

Enhancing The Right to Bail (Reviewing The Practice of Demanding Land and Vehicles as Security in Surety Bond)

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Abstract

In Kenya, Article 49(1) (h) of the Constitution protects the right of the accused to be released on bail. Many judicial decisions acknowledge the right. However, the reality is that accused persons often remain in custody since they are unable to deposit title to land, motor vehicle or other non-liquidated property as the security in surety bonds.

This paper interrogates whether the practice where Kenyan courts reject money and demand title to land or motor vehicles as security in surety bonds is consistent with the right to bail in the legal, social and economic circumstances prevailing in Kenya. The paper starts by examining the content of the right of the accused to bail or bond. It then discusses how demanding land and vehicles as security in surety bond affects the right. Finally, the paper interrogates whether requiring land and vehicles is consistent with the right. The objective of the paper is to provoke debate as to whether the practice is legitimate and perhaps instigate reforms.

I base this paper on the argument that conditions that are not expressly authorised by the law, are unduly difficult or are unnecessary, amount to excessive bail, are unreasonable and unconstitutional. The paper posits that the practice of rejecting money and demanding title to land, motor vehicles and other non-monetary properties is not authorised by the Constitution or statute. The empirical data revealed that majority of Kenyans do not have suitable land or motor vehicles. The data further demonstrated that the process of depositing title to land or motor vehicles as security is unduly

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cumbersome, costly, corrupt and stressful. Finally, that title to land or vehicle is not any better than cash bail or free bond in ensuring the accused attend trial.

The paper therefore concludes that though long entrenched, the practice of rejecting money and demanding title to land and motor vehicles or other unliquidated assets as security in surety bond does not serve any useful purpose, is unreasonable, amounts to excessive bail and is unconstitutional. Upon this finding, the paper suggests that we abolish this practice so as to enhance access to the right to bail.

In the year 2018, the Judiciary of the Republic of Kenya prepared the Criminal Procedure Bench Book, which amongst other things provides that,

‘Where an accused is required to provide security so as to be released on bond, the court must be furnished with a security document such as a title deed, motor vehicle log book, or an insurance bond. In addition to the to the security document, the court may require a valuation report revealing the value of the property being offered as security’².

In noting the category of the property that accused may offer as security in surety bond, it is important to note that the properties do not include money. This paper examines the paradox of excluding money from the properties that the surety may give as security and demanding title to land, motor vehicle and insurance bonds for what is essentially a monetary obligation. At the same time, the paper examines another closely related paradox of placing unnecessary obstacles to the money dominated bail /bond system at a time when other jurisdictions are enhancing access to bail by abandoning monetary bail in its totality for non-monetary bail³. In fact, excluding money from the

² The Judiciary, *Criminal Procedure Bench Book* (2018) 54.

³ Lea Hunter, ‘What You Need To Know About Ending Cash Bail’ (16 March 2020). <https://cdn.americanprogress.org/content/uploads/2020/03/23094429/04-23_Ending-Cash-Bail.pdf?_ga=2.159907134.287116841.1626099696-2122119285.1626099696>

security properties suggests that Kenya practises what may be called property bond as opposed to monetary bond.

Standard 10-1.4 of the American Bar Association Standards for Pre-trial release demonstrates the trend towards monetary bail and/ or security⁴. It provides that courts should promote release of accused on their own recognisance. Further, that additional conditions including cash bail and surety bond should only be imposed in cases where prosecutors demonstrate the need of the individual case to be reasonably necessary to ensure accused attend trial, protect victims, the public, witnesses and the integrity of judicial process. Standard 10-1.4 (c) provides that even in cases where courts find it necessary to impose financial conditions, the court should first consider releasing on unsecured bond.

In this spirit, the State of Arkansas in 2014 abandoned money bail by passing a law that provides that a judicial officer can only set money bail after he determines that no other conditions for release will reasonably ensure the appearance of the defendant⁵. In 2018, the State of California enacted the California Money Bail Reform Act that eliminated the money bail system and replaced it with a system that assesses the risk of flight, danger to the public and other non-monetary considerations⁶. The objective of these reforms is to avoid detaining the accused only because he cannot afford the amount of money bail⁷.

These jurisdictions abandoned the money bail because they realised its shortcomings. Foremost, they realised that many accused remain in remand prisons purely because they cannot afford to pay the money bail.⁸ Others plead guilty purely for convenience because the undue fine or sentence is a far lesser

⁴ The ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007) <https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc/> Accessed 20 May 2021.

⁵ Ark CODE ANN. S9.2 (West 2014)

⁶ S.BB10,2017-2018 Leg.,Reg. Sess. S.36 (Cal.2017)

⁷ Hunter (n 2).

⁸ *ibid.*

devil than remaining in remand prison indefinitely awaiting trial.⁹ In Kenya, innocent motorists opt to bribe traffic police officers or plead guilty purely because of fear of Kenya's bail system since it throws every accused into prison cells and makes it extremely difficult to satisfy the conditions for release on bail¹⁰. Another shortcoming of money bail is that it discriminates accused based on wealth, or rather lack of it, since the system releases wealthy accused facing similar charges. In addition, the money bail system violates the constitutional right to presumption of innocence by detaining the accused before conviction¹¹.

In Kenya, unfortunately, courts have not only stuck on the old money bail and security but they have also made it more difficult to satisfy its conditions by rejecting money and demanding title to land, motor vehicle or other non-monetary property as the security in surety bond¹². This is despite the fact that the 2010 Constitution gives the court wide leeway for improvising conditions for release. Rejecting money and demanding land and vehicles frustrates the right to be released on bail on reasonable conditions. Whereas this paper aspires that Kenya enhances the right to bail to the great heights of releasing accused without demanding money bail, this paper settles for a fairly modest objective that Kenyan courts accept money in surety bonds instead of the unlawful condition of title to land and vehicles. In the part below, the paper starts by discussing the nature and purposes of bail.

Whereas stakeholders including litigation lawyers assume that demanding title to land, vehicles and insurance bonds is lawful and necessary, data indicates

⁹ James A. Allen, 'Making Bail': Limiting The Use of Bail and Defining the Elusive Meaning of 'Excessive Bail' Journal of Law and Policy, vol. 25 No. 2, 2017 p. 637.

¹⁰ Transparency International Kenya, Traffic Legislation Gaps and Drivers of Corruption in Traffic Matters (May 2018) <https://tikenya.org>. <Accessed November 15, 2021>.

¹¹ Tracey Meares and Arthur Rizer, 'THE "RADICAL" NOTION OF THE PRESUMPTION OF INNOCENCE' [2020] The Square One Project. <<https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf>>

¹² Article 49(1)(h) of the 2010 provides that accused has a right to be released on bail on reasonable conditions unless there is a compelling reason not to.

that the practice is unlawful, and unnecessary. Above all, it frustrates exercise of the right to be released on bond since the process is cumbersome, bureaucratic and often insurmountable for many accused. Often, accused persons remain in custody because it is extremely difficult to raise sureties who have land, vehicles and the requisite title documents. It is not surprising that pre-trial detainees make up almost half of the prison population and contribute substantially to overcrowding in prisons.¹³ Accused whose sureties are otherwise able to deposit money as the security remain in custody because the sureties are not able to deposit land or vehicles. Ironically, while the Criminal Procedure Code describes the security in surety bond as a sum of money, Kenyan courts demand properties other than money¹⁴.

Demanding land, vehicles, insurance bonds or other bail conditions that are out of reach of the accused is tantamount to denying bail altogether. In *ODonnell v. Harris County*¹⁵, and in many other cases, courts in the U.S. held that conditions that are out of reach of the accused amount to de facto pre-trial detention. Disturbed by the detention of accused whom courts have in theory released on bond, the study investigated the legality or otherwise of the practice of demanding land, vehicles, and other properties while rejecting money. The objective of the study is to enhance access to pre-trial release by unmasking the illegality of the practice.

Part One

Purpose of Bail

There are at least two schools of thought on the purpose of taking bail/ bond from the accused. On one hand, Starger and Bullock argue that the purpose of

¹³ National Council on the Administration of Justice, Bail and Bond Policy Guidelines March 2015 at 3.

<http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf> Accessed 1/2/2019.

¹⁴ Sections 123 -133 of the Criminal Procedure Code Cap. 75 Laws of Kenya.

¹⁵ Civil Action No. H-16-1414 (S.D. Tex. Nov. 21, 2019)

bail is to guarantee the appearance of the accused for the trial¹⁶. The school is reflected in the decision of the Supreme Court of the United States in *Stack v Boyle*¹⁷. In that decision, Chief Justice Vinson addressed four important matters relating to bail. First, that pre-trial detention hampers preparation of the defence while pre-trial release prevents infliction of punishment before conviction. Second, that unless the right to bail before trial is preserved, the presumption of innocence loses meaning. Third, that the test of excessiveness of bail is whether the court calculated the amount reasonably to ensure that the accused will attend trial. Finally, that setting the amount of bail should be an individualised evidence-based inquiry into what is necessary to ensure the accused attend trial¹⁸. In *Gerstein v Pugh*, the U.S. Supreme Court held that pre-trial detention are measures taken by the state before it presents its evidence of the crime and that therefore, the detention and the conditions for release are just administrative measures for ensuring the accused attend trial. The law does not intend the pre-trial detention and the conditions for bail to be punishment of any kind¹⁹.

In Kenya, the school is reflected in the Bail and Bond Guidelines 2015. General Principle 3.1 (d) provides that bail and bond amounts and the conditions shall be no more than is necessary to guarantee the appearance of an accused for trial. A number of judicial decisions also reflect this school. For instance in *Republic v Godfrey Madegwa & 6 others*²⁰, *Republic v Jao & Another*²¹, *Samuel Kimutai Koskei & 15 Others v Director of Public Prosecutions*²² and *Grace Kananu Namulo v Republic*²³, the High Court held that the amount of bond should not be greater than is necessary to guarantee that the accused person will appear for trial. The choice of words indicates that the guidelines and courts view bond as an instrument of ensuring that the

¹⁶ Collin Starger & Michael Bullock, 'Legitimacy, Authority and the Right to Affordable Bail', William & Mary Human Rights Journal, Vol.26:589 (2018) 609

¹⁷ 342U.S. at 5.

¹⁸ At 6.

¹⁹ *Gerstein v Pugh* (1975) 420 US 103.

²⁰ [2016] eKLR.

²¹ [2019] eKLR.

²² [2019] eKLR.

²³ [2019] eKLR.

accused returns for the trial. In *Republic v Alex Otieno Onyango*, the High court held that the objective of taking security from the surety is not to obstruct the right of the accused to pre-trial release but to ensure that he returns for the trial.²⁴ I will refer to this view as the ‘guarantee for reappearance’ school.

The other school posits that bail and bond have nothing to do with guaranteeing the appearance of the accused for trial. They argue that bail and bond is merely an instrument for pre-ordaining the punishment for failing to appear for trial²⁵. This idea is apparent in the definition of bail in the Bail/Bond Policy Guidelines 2015. The guidelines define bail as an agreement between an accused person or his/ her sureties and the court that the accused will attend court when required and that should the accused abscond, in addition to the court issuing warrants of arrest, a sum of money or property directed by the court to be deposited will be forfeited. They define bond as an undertaking with or without sureties, or security entered into by an accused person in custody under which he or she binds him or herself to comply with the conditions of the undertaking and if in default of such compliance, to pay the amount of bail or other sum fixed in the bond²⁶. I will refer to this view as the ‘penalty’ school.

The school further argues that admitting the accused to bail connotes that the court is convinced that he is not a flight risk and there is no other compelling reason for denying him bail. Therefore, detaining accused because of inability to raise the sum in the bail bond is taking away the right to pre-trial release through the back door. The Criminal Procedure Code seems to support this argument since inability to raise the sum required for bail bond is not listed in section 123A of the Criminal Procedure Code or the Bail Bond Guidelines 2015 as a reason for refusing to release the accused on bail. The thought of

²⁴ *Republic v Alex Otieno Onyango* [2015] eKLR.

²⁵ Donald J. Harris, *The Vested Interests of the Judge : Commentary on Fleming’s Theory of Bail*(1983) 490.

²⁶ ²⁶ National Council on the Administration of Justice, *Bail and Bond Policy Guidelines* March 2015 at 3.

<http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf> Accessed 1/2/2019.

bail/ bond as a mere penalty for the accused failing to reappear voluntarily is reflected in the Judiciary Hand Book. It provides that upon approving the surety, the court should clearly explain that should the accused abscond or breach the terms of the bond, the surety will pay the penalty or forfeit the bail or bond amount²⁷.

This paper adopts the penalty school of bail/ bond. This is because it is difficult to conceptualise how money deposited in court or undertaken to be forfeited can guarantee that a person who is minded to abscond returns. The certainty of forfeiting the money is not a physical constraint. The penalty school is also more consistent with the literal interpretation of the words that the accused and or the surety will pay the amount thereby specified if the accused default in attending court. The penalty school is also more compatible with the argument that it is unreasonable to exclude money and insist on land, vehicles or other unliquidated properties as security for what is essentially a financial consequence.

Test for the legitimacy of the practice

The legitimacy of the terms of bail may be tested using the principles of reasonableness and excessiveness or otherwise of the terms of bail. The test of reasonableness or otherwise derives from Article 49(1) (h) of the Constitution. It provides that an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. On the other hand, the test of excessiveness or otherwise of the terms derive from section 123(2) of the Criminal Procedure Code. It provides that the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive. The two tests are the same since the Black's Law Dictionary defines reasonableness as proper, fair, or moderate in the circumstances and guided by reason²⁸. On the other hand, the dictionary defines excessive as "greater than what is usual or proper; what goes beyond just measure or amount."²⁹ It is a question of terminology used

²⁷ The Judiciary, *Criminal Procedure Bench Book* (2018) 54.

²⁸ Bryan A Garner, *Black's Law Dictionary* (8th edn, West Publishing Co 1999).

²⁹ *Ibid* at 670.

in different jurisdictions. In the U.S., unreasonable terms of bail are referred to as excessive while in Kenya, the excessive conditions are referred to as unreasonable. Accordingly, this paper uses the two terms interchangeably.

1.0 Excessiveness and reasonableness are questions of mixed law and fact

Excessiveness and reasonableness are relative terms. They are not capable of accurate measurement. They depend on the law and the factual circumstances of each case. Accordingly, the excessiveness or reasonableness or otherwise of the practice of excluding money and demanding land, vehicles and insurance bonds is a question of mixed law and fact. Therefore, the excessiveness or unreasonableness of the practice will be tested against the law as well as the factual circumstances, that is, the de-jure and de-facto excessiveness or reasonableness respectively.

1.2 De jure excessiveness

The excessiveness or otherwise of the practice is tested against the provisions of the Constitution, statutes, precedent and guidelines governing administration of bail/ bond. Where the practice contradicts the law, the study categorises such unlawfulness as excessive in law. Excessiveness, like the principle of legality, requires authorities to found their decisions on the law³⁰. Where the law gives discretion, the discretion ought to be exercised according to the principles established by the law³¹. The principle of legality is reflected in Principle 3.1, 3.2 and 3.3 of the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)³². Principle 3.10 of the Tokyo Rules prohibits authorities from restricting the rights of offenders further than is authorised by the competent authority³³. Since the law governing the bail

³⁰ Lesega Mnguni and Justin Muller, 'The Principle of Legality in Constitutional Matters with Reference to Masiya v Director of Public Prosecutions and Others 2007 (5) SA 30 (CC)' [2009] SAFLII 6.

<http://www.saflii.org/za/journals/LDD/2009/9.pdf>

³¹ CF Forsyth and William Wade, *Administrative Law* (Oxford University Press 2014) 286.

³² United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) <https://www.un.org/ruleoflaw/files/UNITED~2.PDF>

³³ Ibid.

and bond in Kenya is the Constitution, the Criminal Procedure Act, and precedent, this paper used these laws to test the excessiveness or otherwise of the practice in law. To be reasonable, the conditions imposed by courts must conform to those laws. Therefore, conditions that contradict Article 49(1) (h) and sections 122-126 of the Criminal Procedure Code are excessive or unreasonable. The provisions of the Constitution, the statute, the guidelines and precedent are discussed below³⁴.

1.3 De facto unreasonableness

The factual circumstances may render the conditions excessive³⁵. Accordingly, section 123 of the Criminal Procedure Code requires the court to have due regard to the circumstances of the case when fixing the amount of bail. Principle 3.1 (d) of the Bail/ Bond guidelines provides that the bail amount should not be greater than is necessary to guarantee that the accused will appear for the trial or so low as to entice the accused to forfeit. It further provides that the Court should take into account the personal circumstances of the accused person. What is reasonable the guidelines say will depend on the facts and circumstances of each case. Commenting on the money bail system of the U.S, Brian Frosh, Attorney General for Maryland, observed that too many people are kept in jail in Maryland purely because they cannot raise the money³⁶. Therefore, the factual difficulties of depositing title to land or vehicle may be so insurmountable as to be tantamount to denying bail³⁷. In *Republic v Jao & Another*, the High Court in Kenya held that in setting the terms of bail, the court should not subject the accused to any condition which is not pragmatic³⁸. In *Sumit Mehta v State of N.C.T of Delhi*, the Supreme Court of India held that ‘any condition’ should not be regarded as conferring absolute

³⁴ N. 38-85.

³⁵ Kellen Frank , ‘The Present Crisis in American Bail’, (The Yale Law Journal Forum April 22, 2019) at 1107.

³⁶ Open Meeting to Consider the One Hundred Ninety –Second Report of the Standing Committee on Rules of Practice and Procedure Before the Court of Appeals.(Md.2017(testimony of Brian Frosh),https://mdcourts.gov/sites/default/files/import/coappeals/media/2017_opnmtngs/20170105rulesmtgpt.1.mp4(at10:33 to 40:28.

³⁷ Collin Starger & Michael Bullock, ‘Legitimacy, Authority , and the Right to Affordable Bail’, William & Mary Human Rights Journal , Vol.26:589 (2018) 609

³⁸ [2019] eKLR.

power on a court to impose any condition it chooses. Any condition has to be interpreted in the pragmatic sense and should not defeat the order granting bail³⁹.

Therefore, evaluating the practice for possible de-facto excessiveness requires one to examine how the demand affects the practical exercise of the right. In *Andrew Young Otieno v Republic*⁴⁰ and *Samuel Kimutai & 15 Others v Director of Public Prosecutions*⁴¹, the High Court held that to impose stringent bail terms that an accused person cannot afford is akin to taking away his right to bail through the back door. In the latter case, the accused were charged with corruption offences. The Magistrate ordered that they be released on a bond of Kshs 50 million with one surety or cash bail of Kshs 12 million.

Therefore, the words ‘excessive’ in section 123 of the Code and ‘unaffordable’ in judicial decisions apply equally to the other requirements including the security that the accused may be unable to comply with. These could be requirements that are not practical⁴², unnecessary⁴³, illogical⁴⁴, too costly⁴⁵, disproportionate⁴⁶, or otherwise too difficult to satisfy. In *Republic v JAO and DAO*, the High Court held that the court should consider the economic circumstances of the accused when fixing the conditions⁴⁷. The list is endless but each circumstance is a question to be decided on the facts of each case. The idea of de facto unreasonableness merges well with the principles of administrative law, which presumes that the law never intended to give public authorities authority to act unreasonably.⁴⁸ Demands that are more cumbersome than those prescribed by Parliament constitute de-facto

³⁹ *Sumit Mehta v State of N.C.T of Delhi* (2013) 15SCC 570.

⁴⁰ [2017] eKLR at paragraph 47.

⁴¹ *Samuel Kimutai Koskei and 15 Others v Director of Public Prosecutions* [2019] eKLR at paragraph 29.

⁴² *Sumit Mehta v State of N.C.T of Delhi* (2013) 15 SCC 570.

⁴³ Bail and Bond Policy Guidelines, General Principle 3:1.

⁴⁴ *Council of Service Union v Minister for the Civil Service* [1984] 3 All ER.

⁴⁵ *Republic v JAO & another* [2019] eKLR.

⁴⁶ Forsyth and Wade (n 30) 312.

⁴⁷ (2019) eKLR.

⁴⁸ *Wanzusi Anor Vs Kampala Capital City Authority* [2019] UGHCCD 119.

unreasonableness. In line with this argument is the principle of administrative law that the Constitution and Parliament never intended to authorize interpretations or applications that make the law unrealistic or unnecessarily difficult to satisfy.⁴⁹

Whether the demand is unreasonable on account of violating the law or by its practical implications, it falls short of the standard of reasonableness envisaged by Article 49(1) (h) of the Constitution. It is excessive, unreasonable, unlawful, unconstitutional and void.

Part Two

Content of The Right

The right to bail is of ancient origins. In the Bible, when Apostle Paul was arraigned in the Court of Governor Felix in Caesarea to answer charges relating to blasphemy, the Governor ordered that he be released. He further ordered Paul to attend for hearing on a date when his accuser, the Jewish Council known as Sanhedrin, would present its evidence⁵⁰. The ancient Roman colonial criminal justice system even released convicted prisoners on bail pending the hearing and determination of appeals. After conviction, Paul appealed to Emperor Ceaser. Emperor Ceaser allowed Paul to stay at his own rented house for a whole two years but under guard⁵¹. As early as the 15th century, Britain had enacted the Habeas Corpus Act 1679 and the English Bill of Rights 1689. The Acts protected the right to bail by prohibiting excessive bail. The Act simply provided that, 'excessive bail shall not be required'.⁵²

In Kenya, bail is governed by Article 49(1) (h), section 123 to 131 of the Criminal Procedure Code, precedent, and the Policy Guidelines on Bail and Bond 2015. Article 49(1) (h) of the Constitution provides that an arrested

⁴⁹Craig, Paul. "Ultra Vires and the Foundations of Judicial Review." The Cambridge Law Journal 57, no. 1 (1998): 63-90. <http://www.jstor.org/stable/4508421> accessed 28 August 2019.

⁵⁰ The Bible, King James Version Ch. 23: 24 Acts of the Apostles.

⁵¹ Ibid Ch. 28: 30.

⁵² www.legislation.gov.uk accessed September 25, 2019.

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.

Section 123(1) of the Criminal Procedure Code provides that when a person other than a person accused of murder, treason, robbery with violence, attempted robbery with violence or drug-related offences is arrested or detained without warrant by an Officer in Charge of a Police Station or appears or is brought before a court and that person 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. Section 123A and Article 49(1) (h) have since overridden the exception of murder, treason and robbery by availing bail in all offences. However, there is a proviso that the officer or the court may instead of taking bail from that person, release him on his executing a bond without sureties for his appearance. The bond is executed according to the subsequent provisions of the Act.

Section 123A (1) provides that in making the decision on bail or bond, the court should have due regard to all the relevant circumstances of the case. In particular, the nature or seriousness of the offence, the character, antecedents, associations and community ties of the accused person, his record in complying with conditions of previous bail and the strength of the evidence of the case. These considerations are subject to Article 49(1) (h) of the Constitution and section 123 of CPC.

Section 123 (2) provides that the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.

Section 124 provides that before a person is released on bail or on his own recognisance, he shall execute a bond for such sum as the court or police officer thinks sufficient. It further provides that the bond shall be executed by one or more sureties undertaking that the person shall attend at the time and place mentioned in the bond and shall continue to attend until otherwise directed by the court or police officer.

Section 126 provides that the arrested person may deposit a sum of money or property in lieu of executing a bond. Further, that where the person is required to execute a bond with or without surety, the court or officer may except in the case of a bond for good behaviour, require the person to deposit a sum of money as the court or officer may fix or to deposit property in lieu of executing a bond.

Evidently, the provisions are not very clear. They use the words bond, bail, and recognisance interchangeably. This ambiguity is not unique to Kenya. Commenting on administration of bail/ bond in the United States, Domingo and Denny argue that vagueness in the wording of the statutes regulating bond creates space for courts to misinterpret the Act⁵³. Nevertheless, the study was able to extract the primary elements of the right to bail/ bond. This paper will discuss the elements in the following section.

The Bail/ Bond Policy Guidelines 2015 define bail as an agreement between an accused person or his/ her sureties and the court that the accused will attend court when required and that should the accused abscond, he will be arrested and in addition, forfeit the sum of money or property directed by the court to be deposited. The guidelines define bond as an undertaking with or without sureties or security entered into by an accused person in custody under which he or she binds him or herself to comply with the conditions of the undertaking and if in default of such compliance to pay the amount of bail or other sum fixed in the bond⁵⁴. Security is defined as the sum of money pledged in exchange for the release of an arrested or accused person as a guarantee of that person's appearance for trial. Surety is defined in the guidelines as the person who undertakes to ensure that the accused will appear for trial and abide by

⁵³ Pilar Domingo and Lisa Denney 'The Political Economy of Pre-Trial Detention' February 2013 < <https://www.odi.org/publications/7286-political-economy-pre-trial-detention> > Accessed March 21, 2019.

⁵⁴ National Council on the Administration of Justice, Bail and Bond Policy Guidelines March 2015 at 3.< http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf > Accessed 1/2/2019.

bail conditions and puts up security such as money or title to property, which may be forfeited if the accused fails to appear. The paper addresses the specific guidelines, policies and situational analysis in the 2015 guidelines.

2.0 The right is not discretionary

It may appear superfluous but in Kenya, it is necessary to reiterate that Article 49(1) (h) of the Constitution protects the right to release on bond on reasonable conditions. It provides that a person who is arrested has a right to be released on bail on reasonable conditions unless there is a compelling reason for not releasing. The need to reiterate arises because as recently as 2019, courts have attempted to subjugate the right to their discretion. In *Republic v Danford Kabage Mwangi*,⁵⁵ the High Court held that “I hold the view that after considering the circumstances of each case the court has the discretion to grant or to refuse bail provided the discretion is exercised judiciously”. In *Republic v Zachariah Okoth Obado*⁵⁶, the High Court held that “the application [for bail] cannot be determined before the witness statements and other evidence are filed and availed to all parties. That is the only way that this court can fully exercise its discretion”. In *Grace Kananu Namulo v Republic*, the High Court held that “the discretion to grant bail and set the conditions rests with the court”⁵⁷. Further, that in exercising the discretion, the court strikes a balance between protecting the liberty of the individual and safeguarding the proper administration of justice⁵⁸. It is perhaps this downgrading of the right to a discretionary favour that prompted the High Court in *Samuel Kimutai Koskei and 15 others v DPP*⁵⁹ to reiterate that bail is not a privilege but a constitutional and statutory right subject to some conditions.

Article 49(1) (h) does not confer discretion. It creates a jurisdictional fact or a right that is dependent on the existence or non-existence of a certain fact. It is important to distinguish between discretion and jurisdictional fact. According to Christie, discretion is the freedom to decide between two or more options

⁵⁵ [2016] eKLR .

⁵⁶ [2018] eKLR .

⁵⁷ [2019] eKLR

⁵⁸ *Grace Kananu Namulo v Republic* [2019] eKLR at paragraph 10.

⁵⁹ [2019] eKLR at paragraph 10

permitted by the law⁶⁰. Jurisdictional fact on the other hand does not leave options. Wade says that jurisdictional fact is a fact whose existence or non-existence determines the existence or non-existence of the jurisdiction in question⁶¹. With respect to Article 49(1) (h), the jurisdictional fact is the compelling reason. The existence or non-existence of the compelling reason determines the existence of the jurisdiction of the court to detain the accused. If the compelling reason is not established, the court has no jurisdiction to detain the accused. Put another way, the court does not have the option or jurisdiction to detain the accused unless the fact constituting the compelling reason is established.

There are other distinctions. While discretion is the power of the court to take one option or the other, the right to be released on bail belongs to the accused depending on the existence or non-existence of the jurisdictional fact⁶². Accordingly, the law usually gives discretion in permissive words. Examples are ‘may’, ‘in his opinion’, ‘deem’, ‘consider’ etc. On the other hand, the law confers rights in mandatory terms. Examples are ‘shall’, ‘must’, and ‘entitled’, etc.⁶³ Further, discretion is inherently subjective while a jurisdictional fact is inherently objective. Objectivity requires that the matters used by the judge to conclude that the compelling reason exists or does not exist should be capable of proof by empirical evidence independent of the judge.⁶⁴ Subjectivity on the other hand is a matter of personal opinion. The matters relied upon in forming the personal opinions need not be capable of proof by extrinsic evidence.⁶⁵ These distinctions mean that compelling reason is not a matter of opinion of the judge. It is a fact to be established by evidence.

⁶⁰ De Smith, Woolf & Jowell, *Judicial Review of Administrative Action* (1995) 296; George C Christie, ‘An Essay on Discretion’ (1986) 1986 DLJ 747. <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2958&context=dlj>

⁶¹ Forsyth and Wade (n 30) 212.

⁶² Mahipal v Rajesh Kumar, Criminal Appeal No. 1843 of 2019 SC. <https://main.sci.gov.in/supremecourt/2019/21884/21884_2019_7_1502_18784_Judgement_05-Dec-2019.pdf>

⁶³ Forsyth and Wade (n 30) 196.

⁶⁴ C.R. Kothari, *Research Methodology* (2004), 4.

⁶⁵ Ibid .

2.1 Compelling reason is restricted by statute

The decision on whether to admit to bail is governed by section 123A (2) of the Civil Procedure Code. Act No. 18 of 2014 introduced the section. It restricts the compelling reason to cases where the accused has previously absconded, is likely to abscond if released, and the need to keep accused in custody for his own protection. Listing the factors that the court may use to deny bail suggests that other considerations such as likelihood of interfering with witnesses and committing other crimes do not apply. This view may appear absurd but it is not without support. Schnacke argues that this narrow interpretation prevailed in the U.S. until 1984 when Congress corrected the absurdity by amending the federal bail statute to require courts to take into account the safety of the public, victims, and potential witnesses in bail hearings⁶⁶. Further, Colin Starger and Michael Bullock argue that prior to the decision of the U.S. Supreme Court in *United States v Salerno*, it was technically illegal to detain a non-capital offender even on grounds that he posed serious danger to society since every accused enjoyed a constitutional right to affordable bail⁶⁷. Courts had no constitutional, statutory or precedent basis for denying bail on such grounds⁶⁸. Faced with legal vacuum, courts would illicitly use excessive bail to detain the accused⁶⁹. Applying this interpretation to Kenya, it means that the only legitimate purpose of bail is to assure return of the accused. In the absence of evidence of a compelling reason, the accused in Kenya has a right to affordable bail. Genuine inability of the accused to pay bail or provide land or vehicle renders the bail excessive, unreasonable, and unconstitutional. In the U.S case of *Bandy II*, Justice Douglas of the Eighth Circuit Court asserted that a poor man cannot be denied freedom where a wealthy man would not just because the poor man does not

⁶⁶ R.Schnacke, The History of Bail ad Pretrial Release , PRETRIAL JUST. INST. (Sept. 23,2010),[https://cdpsdocs.state.co.us/ccjj/committees/BailSub/Handouts/History of Bail-Pretrial Release –PJI_2010.PDF](https://cdpsdocs.state.co.us/ccjj/committees/BailSub/Handouts/History%20of%20Bail-Pretrial%20Release-PJI_2010.PDF) {HTTPS://PERMA.CC/V8QM-FYS9}.

⁶⁷ Collin Starger & Michael Bullock, ‘Legitimacy , Authority , and the Right to Affordable Bail’, William & Mary Human Rights Journal , Vol.26:589 (2018) 609.

⁶⁸ *United States v. Salerno* (1987) 481 US 739.

⁶⁹ Ibid.

have enough money to pay for his freedom. The Judge asserted that instead, the poor man has a right to be released on his personal recognisance where it is reasonable to believe that he will attend trial and comply with the other terms of release⁷⁰. In the *Pugh II case*, the Fifth Circuit court held that if the appearance of a person who cannot afford the bail can reasonably be assured by alternative conditions of release, detaining such a person purely for inability to pay the bail is excessive bail and wealth based discrimination⁷¹.

2.2 Accused need not apply for bail

The Judiciary of Kenya confirms that the accused need not apply to be released on bail⁷². When the accused person steps into the Court, he comes carrying his right to release on reasonable conditions. In *Grace Kananu Namulo v R*, Odunga J. held that the accused does not have to apply to be released. The Judge argued that a person to whom the Constitution bestows rights is not obliged to ask for the same⁷³. This is the official position of the Judiciary. The Judiciary Bench Book provides that the accused need not make a formal application for bail. Further, that courts should grant bail as of right unless the prosecution objects to release on the basis of a compelling reason⁷⁴. However, the Bench Book notes that in many Magistrate Courts in Kenya, the practice is that it is the accused who applies to be released on bail⁷⁵.

2.3 Conditions should be individualised

Standard 10-5.3 of the ABA standards provides that courts should tailor the conditions for release including the amount of bail to the circumstances of each particular accused⁷⁶. Section 123 of the Criminal Procedure Code requires the court to have due regard to the circumstances of the case when fixing the amount of bail. Principle 3.1 (d) of the Bail /Bond guidelines provides that courts should in setting the terms of bail/ bond, take into account

⁷⁰ 82S.Ct 11.

⁷¹ 572 F.2d at 1056.

⁷² Republic of Kenya, The Judiciary, Criminal Procedure Bench Book p47.

⁷³ *Grace Kananu Namulo v Republic* [2019] eKLR at paragraph 18.

⁷⁴ The Judiciary (n 26) 47.

⁷⁵ n. 12 Principle 4.8

⁷⁶ The ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007).

the personal circumstances of the accused person. What is reasonable the guidelines say will depend on the facts and circumstances of each case.

2.4 Detaining is a measure of last resort

Detaining the accused in custody is a measure of last resort. The accused has not been tried or convicted and is entitled to be treated as innocent. Principle 6.1 and 6.2 of the Tokyo Rules reflects this view⁷⁷. In Kenya, Principle 3.1(b) of the National Council on the Administration of Justice, Bail and Bond Guidelines 2015 requires courts to make every effort to avoid pre-trial detention and resort to it only as a measure of last resort⁷⁸. In U.S., section 3142 (e) of the U.S. Bail Reform Act allows a Federal Court to detain an arrestee pending trial only if the Government demonstrates by clear and convincing evidence that no release conditions will reasonably assure re-appearance of the person and the safety of the community. In U.S., the issue at the bail hearing is not whether the court should release but rather, whether it should detain. This distinction is important because in the former, which is the practice in Kenya, the accused bears the burden of applying and proving that he satisfies the conditions for release. In the latter, the burden of applying for detention and imposition of conditions for release falls on the prosecutor. To justify detention, prosecutors in the U.S must prove that there are no conditions or a combination of conditions that can secure re-appearance of the accused.

2.5 Right cannot be denied without a hearing

The court cannot deny the right to bail without a hearing. In the famous *R v Electricity Commissioners ex p. London Joint Committee Co. (1920) Ltd*⁷⁹ the English Court of Appeal held that the duty to hear applies whenever any person or body of persons vested with public power by the law makes decisions that adversely affects the legal rights of subjects. A magistrate in bail hearing is such a person and the duty to hear applies. In *Republic v Galma*

⁷⁷ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) <https://www.un.org/ruleoflaw/files/UNITED~2.PDF>

⁷⁸ General Principle 3.1(b) of the National Council on the Administration of Justice, Bail and Bond Guidelines. At 8.

⁷⁹ 1924 (1KB) at 205.

Abagaro Shano, the High Court held that the accused has a right to be heard in every aspect of the criminal proceedings⁸⁰. This includes bail hearing. The hearing should not be a mere formality. Stevenson notes that in the U.S., bail hearing is more or less a formality lasting less than two minutes⁸¹.

2.6 Hearing must be adversarial

The prosecutor must establish the compelling reason in an adversarial hearing since Kenya adopts the adversarial system. Article 50(1) of the Constitution emphasizes the adversarial character of our legal system by guaranteeing fair trial before an independent and impartial court. The hearing must be substantive, not a mere procedural formality. The accused should be informed in advance of the matters allegedly constituting the reason for denying bail, be allowed to cross-examine the accuser and be allowed to present his evidence to contradict or explain the allegation⁸². Further, the court ought not to see itself as having some duty to assist the state in detaining suspects. In the spirit of the adversarial system, the court should not impose conditions not sought by the prosecution.

2.7 Burden of proving the need for detention or imposing conditions lies on prosecution

The burden of proving the circumstances compelling the court to deny the right to bail lies on the prosecution⁸³. Standard 10-1.4 and 10-5.1 of the American Bar Association Standards for Pre-trial Release provides that courts should presume that the accused is entitled to release on personal recognisance or when necessary on unsecured bond but on condition that they attend trial as required and they do not commit any criminal offence. Standard 10-5.1(c) provides that judicial officers should record the reasons in cases where they decide not to release the accused on personal recognisance. Accordingly, the prosecution may rebut the presumption that the accused is entitled to release

⁸⁰ *Republic v Galma Abagaro Shano* [2017] eKLR.

⁸¹ Megan T. Stevenson, *Distortion of Justice : How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. Econ. & Org. 511, 514 & n.5(2018).

⁸² Katherine Doolin and others, *Criminal Justice* (2nd edition, Sweet & Maxwell Ltd 2002) 210.

⁸³ Republic of Kenya, *The Judiciary Bench Book*, p.47.

on personal recognisance only by evidence of substantial risk of absconding or endangering the victims, witnesses or the public at large or evidence of need for additional conditions or evidence that the defendant should be detained⁸⁴. In this regard, Standard 10.5.3 provides that financial conditions other than unsecured bond should be imposed only when no other less restrictive conditions of release will reasonably ensure that the accused attend trial. In cases where the court finds that it is necessary to impose financial conditions, Standard 10-5.3(d) (i) provides that the court should give the accused, as the first option, an unsecured bond. In Kenya, the equivalent would be a surety bond for a specified amount of money but without a security.

In Kenya, the law on this point is settled but as will be shown later in this paper, the practice is wholly different. In *R v Danson Ngunya & Anor*⁸⁵, *R v William Mwangi Wa Mwangi*⁸⁶, and *R v Danford Kabage Mwangi*,⁸⁷ the High Court held that the burden is on the state to prove the compelling reason why the accused should be denied the right. Further, that if the State wants the accused to be detained it has to apply and prove by evidence. However, in Kenya unlike in the U.S, courts reverse the practice of bond bail hearing. Magistrate Courts conduct bail hearing on the premise that it will detain the accused in custody unless he applies for release on bond/ bail and proves that he meets the conditions. This is an anomaly because as held by Justice Odunga in *Grace Kananu Namulo v R*, the accused does not have to apply to be released.⁸⁸ The reversal of roles undermines the right to be released since Article 49(1) (h) establishes a presumption that the accused will be released unless the prosecutor proves the reason compelling the court not to release and naturally, the conditions should be sought by prosecution.

If the Court doubts that the alleged compelling reason exists, it should request for a bail report. This position was adopted by the High Court in *The State v*

⁸⁴ A Standard for Criminal Justice: Pretrial Release 3rd ed. at 14.

⁸⁵ [2010] eKLR .

⁸⁶ [2014] eKLR .

⁸⁷ [2016] eKLR.

⁸⁸ *Grace Kananu Namulo v Republic* [2019] eKLR at paragraph 18.

*Evans Nzau Ithioka*⁸⁹. Guideline 4.12 of the Bail and Bond Policy Guidelines supports this position by providing that the Court may request for bail report in certain circumstances. The circumstances include where the court doubts the information given by the accused or prosecutor, where the accused claims that he is unable to meet the terms of existing bail, where the victim contests the terms of bail, and by the Court on its own motion.

2.8 Reason not compelling unless there is no alternative to detaining

For the reason to compel the court, the prosecution must demonstrate that no condition or combination of conditions can ensure that the accused will return for trial⁹⁰. In *Grace Kananu Namulo v R*, Justice Odunga held that the Court is required to explore the possibility of ensuring the accused's return by imposing conditions that pre-empt the grounds for denying bail⁹¹. In *Republic v Danford Kabage Mwangi*, the court adopted Black's Law Dictionary definition of 'compelling'. It held that compelling requires the prosecution to convince the court that the only method of ensuring the accused attends trial is by detaining him⁹². The conference of Chief Justices of U.S advised Courts to extend the Bearden rule to bail to the effect that, '*a financial condition of release that operates to detain an indigent defendant must be based on a finding that such condition is necessary to secure the state's interests in ensuring appearance at trial or public safety*'⁹³.

With regard to demanding land, vehicles and other properties other than money, the hearing must establish land and vehicles are specifically more effective than money in ensuring appearance of the accused or protecting the other interests of the state. In *United States v. Sarleno*, the U.S. Supreme Court held that no matter what process the courts use, they must establish that the limitations on liberty is narrowly tailored to serve the compelling interest of

⁸⁹ [2019] eKLR.

⁹⁰ *Oscar Edwin Okimaru v Republic* [2021] eKLR.

⁹¹ n. 8 at paragraph 22.

⁹² [2016] eKLR

⁹³ Brief of Conference of Chief Justice as amicus Curiae in Support of Neither Party , ODonnell, 892,F.3d 147(5th Cir.2018) (n0.17-20333), 2017 WL 3536467, at 24, 26-27.

the state and that the threat to the interest must be identified and articulable and that no conditions of release can reasonably safeguard it⁹⁴. This strict scrutiny protects fundamental rights from avoidable infringements. Like the fading money bail system of the U.S, demanding that the surety deposit land and vehicle does not serve any identifiable and articulable interest in returning the accused. Extending this argument means the prosecution must prove that only land or vehicle will prevent the accused from absconding or violating other terms of the bond. Article 24 of the Constitution of Kenya reflects the U.S. strict scrutiny test. It provides that a fundamental right shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society. Further that the limitation must take into account the nature of the freedom, the importance of the purpose of limitation, the nature and extent of the limitation. Article 24(3) provides that the person seeking to justify a particular limitation shall demonstrate to the court that the limitation satisfies the conditions of Article 24. To satisfy the strict scrutiny test and Article 24, the court must be satisfied that there is no alternative to detention for failure to deposit land or vehicle. My view is that the practice of demanding land and vehicles does not satisfy the strict scrutiny test because to begin with, the law does not require land and vehicle. The Criminal Procedure Code demands money. Depositing land or vehicle is actually the alternative to depositing money. There is no legal basis for detaining the accused because he cannot deposit land or vehicles yet he is able to deposit money.

2.9 Reasons must be proved by evidence

Finally, there must be sound evidence to support the finding of compelling reason. The no-evidence rule denies court's jurisdiction to find a fact without reasonable evidence in support. In *R v Dwight Sagaray and Others*,⁹⁵ the High Court held that the prosecution must produce materials to demonstrate actual or perceived interference with witnesses, threats to witnesses, direct or indirect communication between the accused and witnesses. In *R v Danford Kabage Mwangi*, the court refused to rely on the speculative allegations in an affidavit

⁹⁴ 481 U.S.739 (1987).

⁹⁵ [2013] eKLR.

sworn by the investigating officer⁹⁶. In *Allison v General Medical Council*,⁹⁷ the Court of Appeal of U.K held that the no-evidence rule extends to cases where the evidence taken as a whole is not reasonably capable of supporting the decision. Accordingly, courts do not have jurisdiction to deny bail in the absence of clear and convincing evidence of the alleged compelling reason. If the prosecutor alleges that the accused is a flight risk, he should produce clear and convincing evidence of the accused for fleeing, ticket to a destination outside the Country, and correspondence, actual attempt to flee before or during arrest, past attempts in other cases or such equally persuasive evidence. Courts cannot speculate, infer, or theorise that the accused may fail to return. It has to be hard evidence. To borrow from the civil process, a judgement must identify the points for determination, the decision on each point, and the reasons for the decision⁹⁸. In criminal proceedings, the liberty and so much more of the accused is at risk, accordingly, courts should apply the structured approach much more strictly to deciding whether to detain and the terms of releasing.

2.9.1 The standard of proof is beyond reasonable doubt

In U.S, the courts describe the standard of proof as clear and convincing evidence⁹⁹. In Kenya, the standard of proof in criminal cases is beyond reasonable doubt¹⁰⁰. However, in *Republic v Jao & Anor.*, the High Court held that the standard of proof required in establishing the compelling reason is the balance of probabilities¹⁰¹. The objective of placing the standard of proof at beyond reasonable doubt is to prevent wrongfully convicting and punishing

⁹⁶ [2016] eKLR.

⁹⁷ (1894)1 QB 750 AT 760, 763.

⁹⁸ Civil Procedure Rules, 2010 Order 21 Rule 4.

⁹⁹ Bill Vance, 'The Clear and Convincing Evidence Standard in Texas: A Critique' (1996) 48 Baylor L Rev 391
https://vpn.uonbi.ac.ke/proxy/6644f210/https/heinonline.org/HOL/Page?public=true&handle=hein.journals/baylr48&div=19&start_page=391&collection=journals&se_t_as_cursor=0&men_tab=srchresults

¹⁰⁰ *Pius Arap Maina v Republic* [2013] eKLR

¹⁰¹ [2019] eKLR.

the innocent¹⁰². To avoid wrongful denial of bail, this paper argues that the standard of proof in bail hearings should not be lower than beyond reasonable doubt. In any event, bail hearing is a crucial part of the criminal trial. Further, the consequence of denying the bail is that the un-convicted persons lose their liberty and suffers many other disadvantages despite the presumption of innocence.

2.9.2 Conclusions on the substance of the right

The statutory framework for administration of bail/bond in Kenya is similar to that of the U.S. Accordingly; we can reasonably conclude that the right to bail/bond in Kenya contains the elements established in the United States. These are that the right is constitutional, it is not discretionary, detaining is a measure of last resort, it cannot be deprived without a fair adversarial hearing, the burden of proving the compelling reason for not releasing lies on the prosecution, and that the standard of proving the compelling reason is beyond reasonable doubt. Above all, the reason is not compelling unless the prosecution proves that no condition or combination of conditions will ensure that the accused will return for trial.

This part has established the content of the right to release on bail. In the part below, the study examines the practice of demanding and depositing land and vehicles in for bail and bond in Kenya.

Part Three

The Practice

In Kenya, there are four legal regimes for releasing the accused on bail or bond. These are personal bond, cash bail, surety bond, and surety bond with an alternative of cash bail. The bench book observes that the Criminal Procedure Code is not clear on the precise circumstances in which the accused

¹⁰² Federico Picinali, 'Can the Reasonable Doubt Standard Be Justified? A Reconstructed Dialogue' (2018) 31 C JLJ 365. <https://www.cambridge.org/core/journals/canadian-journal-of-law-and-jurisprudence/article/can-the-reasonable-doubt-standard-be-justified-a-reconstructed-dialogue/E67B6B8D17D4E1F66585BAADCCFD5E4F>

will released on cash bail, personal cognisance, surety bond, multiple sureties. In the situational analysis, the handbook concedes that consequently, there is huge disparity in the conditions of bonds imposed by different courts and it is not clear how they determine the nature, amount, and conditions of bail¹⁰³. It further concedes that the procedures for processing and releasing accused who are able to comply with the condition of bail/ bond are not uniform across the courts¹⁰⁴.

Whatever the kind of bail, the court hands the accused to prison authorities in cases where the accused is unable to satisfy all the requirements of bail or bond. The document used to hand over the accused from the court to the prison authorities is known as Warrant for Commitment on Remand. The prescribed format is exhibited as *Appendix i*. In the part below, the paper examines the nature of various types of bail and the requirements and process of each type of bail or bond.

3.0 Cash bail

The first scenario is where the court releases the accused on cash bail. Here, the accused simply pays the sum of money specified in the court order. The registry issues a receipt. If the Magistrate has not signed the remand warrant and the accused presents the receipt to the holding cells, officers in charge of the court cells release the accused forthwith. If the Magistrate has already signed the Warrant of Commitment to Remand, he is required to sign an additional document. This is the Release Order. The Registry fills a form known as 'Release Order Where Cash Bail has been Received'. The form is exhibited as *Appendix ii*. The magistrate signs on the form making it a court order. Upon receiving the order, the Prison authorities release the accused. This may happen within the courthouse or at the remand prison.

3.1 Personal bond

The second scenario is where the court release the accused on personal bond. Here, the accused signs a Form known as 'Bail and Bail Bond'. The form has

¹⁰³ n.1 at 4.7.

¹⁰⁴ Ibid.

two parts. The accused fills the first part. The form begins with the accused entering his name and acknowledging that he has been called upon to enter into his own recognisance to appear in court on the date specified or whenever else so required and to continue so attending until otherwise directed. The form contains a further declaration that in case the accused defaults in so attending, he shall forfeit the sum of Kenya shillings specified in the court order. The accused then signs the duly filled Bail/Bond Bail Form. The Form is dated. *Appendix iii* shows the standard format. The surety fills the second part of the form. However, since in this scenario the order is that the court release the accused on his own bond, the second part is not completed. The personal bond or own recognisance of the accused is thus complete. The court cells release the accused as soon as the court registry acknowledges that it has received the said personal bond. If the court had signed the warrant of commitment to remand, it in addition signs the release order.

3.2 Surety bond

The third scenario is where the court release the accused on his bond and one or more sureties. In this case, the surety fills the second part of the Bail/ Bail Bond Form. The part contains spaces where the proposed surety declares himself the surety for the accused. In the third segment of the form, the surety declares that the accused shall attend court on the days fixed and as may be required. The surety then declares that if the accused defaults, he will forfeit the sum of Kenya shillings stated in the court order. The form has space for filling the sum of Kenya shillings ordered by the court. The surety signs and dates this part. It is crucial to note that the Bail/ Bail Bond form does not have a provision for indicating the type of security, particulars of registration or the value of the security taken from the accused or the surety. Nevertheless, the, Judiciary of Republic of Kenya Bench Book provides that,

‘Where an accused is required to provide security so as to be released on bond, the court must be furnished with a security document such as a title deed, motor vehicle log book, or an insurance bond. In

*addition to the security document, the court may require a valuation report revealing the value of the property being offered as security*¹⁰⁵.

This misconception of the security as a property such as land or vehicle marks the start of the wrong turn in approving the surety since whereas the section 123 to 133 of the Criminal Procedure Code and the forms refer to sums of money, courts demand title to land and motor vehicles.

3.3 Process of approving surety

This brings us to yet another form that the procedure requires the surety to fill in cases where the court release the accused on surety bond.

The title of the form is ‘Particulars of Surety’. The clerks of the Criminal Registry fill the form. The form records the particulars of the surety. These include the name, relationship with accused, national identity card number, location of residence, address, occupation, telephone number, income and kindred. It has spaces for name, and signature of the Court clerk who fills the form. The last part records the details of the Executive Officer of the Court who checked the details filled by the clerk, the signature of the surety, and the decision of the court. The form does not indicate what kind of decision it requires the court to record. Nevertheless, it appears that the decision at this state is whether to approve or reject the proposed surety. The standard form for recording the particulars of the surety is exhibited as *Appendix iv*.

It is important to note that like the Bail/Bail Bond form, the form for particulars of the surety does not provide space for indicating the particulars of the security. To fill the form, the registry clerks interrogate the surety on the property offered as security. The clerks interviewed indicated that they expect the security to be either a motor vehicle or parcel of land. Further, that they expect the proposed surety to prove his own identity, his ownership of the security, verification by the relevant authority, and the monetary value of the property. For his identity, the proposed surety must produce his original national identity card. The study established that the procedure of establishing

¹⁰⁵ The Judiciary, *Criminal Procedure Bench Book* (2018) 54.

the identity of the surety and authenticity of his title documents is not uniform across the court stations. The anti-corruption courts in Milimani, Nairobi require the Directorate of Criminal Investigations to verify the identity of the proposed surety and authenticate the title documents. This process entails presenting the proposed surety and documents to the Directorate to examine their finger prints and the documents, prepare a written report confirming that the bio data matches the proposed surety or otherwise. The officers of DCI undertake the process from their offices, which are normally located away from courts. The relative location is a serious factor since the representatives of the accused race against time to procure the report before 4 pm when Magistrates sign remand warrants. Ordinarily, where the Magistrate has not signed sureties and the bond by 4 pm, the court cells transfer the respective accused to prison authorities to start life in remand prison. The requirement that the accused respective offices cannot begin the verification process until the accused takes plea, court admits him to bail and issues a letter calling for the verification reports considerably delays the commencement of the process. *Appendix v* shows the standard form of the letter for requesting verification report.

In event the surety offers to deposit title to land as the security, he must produce the original title deed, certificate of official search issued by the Land Registrar, and letter from the Land Registrar authenticating the original title deed and the certificate of search. The Land Registrar must be of the Land Registry in which the land is registered. Therefore, if the proceedings are in Nairobi Courts and the land is located in Mombasa, the Certificate of Official Search must be from the Land Registrar Mombasa. To prove the monetary value, the proposed surety must produce a certificate of valuation issued by a registered valuer. The valuer must undertake the valuation on the ground in Mombasa. His report must confirm that he personally visited the land and observed the material facts. The land should not be under mortgage or otherwise encumbered. The land valuers indicated that the average fees for bail bond valuation is Kshs. 12,000. So, an accused whose surety offers land must assemble the surety in person, the original national identity card of the surety, the original title deed, an original certificate of search, letter from the

Land Registrar of the land registry where the land is registered authenticating the documents, and an original current valuation report.

To establish the ownership of the vehicle, the surety must produce the vehicle itself at the court precincts. Magistrates often interrogate whether the prosecutor personally inspected the chassis, engine, plate numbers and other particulars against those indicated on the registration book. The requirement that the prosecutor personally inspect the vehicle means that for proceedings in Nairobi, the surety whose vehicle is in Mombasa must transport it to Nairobi. The accused must in addition produce the original registration book of the vehicle and certificate of the National Transport and Safety Authority on particulars of the vehicle and its registered owner. To prove the monetary value of the vehicle, courts demand valuation report issued by a registered valuer of motor vehicles. Valuers indicated that their average fee is Kshs. 12,000. If the proposed surety is not able to produce any of those documents, the clerks reject the proposed surety at that point. The proposed surety does not reach the Magistrate.

If the surety assembles all the documents to the satisfaction of the registry clerks, the clerks present the bond forms to the Magistrate. The Magistrate interviews the proposed surety afresh. Ideally, the Magistrate should focus on the relationship of the proposed surety to the accused to assess the ability and commitment of the proposed surety to ensure the accused return for trial and his understanding that he risks forfeiting the money stated in the court order if the accused absconds. This is perhaps because section 131(2) of the Criminal Procedure Code provides that if the surety fails to show cause why he should not pay the sum in the bond and further fails to pay the sum, the security may be sold and proceeds used to pay the amount due under the bond.

In practice however, Magistrates record the same information in the form for particulars of the surety already filled by clerks and verified by the Executive Officer of the Registry. In effect, the Magistrate more or less cross-examines the proposed surety on the information in the form. Presumably, the Magistrate bases his decision to approve or reject the surety on the information in the form and the inquiry. If the Magistrate approves the surety, he signifies the approval

by signing on the form. In the event the Magistrate had signed the warrant of remand, he signs the 'Release Order where the Surety has signed Bond'. *Appendix vi* shows the standard format. If the Magistrate rejects the surety or security or otherwise fails to approve, the accused remains in remand prison. The detention is indefinite since there are no time limits for hearing and determining criminal cases.¹⁰⁶ The procedure applies to all accused released on bond.

3.4 Surety bond with alternative of cash bail

In the fourth scenario, the court releases the accused on surety bond of a specified sum of money but gives the accused the alternative of cash bail. Often, the amount of cash bail is lesser than the amount of the surety bond. The accused has the option of paying the cash bail or providing the surety bond. The Bail Bond Guidelines suggests that the alternative of cash bail of a lesser amount applies where the accused is unable to satisfy the higher amount in the surety bond¹⁰⁷. Courts fix cash bail at lower figures on the understanding that it is more difficult to raise money than a surety bond. The objective of giving the option of cash bail is to enhance access to pre-trial release. However, the rationale is fundamentally flawed because the problem with the surety bond is not the high amount. It is the requirement of land, motor vehicle or properties other than money. Accused especially in corruption offences can comfortably deposit even higher amounts of surety bond if courts accept money as the security of the surety. Indeed, the amount of monies stated in the charge sheets especially in corruption offense show that in most cases the accused persons are in control of huge amounts of money far beyond the amounts fixed in the surety bond. Yet, it is common for the requirement of land and vehicle to defeat even the rich resulting in such rich accused spending several days in remand after the court orders release on surety bond. The NCAJ policy guidelines admits that the requirement of title deeds and logbooks for motor vehicles and the verification process presents considerable challenges

¹⁰⁶ Omboto John Onyango, 'The Challenges Facing Rehabilitation of Prisoners in Kenya and the Mitigation Strategies' (2013) 2 IJRSS 5. <http://www.ijssk.org/uploads/3/1/1/7/3117743/criminology_6.pdf>

¹⁰⁷ N.12 at Para 4.16-4.17.

to most accused¹⁰⁸. Accordingly, though the alternative of cash bail does not have the problem associated with depositing title to land and vehicles, it does not address the conceptual problem of lack of a legitimate rationale for excluding money and demanding land, vehicles, or other non-monetary securities in surety bonds.

Part Four

Analysis And Findings on the Reasonableness of the Practice

The paper used the concepts of de jure and de facto unreasonableness to analyse the reasonableness or otherwise of the practice of demanding land, vehicles or other properties other than money as security in bail/ bond. After analysing the practice, the study found that the demands are unreasonable de-jure and de-facto and hence amount to excessive bail. I present the analysis and findings below.

1.0 Practice lacks factual basis

It is by fact simply unreasonable to reject money as the security for an obligation that is expressed in monetary terms and instead demand title to land, vehicle or other property. This is because the title to land or vehicle per se does not offer any greater guarantee of return of the accused compared to money. Detaining title to land or vehicle does not impose any physical constraints on an accused who intend to abscond. In the absence of a viable factual justification for insisting on land or vehicle, the study finds that the practice is de facto unreasonable. Indeed, studies have in fact shown that most accused persons turn up for the trial even without the court taking any security from them or surety¹⁰⁹. For example, the Pre-trial Services Agency for Washington D.C found that in the year 2016, most people released on personal recognisance witness that an overwhelming majority of those so released obey return for the hearing and do not commit other crimes at least during the

¹⁰⁸ Ibid at paragraph 4.20.

¹⁰⁹ VERA Institute of Justice 'Incarceration's Front Door: The misuse of Jails in America' Feb 2015 at 2 <<https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america>> Accessed April 10, 2019

release.¹¹⁰ Consistent with the said findings, most accused persons whom the courts released on bond indicated that the most important consideration in choosing whether to attend court for trial is the need to clear their names and to avoid living on the run¹¹¹. The fear of forfeiting land, vehicle, money or any other property whether their own or of the surety did not play a significant role. In any event, Kenyan courts do not allow accused to deposit his own property insisting instead on the property of the surety¹¹².

4.1 Practice does not have legal basis

The Judiciary Handbook provides that courts should determine the suitability of the surety by examining him on oath. Citing paragraph 4.40 of the Policy Guidelines on bail/ bond and the decision in *R v James Kiarie Mutungei*, the Handbook sets out the factors to be considered. The very first factor is the financial ability of the surety to meet the obligations of the terms of the bond. The Handbook advises that the court should explain clearly to the surety that he will be required to pay the penalty or forfeit the amount in bond should the accused abscond or breach the terms of the bond. In essence, the guidelines require the surety to prove that he owns the amount of money in question and be prepared to forfeit it if the accused absconds¹¹³. Money in Kenya shillings being the legal tender of the country is the best security for fulfilling a monetary obligation. Conceptually, requiring the surety to deposit money brings the surety in Kenya at par with the bondsman in the U.S. bail system in terms of the conditions of the bond and the legal obligations. As argued by the penalty school of thought, bail and security bond are mere securities for the penalty for failing to attend trial. It is a contingent monetary obligation. The inability of the surety to deposit land, vehicle, or other property other than money does not necessarily mean that he is not able pay the monetary penalty. The other three factors cited by the Handbook for the suitability of the surety are the character of the surety, relationship of the surety to the accused and the

¹¹⁰ Pretrial Services Agency for Washington D.C., Release Rates For Pretrial Defendants Within Washington, D.C (2017)<https://www.psa.gov/sites/default/files//2016/pretrial%defendants.pdf>. Accessed on January 13, 2021.

¹¹¹ N. 90.

¹¹² n. 12 at 4.18.

¹¹³ The Judiciary (n 26) 53.

residence of the surety. Availability of land, vehicle, or other properties is not relevant to these factors in any conceivable way.

A number of judicial officers indicated that their objective in demanding land, vehicle or property other than money from the surety is to tie him to the proceedings. However, while the objective of tying his land, motor vehicle, or other non-monetary security may be noble, it is ultra-vires. The principles of rule of law and legality deny courts the power to pursue purposes that the law does not authorise expressly or impliedly¹¹⁴.

In statutory interpretation, the purpose noble as it may be, is excluded by the Act by express omission¹¹⁵. In any event, if the objective of taking the land or vehicle is to reduce the flight risk, one would expect the courts to take such from the accused rather than the surety since the risk of forfeiting his property may create a greater incentive for him to return compared to taking the security from his surety. Without explaining the reason, the Handbook notes that courts do not permit accused persons to rely on their own property to secure their freedom¹¹⁶.

The vanity of insisting on land or vehicles is demonstrated by section 131(1) of the Criminal Procedure Code. It provides that where the accused absconds, the court cannot order the surety or accused to forfeit the land or vehicle. Instead, it requires courts to require the surety to either pay the penalty fixed by the bond or show cause why he should not. If the surety fail to pay or show the cause, the court may invoke section 131(2) and issue warrants for attachment and sale of the property. Citing the same section 131(2), the Judiciary Hand Book acknowledges that should the surety fail to pay the penalty, the court may make an order for attachment of the movable property of the surety¹¹⁷. Under section 131(4), the person who gave the bond may be imprisoned for six months if he fails to pay or to show cause and the penalty

¹¹⁴ *Gibb Africa Limited v Kenya Revenue Authority* [2017] eKLR at paragraph 31.

¹¹⁵ Georgetown University Law Centre, 'A Guide to Reading, Interpreting and Applying Statutes' (2017) The Writing Center at GULC, at 5.

¹¹⁶ N. 12 at 4.18.

¹¹⁷ The Judiciary (n 26) 54.

cannot be recovered by attachment and sale. This demonstrates that taking land, vehicle, or other property other than money does not really change the monetary character of the liability undertaken under the bond. The surety in Kenya stands in the same legal position as the bondsman in the U.S.

In the absence of a constitutional, statutory or other legal basis for excluding money from the properties that may be used as security in surety bond, the study concludes that the exclusion is de jure unreasonable.

4.2 Unlawfully substitutes the alternative for the primary security

Courts base the requirement of title to land or motor vehicle and the refusal to accept any other property including money on interpretation of section 126 of the Criminal Procedure Code which provides that the court or officer may require the person to deposit a sum of money or deposit property¹¹⁸. Clearly, the surety may deposit land or vehicle as the security as an alternative to depositing money. Section 126 of the Code does not empower courts to convert the secondary option into a mandatory requirement. Depositing land, vehicle or other property other than money is an option of the accused or surety where they are unable to raise the money fixed in bail/ bond order. The Handbook does not explain why the security must be in form of title to land, motor vehicle, or other property other than money. Administrators have a legal duty to give good reasons for decisions¹¹⁹. In the absence of any or any good reason, it is reasonable to conclude that there is indeed no good reason¹²⁰. In Kenya, sections 5, 6, and 7 of the Fair Administrative Act No. 4 of 2015 codifies this principle of law. Failure to give reasons renders the decision liable to nullification.

4.3 Taint of bad faith

It is possible that the whole idea of excluding money is deliberate and intended to cause the accused to spend several days in remand. The motivation of the court may simply be to act or appear to act tough. Indeed, in corruption

¹¹⁸ N12 at 4.20.

¹¹⁹ Jarrod Hepburn, 'The Duty To Give Reasons For Administrative Decisions In International Law' (2012) 61 The International and Comparative Law Quarterly 641.

¹²⁰ *Jopley Constantine Oyieng v Pubic Service Commission*, Civil Appeal No. 32 of 1981 (Unreported).

offences, Edwards notes that judicial officers in Kenya tend to put up a show of acting tough¹²¹. The observation has some basis since in *Reuben Marumben Lemunyete v R*¹²², the High Court noted that given the abhorrence that Kenya expresses towards corruption, it is tempting to give in to the public opinion and lock up the accused in corruption charges or to give them bail or bond terms that are so stringent that they remain in remand. Not surprisingly, bail/ bond hearing takes the predictable pattern where the accused is remanded in prison for three days or so ostensibly to give time to the Magistrate to consider the submissions and write the ruling. After three or so days, the court delivers the ruling. Invariably, the ruling releases the accused on bond of a specified sum of money with one or two sureties of a similar amount. At times, the ruling gives the accused an option of depositing a lesser amount as cash bail. Deferring the ruling for several days suggests bad faith since the submissions are routine and there is rarely anything novel in the ruling or the terms of the bond. Excluding money and deferring the ruling suggests that courts deliberately clog the right to pre-trial release with the unlawful and cumbersome requirements and processes. Such motives are *de jure* unreasonable since the terms of bond should not punish¹²³.

4.4 Practice is unrealistic in Kenya's social economic circumstances

It is a matter of judicial notice that in Kenya access to land, vehicles or title documents is limited. In addition, there are logistical problems, heavy expenses, bureaucracy and even corruption. These and other factors makes it difficult for the accused to deposit land or vehicle for bond. Conditions that are too difficult to satisfy deny the right to bail through the back door. It is perhaps for such concerns that section 123 of the Code requires courts to consider all the circumstances of the case when fixing the terms of the bail/

¹²¹ Edwards (2012) 'Snap-shot of the Use of Conditions of Pre-Trial in Police Cells in Africa'. APCOF report < http://apcof.org/wp-content/uploads/2016/05/No-7-Pre-Trial-Justice-in-Africa-An-Overview-of-the-Use-of-Arrest-and-Detention-and-Conditions-of-Detention_-English-Louise-Edwards-.pdf> Accessed March 22, 2019

¹²² [2019] eKLR.

¹²³ Michael J. Eason, Eighth Amendment--Pretrial Detention: What Will Become of the Innocent, 78 J. Crim. L. & Criminology 1048 (1987-1988) <https://pdfs.semanticscholar.org/a918/e66ae647d8367dfcecd7e2212c40260b3cc8.pdf>

bond. Courts act unlawfully when they fail to consider these social economic circumstances.

In *Samuel Kimutai Koskei and 15 others v DPP*, the High Court took judicial notice of the fragile and poor state of the economy, that not many people own property worth Kshs. 50 million and held that the bond of Kshs. 50 million imposed by the Magistrate is beyond the reach of majority of Kenyans¹²⁴. Therefore, demands that put the right beyond the reach of majority of Kenyans are de facto unreasonable. Byamugisha demonstrated that about 5 million Kenyans live in informal urban settlements commonly known as slums¹²⁵. That in itself means that the 5 million Kenyans do not own the land they live on. Of those who own land, a huge majority own it communally meaning they do not have title deeds or the land register does not recognise their ownership.¹²⁶ Beneficial ownership without registration is quite common in Kenya especially where family land is registered in the name of the ancestor.¹²⁷

The scenario is more or less the same with access to motor vehicles. Research by World Bank indicates that only 23.8 out of every 1000 Kenyans owned motor vehicles as at year 2010¹²⁸. As at year 2017, the number of motor vehicles registered in Kenya stood at 2,989,788 against an estimated population of 47.8 million¹²⁹. Again, actual owners are not necessarily registered as such.

Regarding the cost of valuation, the average of Kshs 12,000 charged by valuers for valuation reports for land or vehicles is beyond the reach of most Kenyans. This becomes more apparent when one considers that the number of Kenyans in wage employment in the country is a mere 2,765,100 out of an estimated

¹²⁴ Ibid at 36 and 38.

¹²⁵ Frank. K. Byamugisha 'Securing Africa's Land for Shared Prosperity: A Program to Scale Up Reforms and Investments. at 85 accessed September 25, 2019.

¹²⁶ Ibid note 77.

¹²⁷ Advisory on Comprehensive Programme for Registration of Title in Land Draft Report http://www.landcommission.go.ke/media/erp/upload/draft_advisory_comprehensive_program_booklet_for_registration_of_title_in_land.pdf

¹²⁸ World Bank, <https://data.worldbank.org/country>

¹²⁹ Kenya/Road Transport: No of Motor Vehicles: Registered: Economic Indicators CEIC <<https://www.ceicdata.com>>Kenya> accessed September 25, 2019.

population of 47.8 million as at year 2019¹³⁰. This number, according to the World Bank, translates to unemployment rate of 9.3 % of the labour force. Further, that even for those lucky to be employed, the bulk earns an average monthly wage of Kshs. 9,014 for agricultural areas and Kshs. 16,841 for urban areas as at January 2019¹³¹. The situational analysis by the Bail/Bond Policy Guidelines notes that in Kenya, many accused persons are unable to afford cash bail in amount as low as Kshs. 1,000 due to poverty and so they remain detained in police custody¹³².

In the *Samuel Kimutai Koskei* case, the High Court took judicial notice that in Kenya, employment opportunities are rare¹³³. Ehlers argues that to reduce unnecessary pre-trial detention, it is necessary to take into account the economic circumstances of the accused when deciding the type and terms of bail¹³⁴. Indeed, Principle 1.3 of the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) requires member states to take into account the political, economic, social and cultural conditions of the country and the objectives of the criminal justice system of the country¹³⁵. Accordingly, when courts decide the security, they ought to take into account the reality that majority do not own land or vehicles. In *ODonnell v Harris County*, the U.S. Fifth Circuit Court held that a system that results in releasing those who afford while detaining those who cannot amounts to discrimination based on wealth¹³⁶. Equally, releasing those who can avail land and vehicles while detaining those who cannot is discrimination based on wealth.

¹³⁰ Kenya National Bureau of Statistics, Economic Survey 2019 at 42. < <http://www.knbs.or.ke>> accessed September 25, 2019.

¹³¹ Kenya National Bureau of Statistics, Economic Survey 2019 at 50 and 51. < <http://www.knbs.or.ke>> accessed September 25, 2019.

¹³² N. 12 at Principle 4.2(d).

¹³³ Ibid at 37.

¹³⁴ Ehlers, L. (2008) 'Frustrated Potential: The Short and Long Term Impact of Pretrial Services in South Africa'. Open Justice Society Initiative Spring :121-139

¹³⁵ Adopted by General Assembly resolution 45/110 of 14 December 1990. <<https://www.un.org/ruleoflaw/files/UNITED~2.PDF>> Accessed on April 2, 2019.

¹³⁶ 251 F.Supp.3d 1052(S.D.Tex. 2017,aff'd as modified,892 F..3d 147(5th Cir.2018).

The study takes into account the fact that even where Government offices ought to issue bail documents free of charge or at a minimal fee, accused are often forced to incur heavy costs. For the certificate of official search for land, the fee is Kshs. 100 only. The letter of the Land Registrar verifying the authenticity of the title documents and the letter from the Directorate of Criminal Investigations verifying the identity of the surety are officially free. The indirect expenses include the cost of travelling to distant Land Registries where the land is far from the Court. An example is where the land is registered in Kisumu, while the proceedings are in Mombasa. The two towns are about 1000 kilometres apart. Bearing in mind that the cost of travelling to Kisumu from Mombasa averages Kshs. 3,000 one way, it may take the accused several days or weeks in remand prison as he waits for the surety to raise the Kshs. 10,000 for fare and travel to and from Kisumu just to obtain the documents.

Where the surety is offering a motor vehicle as security, there are hidden costs too. For instance, the study established that where the vehicle is stationed far from the court, the cost of delivering the vehicle to the court may be prohibitive. Where the vehicle offered is a lorry located in Kisumu, the accused needs about Kshs 80,000 to fuel the vehicle and Kshs 10,000 for a driver to transport it to Mombasa. Over and above these direct and indirect expenses, there is the unspoken bribes that officials inevitably extract from desperate friends and relatives and even Counsel.¹³⁷ Time is crucial in actualising the order of release because the surety has to obtain the required official documents, present the surety and the document to the Registry and Magistrate, persuade the Magistrate to approve the surety, and hopefully secure a release order before the accused persons are committed to remand prison. The anxiety and often desperation makes the accused and counsels vulnerable to extortion of bribes by officials whose services the accused needs desperately. In fact, the Bail Bond Guidelines notes that the bureaucracy forces accused persons or their relatives to bribe officials to expedite the process¹³⁸.

¹³⁷ Bail and Bond Decision making 4.3

<http://www.klrc.go.ke/index.php/mandate/bail-and-bond-policy-guidelines/622-4-bail-and-bond-decision-making>

¹³⁸ n. 12 at 4.20.

This relationship between the terms of bail and vulnerability to extortion for bribes is confirmed by Saxena whose research demonstrated that imposing terms of bail that are difficult to fulfil renders the detainee more vulnerable to exploitation by third party professional bailers¹³⁹. Cases where police release the accused against cash bail and police bond best demonstrate the irony of excluding money. The accused dutifully presents himself to court as required by police bail only for courts to demand land or vehicles as security for the same amount of surety bond and lock up accused that are unable to avail land or vehicles.

4.5 Requirements cause undue delay in releasing

The consequence of the bureaucracy is that considerable numbers of accused who are technically out on bond remain in custody because they cannot obtain a surety who holds title to land or motor vehicle and is ready and willing to deposit them as security. In the U.S., Turner notes that the extent to which the system holds un-convicted people in jail simply because they are too poor to pay bail is horrifying¹⁴⁰. The Bureau of Justice Statistics in U.S. estimated that as at year 2019, sixty to seventy percent of all persons in U.S. prisons were pre-trial detainees¹⁴¹.

In Kenya, the Judiciary admits that the process of complying with the conditions of bail including approving sureties and the securities is characterised by administrative bottlenecks, which considerably delay release of the accused from custody¹⁴². It further concedes that some courts entrust verification of the title documents to investigating officers without setting timelines and that ultimately, the requirement of title to land and motor vehicles in surety bonds and the verification of security documents mean that

¹³⁹ Saxena, RK. (2008) 'Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India' Open Justice Society Initiative , Spring:57-69.

¹⁴⁰ VERA Institute of Justice 'Incarceration Front Door: The Misuse of Jails in America' Feb 2015 < <https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america> > Accessed April 10, 2019.

¹⁴¹ Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, U.S. Department of Justice , NCJ 248629

¹⁴² n. 12 at 4.20

the accused stays in prison for considerable durations and in some cases, for the entire duration of the trial¹⁴³.

4.6 Way forward

Various authorities have suggested that money bail should be abolished and replaced with proof that the accused is well grounded in the local society. In the *State of Rajasthan, Jaipur v Balchand*,¹⁴⁴ the Supreme Court of India observed that the monetary bail may not be very relevant to accused deciding whether or not to reappear for trial. Therefore, the decision urged rethinking of the monetary bail. In this spirit, the State Government of California on August 28, 2018 abolished the requirement of posting money bail and substituted it with evidence of social groundings¹⁴⁵. The law, which came into force on October 1, 2019, requires accused to be subjected to pre-trial risk assessment. The Pre-trial Risk Assessment Services assesses and reports to the court recommending the conditions for release. New York City has since substituted money bail with pre-trial supervised release. These developments are largely informed by the paradox that most people remain in remand prison because they cannot afford to pay bail bond yet most of them can be relied upon to attend court even without depositing the cash bail or other forms of security.¹⁴⁶ This school is reflected in *US v Anthony Salerno and Vincent Cafaro*¹⁴⁷ in which the US Supreme Court held that purposes of pre-trial detention are distinct from the purposes of bail. It argues that an accused who is a flight risk ought to be remanded in custody. It should not matter that he can raise the bail. On the other hand, accused who is not a flight risk should not be detained on account of not being able to pay bail or deposit security. Bail and security bond are mere securities for fulfilling the financial liability for failing to attend trial. It is a contingent financial liability. The study referred to this viewpoint as the penalty school.

¹⁴³ Ibid.

¹⁴⁴ 1977 SCC (4) 308.

¹⁴⁵ Government Code Chapter 1.5 (section 1320.7).

¹⁴⁶ VERA Institute of Justice 'Incarceration's Front Door: The misuse of Jails in America' Feb 2015 at 2 <<https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america>> Accessed April 10, 2019.

¹⁴⁷ 481 U.S 1987.

Imprisoning automatically for failing to pay fine provides a good parallel. In *Bearden v Georgia*, the accused was imprisoned after failing to pay a fine. Outlawing as discrimination based on wealth, the Supreme Court held that, “the Constitution prohibits the state from imposing a fine as a sentence and then automatically converting it to a jail term solely because the defendant is indigent”¹⁴⁸.

5.0 Conclusion

The study concludes that though courts, lawyers, accused and scholars assume that the practice of demanding land, motor vehicles and other properties other than money as security for bail bond is lawful and useful, it is indeed unconstitutional and does not serve any demonstrable useful purpose. It is unduly difficult to comply with, unnecessary, expensive, inconvenient, unrealistic, corrupt, abusive, irrational, and unproductive. It is de facto unreasonable, runs contrary to section 123-126 and 131 of the Criminal Procedure Code and amounts to excessive bail. Courts may nullify the requirement under section 7(2) (i) of the Fair Administrative Action Act on the ground that it is not rationally connected to the purpose for which it is imposed. Above all, it offends Article 49(1) (h) of the Constitution thus rendering it unconstitutional.

The study acknowledges the noble motives of tying the surety and perhaps the accused to the proceedings. It further appreciates that the rigorous scrutiny of the surety and security assist in weeding out fraudsters. In fact, the study encountered cases where sureties used false names and title documents to assist the accused to abscond. However, the noble intentions cannot legitimise the illegitimate. Guilty as the accused may turn out to be, courts must protect his right to pre-trial release on reasonable conditions so long as there is no legitimate compelling reason militating to the contrary.

As observed by Justice Marshall of the US Supreme Court in *United States v Rabanowitz*, “...it is a fair summary of history to say that the safeguards of

¹⁴⁸ 461 U.S.1,20-22(1973).

liberty have frequently been forged in controversies involving not very nice people”¹⁴⁹. In the case of the right of the accused to bail on reasonable conditions, the demands for land and vehicles to the exclusion of other perfectly legitimate securities such as cash money is not authorised by the law. In fact, by unlawfully demanding land, vehicles or other property other than money, courts may very well be unwittingly contributing to use of false title deeds and logbooks. The study hopes that this report will trigger debate amongst the stakeholders towards realigning administration of bail and bond to the letter and spirit of the law and the prevailing social economic realities.

¹⁴⁹ *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950).

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Appendix

Appendix i - Warrant of Commitment on Remand.

Warrant of Commitment on Remand

CRIMINAL 101



REPUBLIC OF KENYA

IN THE COURT
AT
CRIMINAL CASE OF 20

To:

WHEREAS has this day been charged before me with
and has been remanded till the day of 20
This is to authorize and command you to receive him into your custody and to produce him in the Court at a.m./p.m. on the day named.
Dated this day of 20

Further remanded until
(Signature)
Magistrate

Further remanded until
(Signature)
Magistrate

Further remanded until
(Signature)
Magistrate


Further remanded until
(Signature)
Magistrate

Further remanded until
(Signature)
Magistrate

Further remanded until
(Signature)
Magistrate

JKF - 4/00


Appendix ii - Release order Where cash Bail has been paid.

Release order Where cash Bail has been paid.	 REPUBLIC OF KENYA	CRIMINAL
<p>IN THE COURT AT</p> <p>CRIMINAL CASE No. OF</p> <p>REPUBLIC Prosecution</p> <p style="text-align: center;">=Versus=</p> <p style="text-align: right;">..... Accused</p> <p>To: - THE OFFICER IN CHARGE REMAND HOME</p> <p>.....</p> <p>IN ACCORDANCE with the order on the above file and the remand warrant which is in your possession a cash bail of Ksh has been paid by the accused/.....</p> <p>Has been paid on behalf of the accused by</p> <p>Into this court, you are hereby directed to release him/her and inform him/her to attend this court</p> <p>On day of 20</p> <p>Atam/pm</p> <p>GIVEN under my hand and the Seal of the Court at this</p> <p>Day of 20</p> <p style="text-align: right;">..... Magistrate</p> <p>NOTE: Please return the remand warrant together with the bond to this Court</p> <p>JKF - 4/00</p>		

Appendix iii - Bond and Bail Bond.

Bond and Bail Bond

CRIMINAL



REPUBLIC OF KENYA

IN THE _____ COURT

AT _____

I, _____ of _____
being charged with the offence(s) of _____
and after inquiry required to appear before the Judge/Magistrate at _____
and after inquiry called upon to enter into my own recognizance to appear when required hereby
myself to appear in the _____ Court at _____
o'clock in the fore/afternoon on the _____ day of 20____
or whenever required and so to continue to attend until otherwise directed by the C
to answer further to the said charge, and in case of my making default herein, I
myself to forfeit the sum of Shillings _____

Dated this _____ day of _____ 20____

Witness _____ Signature _____

I, _____ of _____
do hereby declare myself surety for the above-mentioned _____
that he shall attend at _____
at _____ on the _____ day of _____ 20____
(or on such day as he may hereafter be required to attend) further to answer to the charge pe
against him, and in case of his making default therein, I hereby bind m
to forfeit the sum of Shillings _____

Dated this _____ day of _____ 20____

Witness to Signature(s) _____ Signature _____

Appendix iv - Particulars of the surety.



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT No.
AT MOMBASA

CRIMINAL/Mscr/TRAFFIC CASE No. OF
ACCUSED'S NAME: - Accused No.
AMOUNT OF BOND Kshs No. OF SURETIES


PARTICULARS OF SURETY

NAME
RELATIONSHIP WITH THE ACCUSED
ID CARD No. ISSUED AT
DISTRICT LOCATION
SUB - LOCATION VILLAGE
(NAME & CONTACT OF CHIEF
RESIDENTIAL ADDRESS P.O. BOX
STREET/NEAREST LANDMARK/INSTITUTION
.....
OCCUPATION EMPLOYER
PHYSICAL ADDRESS AT WORK
.....
TELEPHONE No. AND EXTENSION SURETY'S INCOME
SECURITY DEPOSITED IN COURT
SURETY: - I understand that if the said applicant fails to appear in court as and when required may be
called upon to pay the court the sum of Kshs SURETY SIGNATURE
PREPARED BY COURT ASSISTANT
CHECKED BY EXECUTIVE OFFICER
SURETY APPROVED/NOT APPROVED
COURT'S DECISION

.....
Magistrate

DATED AT MOMBASA THIS Day of 20.....

Appendix v – Letter requesting verification of documents

Telegrams: "COURT", NAIROBI Telephone: Nairobi 2221221 When replying please quote	 REPUBLIC OF KENYA	CHIEF MAGISTRATE'S COURT LAW COURTS P.O. Box 30041-00100 NAIROBI
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ACC. 26 OF 2019

INVESTIGATING OFFICER

EACC

24TH SEPTEMBER, 2019

RE: ANTI-CORRUPTION CASE NO. 26 of 2019

REPUBLIC VERSUS X Y


The accused person in the case under reference was granted bail terms by this Court and is required to avail THREE sureties for the same.

X X

have offered to stand surety for the above named accused person by depositing

1. CERTIFICATE OF LEASE FOR TITLE NO KISUMU/WATHOREGO/1894
2. CERTIFICATE OF LEASE FOR TITLE NO SOUTH GEM/DIENYA/95
3. CERTIFICATE OF LEASE FOR TITLE NO KISUMU/KONYA/3203
4. 3 REPORTS OF REGISTRAR OF PERSONS DATED 20TH SEPTEMBER.2019
5. 3 VALUATION REPORT FROM CHRISCA REAL ESTATES VALUERS LTD
6. 3 OFFICIAL SEARCH CERTIFICATES



You are hereby required by this court to confirm the authenticity of the said documents and to serve the registrar with an attached order of restriction.


P. KIARIE

FOR: CHIEF MAGISTRATE

MILIMANI ANTI-CORRUPTION COURT

Appendix vi – Release order.

Release Order	CRIMINAL 120
<div style="text-align: center;"> REPUBLIC OF KENYA</div>	
TO: THE OFFICER IN-CHARGE G. K. PRISON.....SHIMO LA TEWA.....	
SIR,	
I have the honour to state that the fine of Kshs..... on behalf of prisoner in Criminal/ Traffic Case No.has been paid today in this Court <i>vide</i> Court Fines Receipt No.of.....	
The said prisoner may therefore be released in respect of this charge.	
<div style="text-align: center;"> SEAL</div>	I have the honour to be, Sir, Your most obedient servant
..... Magistrate	
JKF – 9/99	