorquodale, *Pre-trial detention and human rights in the Commonwealth*, British Institute of International and Comparative Law, Vol. 2, Issue 1, 9 (Spring 2014).

⁷⁰ James T. Gathii, *The Use of Force, Freedom of Commerce, and Double Standards in Prosecuting Pirates in Kenya*, 59 AM. U. L. REV.1321, 1343 (2010) (discussing allegations of torture, mistreatment, and denial of bail by those suspected of engaging in piracy in Kenya)

⁷¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5, *as amended by* Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; *entered into force* 3 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan 1990, Protocol 11 on 11 Jan 1998).

suspects who are detained in custody are expected to receive a high-quality of treatment: under the United Nations Basic Principles for Treatment of Prisoners, "[a]ll prisoners shall be treated with respect due to their inherent dignity and value as human beings," and further, "[t]he responsibility of prisons for the custody of prisoners and for society against every reasonable effort to avoid pretrial detention. These standards are considered to be "soft law," and create regulatory standards which states should comply with where possible.⁷²

5.3.2 REGIONAL LEGAL INSTRUMENTS

Concerning regional governance, Kenya is a State Party to the African Charter. The African Charter is the "foundational normative instrument for the protection and promotion of human rights in Africa." Article 6 pronounces that the detention of suspects, without the possibility of bail, constitutes an arbitrary deprivation of liberty: "[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." The African Charter contains several "claw-back" clauses which curtail specific human rights in certain circumstances for specified public reasons: "except for reasons and conditions previously laid down by law;" "subject to law and order," and "within the law." However, the African Commission on Human and Peoples' Rights (ACHPR), the body charged with monitoring states' compliance with the African Charter, has been successful in reducing the effect of the claw-back clauses by interpreting Articles 60 and 61, of the African Charter in light of international human rights jurisprudence.

Duties are also imposed on African citizens, under Article 27(1), regarding "family and society, the state and other legally recognised communities and the international community," and are encouraged to utilize their rights "with due regard to the rights of others, collective security, morality and common interest." Further, the right to a fair trial is protected by Article 7 of the African Charter. This right should be interpreted in combination with the duty of states under Article 26—to assure the courts independence. Article 7 concentrates on the "individual's right to

⁷² Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, International and Comparative Law Quarterly 38 no.4 (1989)

be heard," and Article 26 addresses the "institutions which give meaning and content to that right." As a way to strengthen fair trial rights under the African Charter, and mirror international standards, the African Union Heads of State and Government Summit in Maputo, Mozambique, adopted the Principles and Guidelines on the Right to a Fair Trial and Assistance in Africa (Principles and Guidelines) in 2003. The Principles and Guidelines cover a broad range of issues, including, general principles applicable to all legal proceedings, specific ones such as the role of prosecutors, and fair trial rights. The Principles and Guidelines protect individuals from unlawful and arbitrary infringements of their basic rights: "the right to life and liberty, the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all." Among the general principles applicable to all legal proceedings, a fair and public hearing is given prominence.⁷³

Fair hearings protect the principle of equality—"equality of arms between parties to a proceeding, whether they are administrative, civil, criminal or military," equality of persons before judicial bodies, equality of access to judicial bodies, and equality before the law in legal proceedings. Respect for dignity is very much stressed. The Principles and Guidelines also contain a provision on non-derogability.⁷⁴ Thus, no circumstance—be it the threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency—will justify derogations from the right to fair trial. This reiterates the non-derogability principle put in place by the ACHPR in its decision against The Republic of Chad.⁷⁵

⁷³ The African Union, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, A(2)(a), 2 (2003)

⁷⁴ *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, 9th Annual Activity Report in Compilation 1994–2001, IHRDA, Banjul 2002, pp.72–76

⁷⁵ *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, 9th Annual Activity Report in Compilation 1994–2001, IHRDA, Banjul 2002, pp.72

5.3.3 CONSIDERATION OF THE RIGHTS OF OTHERS UNDER ARTICLE 27(2) OF THE AFRICAN CHARTER

Article 27(2) claws back, inter alia, suspects rights: "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." This provision emerged from the idea that terrorism produces insecurity, which negatively impacts people's freedom of mobility, association, and development. An important role of any state, according to social contract theory, is to secure borders and protect its citizens and property. Citizens are, in turn, "obligated to pay their taxes to the state so as to facilitate it to render basic services which include security." Kenya has recently violated fundamental rights and freedoms of those suspected of engaging in terrorism in order to protect innocent civilians. For example, following incidences of terrorist attacks in 2013 and 2014, President Uhuru Kenyatta instructed parliament to amend security laws in an attempt to quell terrorist activities. But, Article 27(2) is somewhat ambiguous regarding the extent to which the right to bail can be clawed back, so Parliament had to interpret the drafters' intent through supplemental state legislation.

Parliament enacted the Victim Protection Act (VPA) in 2014, to "recognize and give effect to the rights of victims of crime."⁷⁶ This Act seeks to protect the dignity of victims of crime through the provision of better information. This Act implicates bail decision-making in two respects:

- (a) It imposes a duty on the courts to "ensure that every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken":
- and (b) It gives victims of crime the right "to have their safety and that of their family considered in determining the conditions of bail and release of the offender."

With regards to the above analysis, it is shown that international instruments that Kenya has ratified show that every person has a right to be released on bail and failure to do so would seem like a human right violation and accordingly laws should be put in place to ensure that there is

⁷⁶*The Victim Protection Act*, section 3 (a) No. 143 (2014), Kenya Gazette Supplement No. 17

public control and safety. Therefore, while courts of law are deciding on whether to grant bail to terrorist suspects, they should keep in mind the rights of the affected and the rights of the accused persons. This is why judges have come up with compelling reasons as to why they should or should not grant bail to terrorist suspects. Furthermore, Parliament should enact clear policies and guidelines so as to reduce the tension and controversy between judges and the Executive arm of government. There is clearly a need for a legislative policy on this matter.

CHAPTER 6: CONCLUSION

In 2015, Human Rights Watch reported incidences of extrajudicial killings of terrorism suspects by Kenya's Anti-Terrorism Police Unit (ATPU).⁷⁷ These suspects, "last seen in ATPU custody," received death threats from officers after their release by courts. These incidences support the contention that efforts to pacify security threats have been marred by ongoing patterns of serious human rights violations in Kenya, including, arbitrary detentions.

As indicated above, Article 49(1) (h), of the 2010 Constitution protects suspects' rights to bail: "[a]n arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."⁷⁸ Thus, bail is an entitlement of every accused person upon being formally charged at arraignment.⁷⁹ Deviation from appropriate pretrial procedure exposes the presence of discrimination.⁸⁰

Prosecutors must first make an application to limit the right to bail, and courts are obligated to address the matter through a full hearing. The accused must be provided the opportunity to probe the evidence offered in support of limiting the right to bail. The prosecution's arguments must not be based on mere suspicion, facts must be proved in these proceedings. It is only after a hearing that the court can decide whether a terrorism suspect's right to bail should be limited.

Article 25(c) of the 2010 Constitution is especially clear that fair trial rights of accused persons are non-derogable.⁸¹ Thus, any attempt by the Judiciary to limit fair trial rights of terrorism suspects would contravene Article 25(c) and be void to the extent of this inconsistency. Further, Article 50 articulates fair trial rights relevant to terrorism suspects: to be presumed innocent; to

⁷⁷ Human Rights Watch, *WORLD REPORT 2015 (Kenya)*, available at <http://www.hrw.org/worldreport/2015/country-chapters/kenya> (last visited Apr. 24, 2015)

⁷⁸ Article 49, *The Constitution of Kenya*, (2010)

⁷⁹ Scholastica Omondi, *Balancing the Constitutional Right to Bail and State Security in the context of Terrorism Threats and Attacks in Kenya*, 22-32 (2015)

⁸⁰ National Council on the Administration of Justice KENYA, *Bail and Bond Policy Guidelines*. The Judiciary, March (2015) 6 para, 1-11

⁸¹ Article 25, *The Constitution of Kenya*, (2010)

be informed of the charge, with sufficient detail to answer it; to have adequate time and facilities to prepare a defense; to a public trial without undue delay; to be present at trial unless the conduct of the accused person makes it impossible for the trial to proceed; to choose and be represented by legal counsel and to be informed of this right promptly.⁸² The Article also requires prosecutors to inform accused persons "in advance of the evidence that the prosecution intends to rely on, and have reasonable access to that evidence" to prepare for trial. The accused has a right to adduce and challenge the evidence against him. An accused person cannot be convicted for an act or omission that was not an offence in Kenya or a crime under international law at the time when it was alleged to have been committed or omitted. The accused has a right to the benefit of the least of the severe punishment where an offence has been changed between the time that the offence was committed and the time of sentencing. Any evidence intended for use by the prosecution that is obtained in a manner that violates the fundamental freedoms in the Bill of Rights is inadmissible as it would render the trial unfair. Fair trial rights are meant to ensure fairness in the conduct of the proceedings against terrorism suspects.⁸³

It is clear that bail, is an entitlement of every accused person upon being formally charged at arraignment, and, any deviation from appropriate pretrial procedure amounts to discrimination of a protected class of people. Suspected people are protected by the Constitution of Kenya. An inference is drawn that a determination of "compelling reasons," for the denial of bail, permits judges to use their discretion, where there is an absence of binding statutory guidelines. Ultimately, whether the accused will attend his trial informs judges' opinions of what are compelling reasons, with practical concerns, such as the nature of the offense, being determining factors.

Suspects' rights are sufficiently protected under international law by the UDHR, ICCPR, ECHR, and the Tokyo Rules; under regional law by the African Charter; and under state law by the 2010 Constitution. Article 27(2) of the African Charter is rather ambiguous regarding the extent to which the right to bail can be clawed-back in order to protect the rights of others, so Parliament had to interpret the drafters' intent through the enactment of the VPA. Thus, courts in Kenya,

⁸² Article 50 (2) (a) (i), *The Constitution of Kenya*, (2010)

⁸³ Article 50 (4), *The Constitution of Kenya*, (2010)

including the High Court, are required to defer to international law unless it is in contravention to the 2010 Constitution. An inference is drawn that a determination of "compelling reasons," for the denial of bail, permits judges to use their discretion, where there is an absence of binding statutory guidelines. Ultimately, whether the accused will attend his trial informs judges' opinions of what are compelling reasons, with practical concerns, such as the nature of the offense, being determining factors.

It is clear, therefore, that the rights of suspected terrorists are excessively protected by the foregoing international conventions on human rights, which have been domesticated by Kenya's new constitution, to the detriment—in the case of bail—of local and international societies. Article 27(2) of the African Charter gives Kenya's courts strong justification to deny bails to persons arrested on suspicion of crimes of terror. But, the High Court has so far failed to take advantage of this provision due to ambiguous intent regarding the extent of its use. Accordingly, increased authority must be afforded to the VPA. It follows logically that a suspects' constitutional right to be freed on bail pending a trial, should be withheld if releasing that suspect harbours even the slightest probability of harm to others. Ultimately, discretion to make bail decisions on a case-by-case basis for persons arrested on terror offences should be taken out of the hands of judges and magistrates, where this disposition should be applied *pro forma*, and denied indiscriminately by statute to all such suspects.

RECOMMENDATIONS

With regards to the current policy regarding bail for terrorist in Kenya, the Criminal Procedure Code improve the provisions relating to capital crimes that bail may not be granted to include terrorism as one of them. It is clearly stated earlier in this paper that according to the CPC, a person accused of murder, treason, robbery with violence, attempted robbery is not entitled to bail. There is however no mention of the crime of terrorism and since terrorism has the aspects of capital crimes; it should fall under the grounds for not issuing bail under the Criminal Procedure Code.

Secondly more powers should be afforded to the Victims Protection Act in which these victims of terrorism should be able to have a say into the persecution of terrorism or whether granting of bail should be awarded to them since the victims are directly affected by the actions brought about by terrorists.

The Constitution of Kenya and International instruments ratified by Kenya give all accused persons the right to bail while pending trial. It is therefore necessary that although this right is provided for under the Constitution, this right should be withheld by authority whereby there is strong belief that this accused person is going to cause more harm to the general public once they are released on bail.

Therefore it is without question that the law ensures that the right to bail is given to all but this right should not be an absolute one and policy should ensure that this happens, starting with the amendment of the Criminal Procedure Code to include terrorism as a ground which need not be granted bail, secondly the Victims Protection Act should be afforded more authority regarding this bail question and thirdly since the discretion currently lies with the judges, these judges should ensure that they are keen while granting bail to suspected terrorists. To ensure that they do not grant bail to suspects who may pose more harm on people.

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