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A Legal Review Of Bail Reform Propsal, Court Discretion And The Doctrine Of Precedent In Uganda

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***Abstract**: (Bail reforms lies at the centre of recent debates triggered by president Museveni's suggestion that bail for capital offences that include murder, Rape, robbery, and treason should be scrapped in the criminal justice of Uganda because bail is presumed to cause injustice and the release of suspects by courts presumably passes for provocation of victims and their families into carrying out mob justice against the suspects. Bail talks have become 'hot' in Uganda. Bail reform is vehemently opposed by the legal circles, civil society, academia and human rights advocates arguing that, reform is not necessary and unconstitutional. Done right, bail keeps dangerous criminal off the streets; done wrong, it keeps those with less economic in jail longer. This article examines the legitimacy and authority of the bail reforms, evaluates the true doctrinal standing of the right to bail and argues that bail is a constitutional right rooted in history and natural justice, that reforming bail will have widespread theoretical and practical impacts, such as, alter the landscape of bail laws, schedules and risk assessments, impact the debate of equitable application in criminal law, prison overcrowding which is already the country's problem and due process protection of presumption of innocence a non-derogable right. The study finds that, the reform proposal is illegitmate and unconstitutional for it violates the constitutional rights of equality before the law and presumption of innocence and is considered a wall to freedom and justice .)*

Keywords— (bail, precedent, court discretion)

1. INTRODUCTION

Bail reforms lies at the centre of recent debates triggered by president Museveni's suggestion that bail for capital offences that include murder, Rape, robbery, and treason should be scrapped in the criminal justice of Uganda because bail is presumed to cause injustice and the release of suspects by courts presumably passes for provocation of victims and their families into carrying out mob justice against the suspects. Bail talks have become 'hot' in Uganda. Bail reform is vehemently opposed by the legal circles, civil society, academia and human rights advocates arguing that, reform is not necessary and unconstitutional. Done right, bail keeps dangerous criminal off the streets; done wrong, it keeps those with less economic in jail longer.[1] Ugandans have reacted to it as a perceived as an attack on its livelihood, court discretion and legislature, as was states in *Uganda vs. Kiiza Besigye*,2 the refusal to grant bail should not be based on mere allegations and bail should not be refused merely as punishment as it would conflict the presumption of innocence; and that both the high court and subordinate courts have discretionary powers to set bail conditions that they deem reasonable, though this may be done with caution as was seen in *Kalule vs. Uganda*. 3

The bail reform proposition creates a presumption that any condition of release imposed shall be cash or non-cash in nature and the courts shall impose the list restrictive means necessary,[4] mandating the courts to consider releasing the applicant if on assessment he does not present substantial of flight of danger (classified as low-risk, medium-risk, high-risk and setting conditions for release based on those categories);[5] court in *the Matter of Bail Application by Tigawalana Bakali*,[6] in dismissing the bail application court noted that the condition for grave illness, had to be one that cannot be medically treated while the applicant was in custody where is was being held, and that if released the applicant would interfere with prosecution witnesses or abscond or do both. Therefore, this article examines the legitimacy and authority to effect bail reforms in Uganda. The articles argues that the right to bail is a constitutional guarantee as seen from the relevant constitutional court

[1] https://www.monitor.co.ug/uganda/news/national/museveni-softens-now-looks-to-judiciary-on-bail-reforms-3706892

[2] (Constitutional Reference No. 20 Of 2005) [2006] Ugca 42 (25 September 2006);

[3] (CRIMINAL MISCELLANEOUS APPLICATION NO. 001 OF 2018.) [2018] UGHCICD 1 (10 April 2018)

[4] SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL

[5] *Foundation for Human Rights Initiative* v *Attorney General* Constitutional Petition No. 20 of 2006 at page 28. See also Col (Rtd) *Dr. Kizza Besigye* v *Uganda*, Criminal Application No. 83 of 2016.

[6] CRIMINAL APPLICATION NO. 23 OF 2003) [2003] UGHCCRD 7 (12 August 2003);

decisions. In *Uganda vs Nadiope & 5 Ors*,[7] there were high chances that the applicant would influence/interfere with witnesses due his prominence so he was denied bail.

2. History of bail in Uganda

2.1 Early development

Bail has a long-standing history traced from the *Magna Carta*, proving that,

> *"No Freeman shall be taken, or imprisoned, or be disseized of his Freehold, or Liberties, or free Customs, or to be outlawed, or any otherwise destroyed, but by lawful Judgment of his Peers, or by the law of the Land."*[8]

It restored the presumption of innocence[9] from the medieval times, where those charged with non-violent crimes were to be released in almost all cases,[10] while those charged with capital offences would be granted bail if they would be unlikely to flee.[11] Between 1275-1628, the Westminster Act was adopted by the British Parliament which classified offences for the first time as either bailable or non bailable and mandated considerations of the nature of offences, the strength of evidence, the probability of conviction, and factors including the defendant's possibility of jumping bail, bad reputation, characteristics of the accused. The petition prescribed the rules of legality such as; 'no man may be taken to prison or disseized of his liberties but by lawful judgement of by competent court and by the law of the land'.[12] By 1677, an accused person was granted the writ of habeas corpus by the Habeas Corpus Act which provided that an 'an accused person who was denied bail can petition for a writ of habeas corpus to lord chancellor who shall release the prisoner from his imprisonment, taking his recognizance, one or more sureties, any sum according to their discretion, having regard to the quality of the prisoner and nature of the offence, and that the party is committed for such matter of offence which is not bailable'. However, this Act gave courts wide discretion giving a loophole likely to be abused. In 1989, the Bill of Rights was passed and it was one of the ways to address that loophole. It specifically provided that, in criminal cases, "excessive bail ought not to be required" [13]

Bail was introduced to Uganda by the colonial Britain through the reception clause of the 1902 Uganda Order in Council (1902 OIC). Section 15 (the reception clause) allowed the commissioner to laws from common law countries to Uganda with modification. The colonialists applied these laws from other countries verbatim. This is how the right to bail found it way in the laws of Uganda. Historically supported by the reception clause of the 1902 order in council of Uganda. Upon getting her independence, Uganda got her first constitution in 1962 which provided for the rights of prisoners to be released if not presented to court as soon as possible.[14] Section 19(3) specifically provided that, "any person arrested or detained…, who is not released, be brought without undue delay before a court; or is not tried within reasonable time,.. he shall be released either unconditionally, or upon reasonable conditions…, to ensure his appearance at later date for trial." This constitution remained in force till 1966,[15] when it was abrogated by Milton Obote the then Prime minister of Uganda, and replaced by the 1966 pigeonhole constitution and later the 1967 constitution provided for the right to bail in section 10(3).[16] In *Uganda vs. Commissioner of Prisons, Ex Parte Matovu,*[17] there was an application to be released on bail or be granted a writ of habeas corpus. Sir Egbert Udo Udoma, ruled that Obote had orchestrated a coup which according to international law, was a legitimate means of assuming power. That, the Hans Kelsen's theory on change in a state's basic norm may effectively create a new and valid legal order to replace the state's former legal order, thereby creating a new legal regime, new valid government or constitution if only the new legal order is efficious in terms of control and recognition. He declared that Obotes' government was legal and that the new constitution was in force. In *Grace Ibingira & others vs. Uganda*,[18] the petitioners were arrested and detained under the Removal of unwanted persons Ordinance. But the East African Court of Appeal ruled that the ordinance

[7] EPORTED in Ayume, CRIMINAL PROCEDURE AND LAW IN UGANDA, at p. 57.

[8] Clara Kalhous and John Meringolo, 'Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives' (2012) 32 Pace L. Rev. 800.

[9] Shima Baradaran Baughman, 'Dividing Bail Reform' (2020) 105 Iowa Law Review 947 <http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal Justice/%0Ahttps://www.proquest.com/docview/2401324802/fulltextPDF/79A6D6AD1D704EF2PQ/1?accountid=15090>.

[10] Jenny Roberts, Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts, 45 U.C. DAVIS L. REV. 277, 282 (2011)

[11] ISSA KOHLER-HAUSMANN, MISDEMEANORLAND, 164–65 (2018); Megan Stevenson & Sandra Mayson, The Scale of Misdemeanor Justice, 98 B.U. L. REV. 732, 764 (2018); Irene Oritseweyinmi Joe, Rethinking Misdemeanor Neglect, 64 UCLA L. REV. 738, 743

[12] Kalhous and Meringolo (n 17).

[13] ibid.

[14] Uganda Government, 'THE 1962 CONSTITUTION OF UGANDA'.

[15] *Morris, H. F. (1966). "The Uganda Constitution, April 1966". Journal of African Law. 10 (2): 112–117. JSTOR 744686*

[16] Uganda Government, 'THE 1967 CONSTITUTION OF THE REPUBLIC OF OF UGANDA'.

[17] (1966) 1 EA 514

[18] (1966) EA

violated a Ugandan citizen's constitutional right to freedom of movement and ordered a writ of Habeas corpus to be granted. Although the ministers were rearrested outside court and charged under a new law, the Deportation Act.

The 1967 constitution was suspended in 1971 by Dictator president Iddi Amin Dada and ruled Uganda by decree uptill 1980 when he was overthrown by UNLF.[19] UNLF restored the 1967 constitution and it remained in force with all its provisions, upto 1986 when it was overthrown by the NRA military coup headed by Museveni Kaguta. The NRA military regime retained the 1967 constitution but suspended some parts of it upto 1995 when Uganda got her current constitution. The 1995 constitution provides for the right to bail in Article 23(6). Today, Constitutionally, the right to bail is clearly established in Article 23(6),[20] which provides that, 'a person arrested in respect of an offence is entitled to apply to a competent court,[21] to be released on bail, which can be granted him on such conditions as the court may deem reasonable'.[22]

2.2 Bail in Uganda after 1995

The 1995 constitution guarantees the right to bail in Article 23(6). Today, Constitutionally, the right to bail is clearly established in Article 23(6),[23] which provides that, 'a person arrested in respect of an offence is entitled to apply to a competent court,[24] to be released on bail, which can be granted him on such conditions as the court may deem reasonable'.[25] Mulenga JSC in *Attorney General vs. Joseph Tumushabe,*[26] reaffirmed that, the position of the law that, 'Article 23(6) applies to everyone awaiting for trial for criminal offence without exception and that such a person can apply to be granted bail at any time upon and after being charged and the court may at its discretion grant the application irrespective of the category of the offence he is charged with.'

The reformists argue that, the nature of the right to bail administered in the courts of Uganda currently does not fit in the African justice system, operates on the suspicion that it is alien and does not suit in the local context, because it was simply overlaid on the people of Uganda during colonialism from the English common law system. That these super imposed laws have let the masses to lose confidence in the in the judicial system when they see suspects roaming free after a few days of arrest. Their argument is that the laxity in the law favors the offenders to an unnecessary degree and is in one way a contributing factor to the increased crime rate and mob justice. This is a serious issue for the justice system because, trust is the litmus test of citizens' judgements of their governments, distrust of the police and judges is a predictable obstacle to overcome in order to create a balance between the role of criminal justice in representing the state and its responsibility to protect (R2P).[27] However, as Rosco Pound puts it, "distrust and dissatisfaction with the judiciary is as old as the law, as long as there has been lawyers and laws, conscious and well-meaning men had a belief that laws are arbitrary technicalities, and that an attempt to regulate the relations of man-kind in accordance with them results largely in injustice." Rosco Pound augments the judiciary however that, 'the judicial system should not be deceived by the innocent and unavoidable discontent with all law into overlooking or underrating the real and grave dissatisfaction with the courts and lack of respect for law which exists in the country.[28]

Just like her colonial master, the courts in Uganda have upheld that, the basis for bail is the presumption of innocence in the common law system. Justice Twinomujuni in *Attorney General vs. Joseph Tumushabe,*[29] noted that, 'the essence of bail is that, a person presumed to be innocent and who is entitled to a speedy trial should not be kept behind bars for unnecessary long time before trial'. In *Uganda vs Turyamureeba & Anor,*[30] court observed that the presumption of innocence under Article 28(3)[31] implies that, an accused person has no duty to prove his innocence, and the burden of proof lies with the prosecution to prove the case beyond reasonable doubt. Accordingly, the accused has a right to remain silent until proven guilty or otherwise pleads guilty. This position was established in *Woolimington vs. DPP.*[32] Bail is also rooted in the belief that a person who has not yet been convicted of a crime should ordinarily not spend

[19] Karugire, Samwiri Rubaraza (1980). A Political History of Uganda. Nairobi: Heinemann Educational Books. ISBN 9780435945244.
[20] The constitution of Republic of Uganda Constitution as amended, 1995
[21] The court of competent jurisdiction may be; the High court for offences triable by both the High court and subordinate courts.
[22] The 1995 Constitution of Uganda Article 23 (6)
[23] The constitution of Republic of Uganda Constitution as amended, 1995
[24] The court of competent jurisdiction may be; the High court for offences triable by both the High court and subordinate courts.
[25] The 1995 Constitution of Uganda Article 23 (6)
[26] *Constitutional Appeal No.3 of 2005*,
[27] Cavallaro, Police Brutality. Protest against police killings continued into 2004.
[28] Rosco Pound, *the causes of popular Disatisifaction with the Administration of justice*.
[29] *Constitutional Appeal No.3 of 2005*,
[30] (HCT-05- CR-CSC-0297 OF 2006) [2012] UGHC 182 (4 September 2012)
[31] 1995 constitution of Uganda
[32] (1935) AC 462

extended time of more than 48 hours in jail.[33] In *William Obura vs. Attorney General,*[34] court noted that, arrest is unlawful if the arrested person is not handed over to police custody and amounts to false imprisonment where such arrested person is held in custody beyond 48 hours. All this is enshrined in the right to liberty which is a one of the civil and political rights recognized in the constitution of Uganda.[35] In *Uganda vs. Kiiza Besigye,*[36] court stated that, 'an applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment, for it would conflict with the presumption of innocence. In *Kalule vs. Uganda,*[37] it was stated that both the High Court and subordinate courts have got discretionary powers to set bail conditions that they deem reasonable, though caution must be taken in such matters. *In Hon Sam Kutesa & 2 Ors vs. Attorney General*,[38] court observed that the right to bail has base in the right to liberty. That its now manifest that the right to liberty is a universally accepted right, its inherent and not granted by the state; and the constitution enjoins all agencies of government and all persons to respect, uphold and promote the fundamental rights and freedoms. Court also noted that, preservation of the right to liberty is crucial in the constitution that any derogation from it, should be as a matter of unavoidable necessity, and such derogation must be is temporary and not infinite. That the constitution further ensures that that where such right has been temporarily interrupted, it can be reclaimed through the order of habeas corpus, as well was release on bail. In *Uganda vs. Kiiza Besigye,*[39] court gave guidance that, 'while considering bail, the court needs to balance the constitutional rights of the applicant, the needs of society to be protected from lawlessness.

The magistrates' court Act, section 74-77, and section 14 of the Trial on Indictment Act,[40] provide that, a person is entitled to apply to the court to be released on bail and the court may grant bail on such conditions as the court may consider reasonable such as; considerations of;

i. *The nature and gravity of offences,*- If the offence is very great, bail may be refused since the temptation to jump bail in order to escape punishment is great. Likewise, the Courts should not generally rely on such a ground to deny bail simply because the applicant stands a chance of jumping bail.

ii. *The strength of evidence, the probability of conviction and the defendant's possibility of jumping bail, - and* whether the applicant is likely to hinder witnesses from appearing. If Court is contented that the applicant is likely to interfere with prosecution witnesses when released on bail, it may refuse to grant bail. It is the prosecutor to satisfy Court on this ground and if necessary, produce evidence of prior interference attempts or threats. The relationship between the applicant and the witness may indicate the likelihood to interfere with witnesses for example where they are related and the investigations are not complete. Court has observed that if the Courts simply act on allegations, fears, or suspicions, then the sky is the limit and one can envisage an occasion whether bail would ever be granted whenever such allegations are made. *In the Matter of Bail Application by Tigawalana Bakali*,[41]

iii. *The Antecedents and defendants criminal record*. The background and character of the applicant are relevant considerations taken into account before granting bail. If the applicant is a habitual criminal with previous convictions, this suggests that he is likely to commit more offence when released and therefore bail may be refused for this reason. However, the Court may not allow bail if it is satisfied that the applicant should be kept in custody for his own protection. The power is used for example when the applicant is charged with sexual offences against children whose parents would be likely to attack the accused.[42]

iv. *Reputation, characteristics of the accused*,- In *Uganda vs. Wilberforce Nadiope & Ors,*[43] court refused to grant bail on the ground that, the applicant's prominence, and apparent influence in society, there were high chances that he would use his influence to interfere with witnesses.

v. on taking from him or her a recognizance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date and at such a time as is named in the bond.[44]

vi. fixed place of aboard,

[33] Article 23(3) of the constitution of Uganda 1995

[34] *High Court Civil Suit No. 56 of 2001) ((High Court Civil Suit No. 56 of 2001)) [2008] UGHC 40 (13 November 2008)*

[35] Article 23 of the 1995 constitution of Uganda

[36] (Constitutional Reference No. 20 Of 2005) [2006] Ugca 42 (25 September 2006);

[37] (CRIMINAL MISCELLANEOUS APPLICATION NO. 001 OF 2018.) [2018] UGHCICD 1 (10 April 2018)

[38] (Constitutional Reference No. 54 O f 2011) [2012] UGCC 02

[39] (Constitutional Reference No. 20 Of 2005)

[40] Trial on indictment Act cap 23

[41] CRIMINAL APPLICATION NO. 23 OF 2003) [2003] UGHCCRD 7 (12 August 2003);

[42] https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/25-sexual-offences-3/sexual-offences-against-children-and-young-people/

[43] EPORTED in Ayume, CRIMINAL PROCEDURE AND LAW IN UGANDA, at p. 57.

[44] 5.14 (1) T.I.A.

vii. the court may also refuse bail for the defendants' own protection, and
viii. where he is already serving a custodial sentence for another offence.

In the case of bail pending appeal, the applicant has to prove in addition to the above, exceptional circumstances, as was stated in *Nkojo vs. Uganda*,[45] that exceptional circumstances such as grave illness, advanced age, had to be proved. In *Tigawalana Bakali*,[46] bail application, court agreed that asthma and hypertension amount to grave illness within s.14 A (3). In *Rwabuhoro vs. Uganda,[47]court held that,* proof of exceptional circumstances in application for bail pending appeal wasn't only a rule of practice but a requirement of law under s.15(3) of TIA. In *Ssemugooma vs Uganda,[48] court held that, the* considerations for granting bail pending appeal include, among others, whether the offence of which the applicant was convicted involved violence. In *Kwagala Gonza vs. Uganda,[49]court observed that,* bail pending appeal is not an automatic but granted at the discretion of court.

3. The Devil in Court Discretion

The constitution of Uganda gives courts discretion while granting bail. Article 23(6) specifically states that, everyone awaiting trial for criminal offence without exception can apply to be granted bail at any time upon and after being charged and the court may at its discretion grant the application irrespective of the category of the offence he is charged with.' In *Kalule vs. Uganda,[50]* it was stated that both the High Court and subordinate courts have got discretionary powers to set bail conditions that they deem reasonable. . In *Kwagala Gonza vs. Uganda,[51]court observed that,* bail pending appeal is not an automatic but granted at the discretion of court. This implies that granting or bail is an exercise of court discretion.

Ugandans have reacted to it as a perceived as an attack on its livelihood, court discretion and legislature, as was states in *Uganda vs. Kiiza Besigye*,[52] the refusal to grant bail should not be based on mere allegations and bail should not be refused merely as punishment as it would conflict the presumption of innocence; and that both the high court and subordinate courts have discretionary powers to set bail conditions that they deem reasonable, though this may be done with caution as was seen in *Kalule vs. Uganda.*[53] It was further stated in *Kiiza Besigye case* that, 'remanding a person in custody is a judicial act, which requires the court to summon judicial mind to bear on the matter before depriving the applicant of their liberty. That, the decision must be fair within the legal provisions, implying that discretion is not unfettered as implied by the word 'reasonable' in Article 23(6)(b)(c) included for policy reasons and safeguards against violence and wanton abuse of human rights which has characterized Uganda in the past.[54] This gives us the test of reasonableness as was stated in *Onyango Obbo & Andrew Mwenda,*[55] that, 'whether a prudent man, being guided by such rational considerations of ordinary human conduct, would have done or abstained from what the judge did'. In that way the judge will be building trust and to safeguard against dangers of manipulation, which is paramount for every criminal system. Public confidence in the judiciary can only be reclaimed by establishing a reputation of integrity in the judicial system and by subjecting the activities of the institution to public scrutiny.[56]

The constitution further guarantees judicial independence under Article 128, and provides that, 'in exercise of judicial power, the courts shall be independent and shall not be subject to the discretion or control of any person or authority. That, no authority shall interfere with the courts or judicial officers in the performance of their functions, and all the organs and agencies of the state shall accord to the court such assistance as maybe required to ensure the effectiveness of the courts'. The commonwealth (Latimer House) Principles on the three branches of government state that, upholding the rule of law requires an independent, impartial, honest and competent judiciary, that are most likely to endanger public confidence and dispensing of justice.[57] The independence of the judge tasked with interpreting and applying the law in cases is very paramount for building public confidence in the justice system. As stated by a famous English judge, that, "justice is

[45] (MISCELLENOUS APPLICATION No. 197 OF 2018) [2019] UGCA 30 (9 April 2019)
[46] (Criminal Application 23 of 2003) [2003] UGHCCRD 7 (12 August 2003)
[47] (CRIMINAL APPLICATION No. 151 OF 2018) [2019] UGCA 27 (9 April 2019)
[48] (CRIMINAL APPLICATIONS No. 145 OF 2018) [2019] UGCA 27 (9 April 2019)
[49] (Criminal application No 89 of 2017) [2018] UGCA 15 (16 May 2018);
[50] (CRIMINAL MISCELLANEOUS APPLICATION NO. 001 OF 2018.) [2018] UGHCICD 1 (10 April 2018)
[51] (Criminal application No 89 of 2017) [2018] UGCA 15 (16 May 2018);
[52] (Constitutional Reference No. 20 Of 2005) [2006] Ugca 42 (25 September 2006);
[53] (CRIMINAL MISCELLANEOUS APPLICATION NO. 001 OF 2018.) [2018] UGHCICD 1 (10 April 2018)
[54] Constitutional Reference No. 20 of 2005
[55] High Court Criminal Miscellaneous Application No. 145 of 1997
[56] Robert Martin and Estelle Feldman Access to Information in developing countries, transparency international working paper, ch-8.
[57] The commonwealth (Latimer House) Principles on the three branches of government

rooted in confidence," that the confidence litigants and the public must have that the judicial decision-makers are impartial is justice. That there must be certainty in the minds of those who come before courts that decisions made by the courts are free from outside influence, pressure and are impartial solely dependent on facts and the law.[58]

Consequently, as Watson puts it, 'the sole purpose of judicial independence is to ensure that every citizen who comes before the courts of law will have their case heard by the judge who is free of governmental or private pressures that may impinge upon the ability of that judge to render a fair and unbiased decision in accordance with the law.'[59] Nicholson states that, judicial independence is the capacity of the courts to perform their constitutional function free from actual or apparent interference by and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions including, in particular, the executive arm of government over which they do not exercise direct control.[60]

Notwithstanding of all those constitutional safeguards, in as much as the judge would want to act according to the 'reasonableness' test in article 23(6)(b), and judicial independence under Article 128 of the constitution of Uganda, they are most often hampered by political will in most high-profile cases. This implies that, whatever is done by the judiciary must be supported by the executive arm of government at least constructively, there must not be arms-twisting between these arms of government but instead support and complement each other. However, jurisprudence in Uganda shows how the executive has a tendence of interfering in the in the courts exercise of their power to grant bail. A case in point was a scenario, of rearresting the Kiiza Besigye immediately after his release on bail at the High court in 2005 by the black mambas.[61]

Nevertheless, a significant number of those charged with either misdemeanors or felonies end up in jail in the Ugandan criminal justice system having been denied bail. This has a significant effect on their case preparation, in most cases limits their chances to win their case because they do not have adequate time and facility to prepare their defense while in detention because "justice is more attainable from outside of a prison cell". Denial of bail may lead to loss of job, family instability, increase reoffending risk and exposure to harsh jail conditions, and a lowered chance of successfully defending their case, of striking a favorable plea bargain.[62] The chances are high for a prisoner to accept a plea bargain for time served even when they are innocent because they just want to leave jail and return to their homes. Studies indicate that, there is a higher rate of conviction, plead guilty, for defendants who are detained until trial. There is no doubt that any conviction has serious and collateral consequences such as; ability to get a job or professional license, driver's license, hold public office, or join forces.[63] This article therefore demonstrates that bail reforms may be a fundamentally flawed exercise.

3.1 The 'wall of authority' and the doctrine of precedent

The 'wall of authority' is a metaphor suggesting that an unbridgeable exists that separates bail from equal protection of applicants.[64] The doctrine of precedent in the common law system is seen as those walls. The courts adopt propositions whether to grant bail or not based on the authority of prior court decisions. A precedent is every decision of one of the superior courts[65] which has not been reversed on appeal or overruled, in hierarchy having binding force on subordinate courts. It can also be a judgment or decision of a court of law cited as an authority for deciding a similar set of facts, it serves as a *locus classicus* case,[66] an authority for legal principle embodied in its decision. This implies the law-making power of the judge through interpretation of the principle and creating a new rule that did not exist but does exist from the moment is given. The doctrine of precedent therefore, presupposes that other judges of the same and

[58] British Columbia, Supreme Court and Provincial Court, 'Judicial Independence (And What Everyone Should Know About It)'.
[59] Garry D. Watson, "The Judge and Court Administration" in The Canadian Judiciary (Toronto: Osgoode, 1976) at 183 quoted in British Columbia, Commission of Inquiry Pursuant to Order-in-Council #1885, July 5, 1979, Report of the Honourable Mr. Justice P.D. Seaton, Commissioner (October 23, 1979) at 11 ["Seaton Report"].
[60] Nicholson RD "Judicial independence and accountability: Can they co-exist?" (1993) Vol.
67 The Australian Law Journal at 405. 187
[61] The then chief justice Benjamin Odoki, the Inspector General of Government justice faith Mwondah, the then Principle Judge, Justice Ogola James and the Uganda Law Society condemned the deployment of the JATT at the high court as, 'the most naked and grotesque violation of the twin doctrine of the rule of law and the independence of the judiciary, an act of crude intimidation that undermines the independence of the judiciary, a heinous and repugnant assault on the judiciary and an egregious desecration of the High Court by a group of heavily armed men'.
[62] Baughman (n 18).
[63] 3 John G. Malcolm, The Problem with the Proliferation of Collateral Consequences, 19 FEDERALIST SOC'Y REV. 36, 37 (2018)
[64] Baughman (n 18).
[65] Art. 129(2) of the 1995 constitution of uganda
[66] An authoritative and often quoted passage that has become a standard for elucidation of a word or subject. https://www.merriam-webster.com/dictionary/locus%20classicus

subordinate courts will have to apply the rule in future cases. [67]

The adherence to judicial precedent s finds its expression in the doctrine of *stare decisis,* [68] which implies that, 'when a point or principle of law has been once or officially decided by a ruling of a competent court, it will no longer be considered as open to examination by the same court or those bound to follow its adjudications unless it is by urgent reason or in exceptional cases.[69] Uganda is a former British colony where common law is practiced and the doctrine of precedent has been in use since 1902 when colonial administration was formally established by the 1902 order in council.[70] This was seen in *Rex vs. Amkeyo,*[71] where the court relied on the case of *Hyde vs. Hyde,*[72] as a precedent to define what amounts to marriage and Hannington CJ held that, marriage is a voluntary union for life of one man and one woman to the exclusion of others, and that payment of pride price amounted to wife purchase and did not amount a legal marriage as understood by civilized people. That case demonstrates the possibility of a legal system imposing its concepts and values on a society that is governed by a different social-culture. This can also be said for the case of bail and the decision to grant or not to grant. If the first court to reject the right to bail and set conditions for granting bail erred and badly misread the law, there is a possibility of subsequent courts repeating the mishap in the names of following precedent.[73]
While constitutionally, a right to bail exists in capital offences in Uganda, recent trends demonstrate that courts regularly deny bail many defendants. This has caused preventable criminal justice system failures such as; prison overcrowding, inequitable treatment of defendants who are denied bail, and due process violations.[74]

4. Bail Reform proposals

Bail reforms lies at the centre of recent debates triggered by president Museveni's suggestion that bail for capital offences that include murder, Rape, robbery, and treason should be scrapped in the criminal justice of Uganda because bail is presumed to cause injustice and the release of suspects by courts presumably passes for provocation of victims and their families into carrying out mob justice against the suspects. Bail talks have become 'hot' in Uganda. Bail reform is vehemently opposed by the legal circles, civil society, academia and human rights advocates arguing that, reform is not necessary and unconstitutional. Done right, bail keeps dangerous criminal off the streets; done wrong, it keeps those with less economic in jail longer.[75] Ugandans have reacted to it as a perceived as an attack on its livelihood, court discretion and legislature, as was states in *Uganda vs. Kiiza Besigye,*[76] the refusal to grant bail should not be based on mere allegations and bail should not be refused merely as punishment as it would conflict the presumption of innocence.

There have been several calls from President Yoweri Kaguta Museveni the president of Uganda to the judiciary and the legislature to amend the law on bail not to allow bail for capital offences. His call is intended to tighten the hands of judicial officers and police in their exercise of discretion when granting bail and bond. His argument is that discretion is in most times abused by judicial officers who don't care about the well-being of society and end up setting free the criminals back to society. This act he says, is a provocation to society and the people leading them to mob justice. People will end up killing each other because in African culture, "if you kill, the family of the victim is duty bound to avenge". Therefore, the call is for the judicial system have bail for capital offences like, murder, rape, defilement, robbery, and treason scraped.[77] Mr. Museveni's argument is that, the judiciary as one of the branches of government is duty bound to focus on stability, and economic development in the country, by protecting life (no arbitrary killings, and those who kill should die), protection of property from looters and rioters or robbers, prevent corruption, rape and defilement. That those who commit those offences must die.[78]

The has legitimate authority under Article 98 of the constitution of Uganda as the head of state and government to show concern about the well-being of the people of Uganda as mandated in Article 99(3), and as the judiciary is mandated under Article 126, that, 'judicial power is derived from the people and shall be exercised by the courts...in the name of the people and in conformity with the law and the values, norms and aspirations of the people.' This argument is also in line with the *Uganda vs. Kiiza Besigye case,*[79] *where* court gave guidance that, 'while considering bail, the court needs to

[67] William M. Lile et al. *Brief making and the use of law books*
[68] See, Airedale NHS Trust v. Bland (1993)
[69] Machacha Wandera Livingstone. *A Simple Guide to Introduction to Law.*
[70] J B Kanyeihamba, *Constitutional History of Uganda*
[71] (1917) EAPLR 14
[72] (1866) ARIPP 130
[73] Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010)21 European Journal of International Law 967.
[74] Ayume, CRIMINAL PROCEDURE AND LAW IN UGANDA,
[75] https://www.monitor.co.ug/uganda/news/national/museveni-softens-now-looks-to-judiciary-on-bail-reforms-3706892
[76] (Constitutional Reference No. 20 Of 2005) [2006] Ugca 42 (25 September 2006);
[77] https://www.monitor.co.ug/uganda/news/national/museveni-softens-now-looks-to-judiciary-on-bail-reforms-3706892
[78] https://www.monitor.co.ug/uganda/news/national/museveni-softens-now-looks-to-judiciary-on-bail-reforms-3706892
[79] (Constitutional Reference No. 20 Of 2005)

balance the constitutional rights of the applicant, the needs of society to be protected from lawlessness.

Consequently, Bail talks have become 'hot' in Uganda. Bail reform is vehemently opposed by the legal circles, civil society, academia and human rights advocates arguing that, reform is not necessary and unconstitutional. Done right, bail keeps dangerous criminal off the streets; done wrong, it keeps those with less economic in jail longer.[80] Ugandans have reacted to it as a perceived as an attack on its livelihood, court discretion and legislature, as was states in *Uganda vs. Kiiza Besigye*,[81] the refusal to grant bail should not be based on mere allegations and bail should not be refused merely as punishment as it would conflict the presumption of innocence; and that both the high court and subordinate courts have discretionary powers to set bail conditions that they deem reasonable, though this may be done with caution as was seen in *Kalule vs. Uganda*.[82]

The bail reform proposition creates a presumption that any condition of release imposed shall be cash or non-cash in nature and the courts shall impose the list restrictive means necessary,[83] mandating the courts to consider releasing the applicant if on assessment he does not present substantial of flight of danger (classified as low-risk, medium-risk, high-risk and setting conditions for release based on those categories);[84]

4.1 AN HONEST PITCH

In the case of *Uganda vs. Kiiza Besigye*,[85] court noted that, the framers of the constitution expected the decision on bail to be fair within the legal provisions, implying that discretion is not unfettered as implied by the word 'reasonable' in Article 23(6)(b)(c), it was included for policy reasons and safeguards against violence and wanton abuse of human rights which has characterized Uganda in the past.[86] This gives us the test of reasonableness as was stated in *Onyango Obbo & Andrew Mwenda*,[87] that, 'whether a prudent man, being guided by such rational considerations of ordinary human conduct, would have done or abstained from what the judge did'. The law surely expresses a unique national consensus that more can be done and must be done to combat crime and safety of communities from criminals, preserve freedoms, control and guide police and judicial officers in Uganda which is a key concern for Mr. Museveni the president of Uganda.

The law is very clear and sufficient on the conditions and consideration for bail. That the courts may release an applicant upon considerations of;

i. *The nature and gravity of offences*
ii. *The strength of evidence, the probability of conviction and the defendant's possibility of jumping bail, - and* whether the applicant is likely to hinder witnesses from appearing
iii. *The Antecedents and defendants criminal record*.
iv. *Reputation, characteristics of the accused*,
v. On taking from him or her a recognizance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date and at such a time as is named in the bond.[88]
vi. fixed place of aboard,
vii. the court may also refuse bail for the defendants' own protection, and
viii. where he is already serving a custodial sentence for another offence.

The law most in that case presents a practical guidance how the courts preserve the society from crime and criminals by not granting bail to those who pose a risk to society and most likely to commit further crimes (serial offenders), and granting bail those who pose less risk (without criminal record), unless the state can prove that the applicant is most likely to interfere with investigation and threaten witnesses, and likely to become a fugitive.[89]

On the other hand, strict bail conditions tend to violet the applicants' constitutional rights guaranteed under Article 28 in the constitution of Uganda. For instance, dial of bail in most cases limits the applicants' chances to win their case because they do not have adequate time and facility to prepare their defense while in detention because "justice is more attainable from outside of a prison cell". Denial of bail may lead to loss of job, family instability, increase reoffending risk and exposure to harsh jail conditions, and a lowered chance of successfully defending their case, of striking a favorable plea

[80] https://www.monitor.co.ug/uganda/news/national/museveni-softens-now-looks-to-judiciary-on-bail-reforms-3706892
[81] (Constitutional Reference No. 20 Of 2005) [2006] Ugca 42 (25 September 2006);
[82] (CRIMINAL MISCELLANEOUS APPLICATION NO. 001 OF 2018.) [2018] UGHCICD 1 (10 April 2018)
[83] SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL
[84] *Foundation for Human Rights Initiative* v *Attorney General* Constitutional Petition No. 20 of 2006 at page 28. See also Col (Rtd) *Dr. Kizza Besigye* v *Uganda*, Criminal Application No. 83 of 2016.
[85] (Constitutional Reference No. 20 Of 2005) [2006] Ugca 42 (25 September 2006);
[86] Constitutional Reference No. 20 of 2005
[87] High Court Criminal Miscellaneous Application No. 145 of 1997
[88] 5.14 (1) T.I.A.
[89] Larry Laudan, Ronald J Allen and Ronald J Allen, 'Chicago-Kent Law Review Deadly Dilemmas II : Bail and Crime' (2010) 85.

bargain.[90] The chances are high for a prisoner to accept a plea bargain for time served even when they are innocent because they just want to leave jail and return to their homes. Studies indicate that, there is a higher rate of conviction, plead guilty, for defendants who are detained until trial. There is no doubt that any conviction has serious and collateral consequences such as; ability to get a job or professional license, driver's license, hold public office, or join forces.[91] This article therefore demonstrates that bail reforms may be a fundamentally flawed exercise.

5. CONCLUSION

This article argues that the right to bail is guaranteed under 1995 constitution of Uganda and there are sufficient safeguards in it to ensure the safety of society. The study concludes that, bail is a constitutional right which is based upon the presumption of innocence a non-derogable right. However, the right to bail is not absolute, the courts have discretion to grant or deny bail to the applicant depending on certain conditions and considerations such as, gravity of the offence, strength of the evidence, antecedents of the accused, and exceptional circumstances like, advanced age, and grave illness. The study found that the discretion given to courts is sometimes abused by wanton judges who set free criminals at the risk of the community. On the other hand, the study noted that, in as much as the judges have the discretion to grant or deny bail, this has been interred with by the executive arm of government who in most cases rearrest the people set free by the courts, the judges are intimidated not grant bail to some people and grant some. This greatly affects the exercise the judicial power in the name and values of the people, hampers judicial independence. This makes the public to lose trust and confidence in the justice system which makes them to resort to mob justice.

6. ACKNOWLEDGMENT

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[90] Baughman (n 18).

[91] 3 John G. Malcolm, The Problem with the Proliferation of Collateral Consequences, 19 FEDERALIST SOC'Y REV. 36, 37 (2018)