chapter four

THE LAND OF FREEDOM?

BAIL AND THE RIGHT TO LIBERTY IN UGANDA

Chapter Four Uganda Public Interest Paper No. 3 | May 2025

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Chapter Four Uganda is an independent, non-partisan, non-governmental organization, established in 2013, to defend civil liberties and promote human rights for all. We provide bold and innovative legal response through strategic and public interest litigation, legal representation in first-line response cases, legal research, general counsel for civil society organizations, and strategic advocacy. We work with the most vulnerable and underrepresented sections of society.

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1. Introduction

Anthems are unifying tools that construct national identities, espouse the founding values of a nation[1] and evoke strong emotions of patriotism in all who hear them.[2] From 1894 to 1962 Uganda was a British protectorate under the lordship and 'protection' of the British monarch, and the anthem that sounded throughout its borders was 'God Save the King' - an anthem that exalts a monarch above all else.[3] At the dawn of independence, as the winds of change swept in the new nation, the consecration of Westphalian republicanism demanded that it have a national anthem of its own, one that would define its identity and character and gave no obeisance to a tyrannical overload.

Immediately, a committee headed by Professor Senteza Kajubi was set up to execute the task and determine the anthem of the new nation. The committee was cognizant that it had to involve the people of Uganda, for this was more than writing a catchy or poetic tune by griots; it was about composing a 'musical masterpiece that would capture the spirit, culture, and aspirations of the Ugandan people as they embarked on this new chapter in their history.'[4] It thus set up a nationwide contest and invited Ugandans to submit pieces that were 'short, original, solemn, praising and looking forward to the future'[5]. The piece submitted by George Wilberforce Kakoma won the contest and later would be Uganda's anthem.[6] It was officially adopted and first nationally played on 9 October 1962 in a watershed moment as the Union Jack descended and the flag of the new republic was raised to the skies of sovereign freedom. Kakoma's anthem had the following solemn words:

> United, free for liberty
> together we'll always stand.
>
> Oh, Uganda! The land of freedom…

Those words are of great significance. They reveal that one of the founding values of this nation was liberty. Uganda was to be a land of freedom. A land where liberty loomed large, where the liberty of one, was the liberty of all, and where liberty would never be curtailed lightly, wantonly

[1] Y Erden 'National anthems as unifying tools: A comparative analysis of selected western national anthems' (2019) 1 *Eurasian Journal of English Language and Literature* 44.
[2] M Brodo 'The Role of National Anthems in Constructing National Identities in the Atlantic World'
[3] Erden (n 1 above) 50.
[4] New Vision, The Story of Uganda's Anthem' October 04, 2023. Accessed at https://www.newvision.co.ug/category/report/the-story-of-ugandas-national-anthem-NV_171793
[5] As above.
[6] It was titled 'Oh Uganda, Land of Beauty'.

or even worse, arbitrarily.[7] Through an analysis of hundreds of judicial decisions and legislative enactments on the right to bail, this paper examines the extent to which the right to bail and liberty have been realised in postcolonial Uganda.

Section I provides the introduction, while Section II defines the concept of bail and outlines its current legislative foundations in Uganda. Section III traces the historical treatment of bail and liberty in Uganda from 1962 to 2010. Section IV analyses Uganda's contemporary jurisprudence on bail, highlighting its achievements, shortcomings, and the need for reform. Finally, Section V presents the conclusion.

2. The Right to Bail

2.1. Definition

Bail is the process by which a person is released from custody either on the undertaking of a surety or on his or her recognizance, usually for a future court appearance.[8] It is an important judicial instrument that protects the liberty of the individual and provides a better alternative to pretrial detention. When an individual is arrested and applies for bail, they seek to regain their liberty. Liberty, defined as the freedom from bodily confinement, is so profound that it is the first substantive right recognised by the Universal Declaration of Human Rights.[9]

It is interconnected and indivisible with all other rights because the unlawful and arbitrary deprivation of liberty is usually the beginning of all other human rights violations.[10]

Because the right to bail is exercised in the context of criminal proceedings, it is also founded on the immutable right to be presumed innocent,[11] and the need to afford an accused person an adequate opportunity to prepare their defence, which cannot easily be done while they are incarcerated.[12] An accused person who is on bail is placed on the same pedestal of equality which is given to the prosecution to conduct its case against them. Therefore, four fundamental rights

[7] *Col (Rtd) Dr. Kiiza Besigye vs. Uganda*, High Court Criminal Misc Appl No. 228 and 229 of 2005.
[8] Black's Law Dictionary 10th Edition at page 167. See also Practice Direction 4 of the Constitution (Bail Guidelines tor Courts of Judicature) (Practice) Directions, 2022 Legal Notice 8 of 2022.
[9] UN General Assembly, Universal Declaration of Human Rights, 217 A (III), 10 December 1948, Article 3.
[10] UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para 2.
[11] The rationale of granting bail is that instead of keeping a suspect under the harsh conditions of remand who might in the end be found innocent, he should not be incarcerated if the court is satisfied that he will turn up to answer the charges. See *Okello v Uganda* [2012] UGHC 119.
[12] This includes finding relevant witnesses, marshalling resources to engage counsel, and having the freedom to conduct one's defence without the shackles of prison. See *Nuwamanya Justus v Uganda* [2020] UGHC 21.

buttress the right to bail. These are the right to be presumed innocent, personal liberty, a fair trial, and equal protection of the law.

2.2. Legislative Provisions

The Constitution of Uganda protects the right to personal liberty and specifies that it may be limited only in specific circumstances.[13] Such as for the purpose of bringing a person to court upon a reasonable suspicion that they have committed an offence.[14]

The right to liberty is so sacrosanct that its limitation may only be temporary. The Constitution has put in place measures to restore this right when there is a temporary cessation in its enjoyment - these are the right to bail and to an order of habeas corpus.

Under Article 23(6)(a), a person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as it considers reasonable. An individual is also entitled to mandatory bail after spending either 60 or 180 days in custody in respect of a minor or capital offence, respectively.[15]

The Chief Justice has also enacted the Bail Practice Directions of 2022 to, inter alia, streamline the law on the right to bail in Uganda and reduce incidences of pretrial detention.[16] These Practice Directions reproduce the law on bail existing in different statutes.[17]

Some of the general principles in the grant of bail are that an applicant is presumed innocent, they have an obligation to attend trial, bail is discretionary, and there is a need to balance the rights of the applicant and the interests of justice.[18] An accused person may apply for bail any time after being formally charged.[19]

[13] Article 23, Constitution of the Republic of Uganda 1995.
[14] Article 23(1)(c) Above.
[15] Article 23(6) (b-c) Above.
[16] Bail Guidelines (n 8 above) Practice Direction 3.
[17] Section 135 of the Children Act, Cap 62; Section 15 of the Trial on Indictments Act Cap 25, Section 40 of the Criminal Procedure Code Act, Cap 122, Section 65 of Prisons Act, Cap 325, Section 217 of the Uganda Peoples Defence Forces Act, Cap 330; and Section 75 of the Magistrates Courts Act Cap 19.
[18] Bail Guidelines (n 8 above) Practice Direction 5.
[19] As above, Practice Direction 7.

3. Historical Treatment of Bail and Liberty

3.1. The Entry of Special Circumstances (1962 – 1970)

While postcolonial Uganda started with the adoption of an anthem that proclaimed liberty, Ugandans would soon learn that it takes more than a song to secure the rights of the human person. The ideas of liberty and human rights were illusory in independent Uganda as what happened was a mere change of guards and not policy. The colonial dictator had returned in the garb and guise of a black skin.

The post-colonial 'independent' state, like its predecessor, was therefore preoccupied with protecting the well-being of its ruling class and government at the expense of all the rights and liberties of the citizens. *Kiguli* poetically wrote that the water at the well of independence defied the half-fired pots of Ugandans as the vultures laughed at them.[20] Ugandans could not drink from that brook of freedom that they fought to gain through independence, because new autocratic rulers (vultures) were superintending over them.

Thus, although the 1962 Constitution, enacted through a process of colonial and political compromise, protected the right to liberty and the right to bail, the reality was different.[21] Under the Obote independence government, the right to liberty and bail were constantly violated. The government enacted laws like the Emergency Powers Act,[22] Public Order and Security Act,[23] and the Karamoja (Amendment) Act,[24] which gave sweeping powers of detention without trial to the Obote government. Many Ugandans were arbitrarily detained and had their right to liberty violated under these draconian enactments.[25]

In a bid to entrench his dictatorship, Obote soon abolished the 1962 Constitution and replaced it with the 1966 Constitution through a civilian coup, and thereafter the 1967 Constitution. This Constitution also provided for the right to personal liberty and the right to bail in Article 10(1) and 10(3)(b).[26] These provisions were to the effect that when a person was not tried in a reasonable time, then they had to be released on bail. While the 1967 Constitution created a right to bail as opposed to the right to apply for bail because of the use of the word 'shall', which is mandatory,

[20] S Kiguli, 'Why the Vultures Laugh at Us' in Susan Kiguli *The African Saga: Poems* (1998). See also D Kahyana 'Writing dictatorship and misrule in Uganda: Susan N. Kiguli's The African saga' (2015) 41 *Social Dynamics* 502.
[21] Article 19(1) and 19(3)(b) (Independence) Constitution of Uganda, 1962.
[22] Emergency Powers Act, No. 8 of 1963.
[23] Public Order and Security Act, No. 20 of 1967.
[24] Karamoja (Amendment) Act, No. 25 of 1963.
[25] *Ibingira & Ors v. Attorney-General* [1966] EA 305, 445; *In re Lumu & Ors*, Misc. App. Nos. 31-35 of 1966 (HC); and *Uganda v. Commissioner of Prisons ex parte Matovu* [1966] EA 514.
[26] Constitution of the Republic of Uganda, 1967.

its provisions were a mere formality, a whitewash on a tomb in a feeble attempt to conceal the rot inside.

The provisions of the 1967 Constitution on bail were rarely tested in Court, and instead, in order to determine bail applications, the courts of law imported the English common law doctrine that a bail applicant had to prove 'special circumstances' into Uganda. This was notwithstanding the fact that even Britain had long abandoned this rule. In the case of *Girdhar Dhanji Masrani v R*, it was argued by Counsel for the applicant that the old rule that required an applicant to prove special circumstances before the grant of bail was from a harsher age of the common law, and in search of a more humane approach, it should not be imported into Uganda.[27] Sheridan J, however, disagreed and imported the rule by holding that an applicant for bail had to prove special and unusual circumstances before they could be granted bail.[28] Therefore, as the executive was preoccupied with violating the rights of Ugandans, judges were preoccupied with transplanting the tough and rigid rules of the common law to defeat any enforcement of those rights.[29]

Due to the application of this rule of special circumstances, bail applications were denied. In *Henry Nsereko v Uganda,* the accused, who had been on remand for a long time without his trial commencing, was told by the court that only in exceptional circumstances would he be granted bail. Delay by itself was not a good ground for bail.[30]

Bail was also denied on mere allegations and assumptions. In *Uganda v Disan Kabogoza*, an applicant was denied bail exclusively on the ground that the offence was a serious one. The court assumed that the accused would do everything in his power to abscond. The Court also reasoned that since this was a robbery, any money deposited as cash bail might come from the proceeds of the robbery.[31] In *Uganda v. William Nadiope*, it was assumed without prosecution adducing any evidence that the accused would interfere with witnesses.[32] This violated the presumption of innocence. Bail applications were dismissed incessantly[33], and the right to liberty was left in limbo.

[27] *Girdhar Dhanji Masrani v* R [1960] 1 EA 320 (HCU).
[28] The judge also added that 'delay in hearing a case in itself was not a good ground for the grant of bail.
[29] In *Nyali Ltd v Attorney General* [1956] 1 QB 1, Lord Denning warned of the effects of transplanting the rigid common law rules to Africa as thus 'Just as with the English oak, so with the English common law: one could not transplant it to the African continent and expect it to retain the tough character which it had in England. It had … many refinements, subtleties and technicalities which were not suited to other folk. These off-shoots must be cut away. In those far-off lands the people must have a law which they understood and which they would respect.'
[30] Miscellaneous Criminal Application No 75 of 1970. This is however to be contrasted with *Mohamed Kasujja v. Uganda* Criminal Revision No. 261 of 1970 where the Court cautioned that the inexplicable delay in the prosecution of cases was profoundly disturbing and amounted to an infringement of the accused's constitutional rights.
[31] *Uganda v. Disan Kabogoza*, Criminal Miscellaneous Application No. 40 of 1970.
[32] *Uganda v. William Nadiope & 5 others*, H.C. Misc. Criminal Applications Nos.51-56 of 1969.
[33] *Uganda v Kiwala* [1967] 1 EA 590.

In other instances, bail was used as a means to extort the accused of their money and to enrich Gombola officials who stole this money.[34] Bail money was also forcefully taken from applicants and forfeited without just reasons.[35] Pretrial detention and abuse of power were the general rule, not the exception.

3.2. The Reign of Terror (1971 – 1979)

General Idi Amin came to power through a military coup that overthrew the Obote government in January 1971. He immediately subordinated the 1967 Constitution to his military decrees in Legal Notice No. 1 of 1971.[36] The 1967 Constitution in Article 10 had hitherto protected the right to personal liberty. But that too was now subject to the decrees of Amin. In *Uganda v Alfred James Kisubi,* it was held that the 1967 Constitution was subject to the decrees of Amin and that if there was any inconsistency between the provisions of any decree and the constitution, the provisions of the decree prevailed.[37]

With all the legal safeguards removed, the right to personal liberty was placed in jeopardy and wanton disregard. In March 1971, the government enacted Decree No. 13 of 1971, which gave very broad powers of arrest without warrant to all security forces.[38] It also enacted Decree No. 7 of 1971, which authorised up to 6 months detention and gave the military authority to detain political suspects.[39] The government also enacted the Trial on Indictments Decree No 26 of 1971 on October 4, 1971. This decree was to apply retroactively and was deemed to have come into force on the 18th day of March, 1971.[40] The decree limited the right to bail by providing that an applicant for bail had to prove exceptional circumstances before their release.

As if that was not worse enough, these exceptional circumstances were not defined in the law, and as such, the judicial mind was left to extreme guesswork. The decree also prescribed that persons charged with capital offences would only be granted mandatory bail after spending 365 days on remand, while those on minor offences would have to spend 182 days.

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[34] *Aloysious Byaruhanga v The Rukurato* [1963] 1 EA 686.
[35] *Nsubuga v Uganda* [1968] 1 EA 10.
[36] The Legal Notice (Proclamation) became the Supreme Law of Uganda.
[37] *Uganda v Alfred James Kisubi* [1975] HCB 173.
[38] Armed Forces (Power of Arrest) Decree, (No. 13 of 1971).
[39] Detention (Presumption of Time Limit) Decree No. 7. The right to liberty was made illusory by these decrees. A report by the International Commision of Jurists observed that '[a]t the time of the coup there were only about 50 detainees in Uganda prisons. Yet, within several months, 700-800 people had been detained without trial by the new government. At a later stage, little or no use was made of the powers of detention. People on whom suspicion fell simply disappeared.' See A study by the International Commission of Jurists 'Violation of Human Rights and the Rule of Law in Uganda' S-1343, 1974 at 16.
[40] Trial on Indictments Decree No 26 of 1971. Retroactive criminal legislation violates international law. See Article 15, UN General Assembly, International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966.

During this reign of terror and blatant unconstitutionalism, the Courts were generally subservient to the executive and made it a general rule to deny bail. In *Musa Namuyimba v Uganda*, it was held that an accused had to prove 'some unusual, exceptional, or special circumstances that justify the grant of bail.'[41] Bail would not just be granted anyhow. Because the requirement to prove special or exceptional circumstances was left unchained, it led to the ends of injustice.[42] The grant of bail pending appeal was even harder.

First, the applicant had to lodge a valid notice of appeal in Court,[43] and also prove that the appeal stood a chance of success.[44] Second, the conditions for bail after conviction had to be more stringent than the conditions for bail before conviction. In case it was a cash amount, it had to be an amount that could not be easily obtained by the accused.[45] In *PJ Kotecha v Uganda*, Justice Manyindo held that bail pending appeal should not be granted readily as there was always a presumption against the appellant that he had been properly convicted. An appellant had to, on top of other reasons, prove exceptional reasons why he should be granted bail, and a delay in hearing the appeal alone was not enough.[46] The fact that the crime was non-violent was also insufficient.[47] Almost the whole judiciary followed this rule to the book except one judge.

The golden thread in the realisation of the right to personal liberty came in the few cases that were decided by the then Chief Justice, Ben Kiwanuka. In *Margaret Nakuye v Uganda,* the applicants were charged with murder arising from the beating of a thief. One applicant was a widowed mother of eight children, ranging from 2 to 16 years old. The two other applicants were her children, aged 16 and 14. All three applied for bail, which was denied by a judge of the High Court on the grounds that there were no exceptional circumstances.[48] When the case was sent to the chief magistrate to remand them, he wrote to the Chief Justice Ben Kiwanuka and informed him of the circumstances of the case. The Chief Justice called the file and held that it was not unusual to grant bail on a charge of murder.[49] There, however, had to be some unusual, special or exceptional circumstances, to justify the grant of bail.[50] He held that the existence of a 2-year-old child in the care of a widow is an exceptional circumstance that justifies the grant of bail. The

[41] *Musa Namuyimba v Uganda*, Miscellaneous Criminal Application No 2 of 1971.
[42] *Wonyoto Chemuswa v Uganda* Miscellaneous Application No 11 of 1973.
[43] *Christopher Kabenge v Uganda*, Criminal Appeal No. 320 of 1971; *Uganda v Ntalo* Criminal Revision No 161 of 1973.
[44] *YR Matari and Anor v Uganda*, Miscellaneous Criminal Applications No 44 & 45 of 1971.
[45] As above.
[46] *PJ Kotecha v Uganda*, Miscellaneous Criminal Application No 127/73 (Delay was not a good ground for the grant of bail); *Wanyoto v Uganda* Miscellaneous Application No 11 of 1973 (Anticipated delay in the hearing of an appeal is not sufficient ground except coupled with other factors).
[47] As above.
[48] *Margaret Nakuye v Uganda* Miscellaneous Criminal Application No. 108 of 1971. See also *Uganda v J Kazarwa and 3 others* [1976] HCB 336 (mother of twins granted bail as the life and liberty of delicate twins was in danger'); *Uganda v Matia Akidi* [1985] HCB 1 (mother with 6 months child in prison and expecting another baby anytime granted bail).
[49] This is something no other judge had ever said. As a general rule, bail was not granted in capital offences.
[50] Above.

woman had so many young children to look after; she was a widow and was thus in the category of people with exceptional circumstances and was entitled to bail. He further reasoned that while the two boys had no babies to look after, their education was very important.[51] And moreover, since the Amin Government had come out with a declaration that ordered the police to shoot to kill whenever they come into contact with kondos, this message was also heard by the public.[52] He granted all the applicants bail.

The procedure of the police in the 1970s was to arrest first, and then do investigations later. In the case of *Samuel Lubega and 4 others v Uganda,* where the investigations took long to complete and the accused had been previously denied bail on the ground that there were no special circumstances, the Chief Justice Kiwanuka had this to say while granting bail:

> [W]hen a citizen was seized upon an allegation that he had committed an offence, the law required and the public expected that the case should be investigated with speed and then brought before the court of the land for trial. No one would expect that the police would keep a citizen in prison for 17 months investigating a crime that happened in broad daylight in the Township of Masaka. If the police thought they could circumvent the provisions of the law and sought to punish citizens of the land in the guise of 'police inquiries incomplete', then the courts should be vigilant to prevent this abuse of power on the part of the police. It was the courts view that if the police could not investigate a case and complete their investigations within say 6 months, the desire of the public to keep the accused person in custody because of continuing investigations came to an end.[53]

The Chief Justice pushed back against the human rights violations of Amin and would not mince his words. He also had an opportunity to tackle the concept of exceptional circumstances in bail applications. As Courts had made it a general rule to refuse bail, he would hold otherwise. In *Morrison Mayanja Kulanima v Uganda*,[54] where an accused had been denied bail several times and no steps were taken to commence committal proceedings, he held that the phrase 'exceptional circumstances' was not defined, and many circumstances might well become exceptional depending on the manner in which they occurred. While in previous precedents, inordinate delay

[51] Above.
[52] Above. See also the Robbery Suspects Decree, No. 7 of 1972 under which the security forces were authorised to kill anyone they suspected of being a robber (kondo). The decree applied retroactively to June 1971. Over 10,000 people were killed through this anti-Kondo law. See A study by the International Commission of Jurists 'Violation of Human Rights and the Rule of Law in Uganda' S-1343, 1974 at 19.
[53] *Samuel Lubega and 4 others v Uganda*, Miscellaneous Criminal Application No. 71-74 of 1971. See also *John Kamoga v Uganda* [1976] HCB 121 where Saied CJ held that 'The Police had no excuse to hang on to this unfortunate man if it had failed to finalise its investigations. If there was no hope of any progress, then the charges should have been withdrawn.' Further see *Kiwanuka and Anor v Uganda* [1988-1990] HCB 22 for the proposition that prosecution was slow in investigations and this coupled with a long time on remand proved exceptional circumstances.
[54] *Morrison Mayanja Kulanima v Uganda*, Miscellaneous Criminal Application No 251 of 1971.

in presenting the prisoner for trial and a lack of interest in the prosecution of the accused did not constitute exceptional grounds justifying the grant of bail, this case was different, as there was an added ground of the health of the accused. He granted bail when no other judge would.

The Chief Justice even went further in *Matiya Sengendo & 12 others v Uganda* and held that delay alone would qualify as an exceptional circumstance for the grant of bail.[55] He held that where persons were left to linger a whole year on remand without trial, that fact contravened the constitution which required a person accused of an offence to be tried within a reasonable time. In another case where the accused had spent one year and 2 months on remand, he argued that 'it was wrong to keep the accused in custody any longer. To leave them in custody under those circumstances would be the same as condemning them to remain there for life.'[56]

Chief Justice Kiwanuka stood amidst this reign of terror as a paragon of judicial independence and a protector of the rights and liberties of the citizen. He espoused the principles that even in the state of military capture, the laws to him did not fall silent. He was a pillar of freedom, not a respecter of persons. As a judge, he 'stood between the citizen and any attempted encroachments on his or her liberty by the executive alert to see that any coercive action was justified in law'.[57] This was a cause he was prepared to die for, and for which he did.[58]

While this was the judicial philosophy and character of one judge in protecting the right to liberty, the majority of the other judges were 'more executive-minded than the executive.'[59] Other judges were not as courageous, and after his murder by the regime, the entire legal community operated under great fear.[60] It was reported that 'judges and magistrates were very cautious about making legal rulings which may hurt the government's interests.'[61] Members of the security forces would turn up in a courtroom and demand that a person be sent to jail, and judges obliged.[62] Lawyers, too, could not conduct their defence as they would have planned because a defence counsel could be in serious trouble if he successfully defended an alleged criminal.[63] Some persons released on bail would be swiftly rearrested or shot dead outside court premises by security operatives, and

[55] *Matiya Sengendo & 12 others v Uganda* Miscellaneous Criminal Applications No. 699 & 707 of 1971.
[56] *Sulaimani Kiwala and Another v Uganda* Miscellaneous Criminal Application No. 56 of 1972.
[57] *Liversidge v Anderson* [1942] AC 206 at 244.
[58] Chief Justice Ben Kiwanuka was dragged from his chambers by forces loyal to Amin after he granted a habeas corpus application. He was never to be seen again. His martyrdom is allegorical to the 1964 speech by Nelson Mandela during the Rivonia Trial in which he said 'I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.' See D Hook *In the name of Mandela. In The Courtroom as a Space of Resistance* (2016) Routledge.
[59] *Liversidge* (n 57 above) 244.
[60] A study by the International Commission of Jurists 'Violation of Human Rights and the Rule of Law in Uganda' S-1343, 1974 at 20.
[61] As above.
[62] As above.
[63] As above.

so persons preferred to be sent to prison even if they were innocent rather than risk death on the streets.[64]

Perhaps it is because of this hostile environment that other judicial officers did not support the Chief Justice in his defence of liberty. They cemented the doctrine prescribed by Decree 26 of 1971 that bail would not be granted except in exceptional circumstances.[65] Even if it was granted, courts ensured that the conditions of bail were so stringent and prohibitive so as to make it difficult for the accused to fulfil.[66] The fate of accused persons was that they remained in detention for long periods on mere allegations and unsubstantiated assumptions that they would interfere with witnesses.[67] Bail was denied merely because the applicants had not spent such a long time on remand or because they were presumed to be wealthy and so may interfere with witnesses.[68]

In 1973, the government amended Section 14 of Decree No. 26 of 1971.[69] This amendment excessively extended the time an accused person can spend on remand before they are granted bail. For capital offences, it was increased from 356 days to 545 days, and for non-capital offences from 182 days to 545 days. These amendments made it harder for an accused to acquire bail. In interpreting this Decree, courts held that it did not confer on any accused the right to bail but only the right to apply for bail.[70] But even when the accused persons applied, bail was always denied. Judges outrightly refused to grant bail even where there was a manifest violation of the rights of the accused. In one case, an accused had been arrested under the Military Police Decree[71] and detained incommunicado for over seven months. When finally produced in Court, his application for bail was rejected on the mere technicality that his affidavit was defective.[72] Technicalities were used to defeat substantive justice.[73]

Further, the Judiciary always assumed that every person accused of a capital offence had a great temptation to escape, and so they would not be granted bail.[74] Even for lesser charges, this

[64] As above.
[65] *Fenekasi Mukiibi v Uganda*, Criminal Appeal No 31 of 1972.
[66] *Uganda v JK Kanamwagi*, Criminal Revision No 91 of 1972.
[67] As above.
[68] In *Bonifansio Othieno v Uganda*, Miscellaneous Criminal Application No 17 of 1972 the Court held that if the applicant was a prominent trader with a lot of wealth in his area, he would be likely to interfere with witnesses if he was released on bail and in any case, two months was not a very long delay.
[69] Trial on Indictments Amendment Decree (No 24 of 1973).
[70] *Uganda v Zubairi Sentongo & Anor* EACA Criminal Appeal No 93 of 1973. This kind of interpretation still plagues the courts to date as I shall soon discuss.
[71] Military Police (Powers Arrest) Decree 19 of 1973.
[72] *In the Matter of a Bail Application*, Misc. Criminal Application No 54 of 1974.
[73] *Bernard Elly Kabakerehe & Ors v Republic of Uganda* [1975] HCB 80.
[74] *Uganda v Muhamudu Sebi* [1976] HCB 94.

assumption was given credence without any proof.[75] In other instances, bail was cancelled on mere suspicion. In *Florence Nansikombi v Uganda*, when the magistrate found out that the case file was missing, he said that 'someone somewhere is tampering with evidence' and then cancelled bail without formal proof or confirmation of the suspicion.[76]

On appeal, the High Court did not reinstate the bail on the technicality that an order cancelling bail was not appealable.[77] In another case, the magistrate cancelled bail the moment the prosecution made the argument that the accused had to be prosecuted by a military tribunal, although this was not the case.[78] In conclusion, during this reign of terror, there were no human rights that the government of Amin felt entitled to respect. All that was there was 'continual fear, and danger of violent death; and the life of man, was solitary, poor, nasty, brutish, and short.'[79]

3.3. The Decade of Waiting (1980 - 1994)

Amin was overthrown in 1979; however, his decrees remained in force. For five years, there was no change in the law on bail. Perhaps this is because the governments that ascended to power during that time were more preoccupied with securing their political offices than with guaranteeing human rights. Nevertheless, the Trial on Indictment Decree No. 26 of 1971 was amended in 1985.[80] This amendment did not change much. It retained the requirement that a person accused of a capital offence could only be granted bail after proving exceptional or special circumstances in mandatory terms. However, for the first time, the law defined what those circumstances were. They included having spent 15 months on remand, infancy or advanced age, a certificate of no objection from the Director of Public Prosecutions, and a grave illness certified by a medical board that was to be set up under the Act. This board was, however, never constituted in practice. Even when all these special circumstances were proven, an applicant also had to show that he would not abscond.[81] This could be proven by substantial sureties and a fixed place of abode.

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[75] *Micheal Elasu v Uganda* [1976] HCB 123 (theft); *Mukasa & 5 Ors v Uganda* [1976] HCB 122 (forgery) here the court also held that 'the fact that the accused were married or had permanent abodes within the jurisdiction of Uganda was not a cogent reason for grant of bail.'

[76] *Florence Nansikombi v Uganda* [1977] HCB 121. The High Court however overturned this ruling and held that bail should only be cancelled for a grave reason or a breach of the terms under which it was given. See also *Uganda v Lawrence Luzinda* [1986] HCB 33 for the holding that bail cannot be cancelled on flimsy reasons.

[77] As above

[78] *John Bonjo v Uganda* [1977] HCB 320; See also *Uganda v P/C Malingo* [1979] HCB 5 where a magistrate cancelled bail on the basis of lack of jurisdiction yet he actually had the jurisdiction to try the charge.

[79] T Hobbes, *Leviathan* (2008) Oxford University Press.

[80] Trial on Indictment (Amendment) Act No 5 of 1985.

[81] By Section 14A (3) 'In considering whether or not the applicant is likely to abscond the court shall take into account matters among which are whether the accused has a fixed place of abode within the jurisdiction and whether accused has sound sureties.' *Sunday Mibulo v Uganda* [1990] UGHC 9; Rukanyangira *and 2 Others v Uganda* [1994] UGHC 75 here the applicants had spent fifteen months on remand but had insufficient sureties. The Court denied them bail and instead replaced it with hope. The Court 'hoped that the

The first challenge faced by bail applicants was the concept of the medical board. In *Masitula Nakyeyune v Uganda,* the applicant was four months pregnant, hypersensitive, and had a history of epilepsy. She applied to be released on bail, but her application was dismissed because she had not been examined by the medical board stipulated under the Amendment Act.[82] The Board had never been constituted and was non-existent in practice, but the Court, with its moral legalism, turned a blind eye to this fact.

Similarly, in *Ahmad Sengendo v Uganda*, a bail application on the grounds of grave illness was dismissed for lack of evidence.[83] A grave illness under the Act was understood to mean an illness for which there was incapable medical treatment in prison.[84] If there was a possibility of being treated in prison, a bail applicant would not be released. In *Christopher Lubaale v Uganda*, the Court strangely held that HIV/AIDS was not a grave illness because it had no cure, whether in prison or out of prison.[85] This was problematic as the test was not about whether an ailment had a cure or not, but whether it could be sufficiently cared for while in prison.

The problem with the requirement of a report from the medical board was that, since it was non-existent in practice, no one could get a report from it and present the same in court. It was an unrealistic requirement that the courts imposed. However, in *Sengendo* above, the Court seemed to remedy this problem by holding that since the medical board under the law had never been operationalized, the court could constitute itself into a medical board and examine the condition of the accused.

The 1985 Amendment also reduced the requirement from the Amin era that an accused had to spend 545 days on remand before they were granted bail, to 480 days. This totals to 15 months. This was still not a great improvement. In the post-Amin years, it is this requirement that would defeat bail applications. But first, it needed judicial approval. The requirement that 15 months of remand was an exceptional circumstance was examined by the Court in *Uganda v D/AIP Okot* where it was held that this requirement was not unconstitutional and did not violate Article 10(3) of the 1967 Constitution to be tried within a reasonable time. Court argued that it did not delay a speedy trial since a reasonable time depended on the circumstances of each case.[86] From then on,

Director of Public Prosecutions would honour his word and commit the accused persons to the High Court for trial as soon as possible.'

[82] *Masitula Nakyeyune v Uganda* [1986] HCB 17.

[83] *Ahmad Sengendo v Uganda* [1986] HCB 32; *Uganda v Rwabarali & Anor* [1988-1990] HCB 34 (A grave illness had to be certified by a medical board, short of that, it would fail).

[84] *B Ssemogerere v Uganda* [1988-1990] HCB 26 (Grave illness was a disease that could not be treated in prison).

[85] *Christopher Lubaale V Uganda* [1995] UGHC 1. It took 8 years for the High Court to release the first person on bail on account of HIV/AIDS in *Tweteise Enos v Uganda* [2003] UGHC 90.

[86] *Uganda v D/AIP Okot* [1987] HCB 17.

courts treated it as mandatory.[87] In subsequent cases, applicants who had not been detained for more than 15 months were denied bail as they had not complied with this condition.[88] In *Reuben Baguma v Uganda*, it was held that 13 months was not enough and the applicant had to wait for another two.[89] Only persons remanded for 15 months or more were granted bail.[90]

This requirement violated the right of the accused to liberty because it was a mechanical and blanket restriction that did not allow the court to take individual considerations into account. The holding in *Ali Fadhul v Uganda* was particularly disturbing. The accused had spent 5 years on remand during his first trial, which was quashed by the Supreme Court, and a retrial was ordered. He had remained on remand for another 468 days waiting for a retrial. When he applied for bail, the Court held that the time had started counting again from the time of the Supreme Court judgement. The earlier five years would not be taken into account. The Court further held that since he had only spent 468 days on remand, his application was 12 days early and thus premature. He was not entitled to bail.[91]

To worsen matters, the 15-month period had to be time continuously spent on court remand, and not in police detention, however unlawful. In *Ogwang v Uganda,* the applicant had been unlawfully detained by the police for nine months without being produced in Court. He was later arraigned in court and remanded. Court held that the time would start counting from the date of court remand, and by computation, he had only spent 430 days and thus had another 50 days to go. His bail application was premature.[92] To circumvent these provisions, an applicant had to get a certificate of no objection from the DPP.[93] This was another difficult huddle, as it depended on the willingness of the state.

The other special circumstance was advanced age, which was held to be 50 years and above.[94] In one case, the state tried to argue that the advanced age of a woman was different from a man but this argument was rejected.[95] The problem with this period is that special circumstances were treated as mandatory and as such, hindered the success of bail applications. Accused persons were

[87] The provisions of Section 14 of the Trial on Indictments Decree and Section 75 of the Magistrates Courts Act were mandatory. *Nkuba v Uganda* [1991] UGHC 63.
[88] *Abdul Lukoma & 2 Ors v Uganda* [1987] HCB 20; *Lochomin v Uganda* [1994] UGHC 93.
[89] *Reuben Baguma v Uganda* [1988-1990] HCB 33.
[90] *Arinaitwe Moses v Uganda* [1988-1990] HCB 32; *Bumbakali v Uganda* [1990] UGHCCRD 13 (38 Months remand); *John Sebwato & Anor v Uganda* [1990] UGHC 7; *Sunday Mibulo v Uganda* [1990] UGHC 9 (Remand for 33 months, Police file nonexistent); Contrast with *Goddie Magume v Uganda* [1992-1993] HCB 61 for the view that on the ground of a grave illness, bail would be granted even if the statutory period had not reached.
[91] *Ali Fadhul v Uganda* [1992] UGHC 70.
[92] *Ogwang v Uganda* [1994] UGHC 94.
[93] *Kimanyi v Uganda* [1991] UGHC 46; *Mashukano v Uganda* [1993] UGHC 76.
[94] *Uganda v Rwambarali & Anor* [1988-1990] HCB 34; *Adimola v Uganda* [1992] UGHC 79; *Uganda v Mukasa* [1994] UGHC 77.
[95] *Aldo Okello v Uganda* [1991] HCB 42 (Grey beards did not grow in young people).

kept in detention simply because 480 days had not elapsed. This violated both the right to liberty and the right to be tried within a reasonable period of time.

However, in the few years towards the adoption of the 1995 Constitution, there was some progressive jurisprudence. Courts became firmer in their resolve to protect personal liberty. They rejected arguments that an accused would abscond merely because the sentence was grave or the charges were serious.[96] They would not be moved by mere allegations. In *Adimola v Uganda,* it was held that any allegations advanced by the prosecution in opposition to a bail application had to be proved by way of affidavit. Justice Kireju held:

> Allegations concerning interference of witnesses should be proved. This is an attempt by the court to limit the abuse of this ground as the prosecution would always put it as a matter of course to bar the bail application without any evidence to support it. It has now become the practice to swear an affidavit in case the prosecution wants to adduce any evidence to support the allegation of interfering with the witnesses or investigations. I therefore find that in the absence of any evidence to support the allegation of interfering with witnesses, I find that the state's allegation is just speculation and cannot be acted upon by the court.[97]

In one case where bail was sought on the ground of grave illness, the court found that even without a medical report, it would believe the accused.[98] Courts also noticed that the amended Section 14A of the Trial on Indictments Act did not cover inordinate delay as a special circumstance and implored the legislature to look into this.[99] Further, court could still grant bail even when the accused had been committed or had gotten a hearing date.[100] In cases of bail pending appeal however, the threshold was still very high.[101] The ground of delay could only be considered if it rendered the appeal nugatory.[102]

3.4. Settling the Law on Bail (1995 - 2010)

The current Constitution of Uganda commenced on 8 October 1995. In its preamble, the people of Uganda recalled their history, which had been characterised by political and constitutional

[96] *Nkuba v Uganda* [1991] UGHC 63.
[97] *Adimola v Uganda* [1992] UGHC 79, It was further held that '[u]nder our laws every accused person is presumed innocent until proven guilty. The law also allows bail because at the end of the hearing of the case if the accused is found innocent there is no remedy for the years he may have spent in prison on remand.'
[98] *Ndyamwijuka v Uganda* [1992] UGHC 73. See also *Siraji Mulabanaku V Uganda* [1995] UGHC 12; *Solomon Muhirwa v Uganda* [2003] UGHC 12.
[99] As above (Remand for 8 years).
[100] As above.
[101] *Robert Muwanga V Uganda* [1992] UGHC 7 (show exceptional or unusual reasons).
[102] As above.

instability. The people committed to building a better future by establishing a constitutional order based *inter alia* on the principles of equality and freedom. It is on this basis that the people guaranteed the right to bail, to personal liberty, to the presumption of innocence and to a fair and speedy trial. These rights are inherent and not granted by the state. They must also be upheld, respected and promoted by all organs of the state.

The Constitution entitled an accused to apply for bail and court would grant it on such conditions as it considered reasonable. The provision created the fundamental right to bail, and placed it at 'at the cornerstone of [the rights to a] fair trial and presumption of innocence that are non-derogable.'[103] The time a person may spend on remand was also reduced by the Constitution from 480 days to 360 days for capital offences and 120 days for minor offences. In 2005, the Constitution was amended and this time was further reduced to 180 days for capital offences and 60 days for minor offences.[104]

Under the new constitution, courts for the first time attempted to settle the law on bail, which had hitherto been filled with contradictions. In *Ruparelia v Uganda,* the High Court held that in granting bail, it had to consider whether the accused would appear to stand trial. In this assessment, it could look at the nature of the offence, the evidence available, the possible punishment, whether the applicant has a fixed place of abode, the antecedents of the applicant and whether it was likely that he would interfere with witnesses. Fixed place of abode did not mean living in his own house, it only meant that the applicant was ordinarily resident in Uganda, and allegations of interfering with witnesses had to be proved to a standard of reasonable belief.[105] In *Haruna Kanabi v Uganda,* the High Court added that there should be sureties who must be substantial, the test for substantiality being their ability to command influence over the accused.[106]

Courts also touched on the aspect of infancy as a ground for bail, which had hitherto never been defined. In *Gerald Bakojja v Uganda,* an applicant aged 15 years was found to be an infant under the law. The High Court reasoned that infancy in Section 14 of the Trial on Indictments Act meant any person below the age of eighteen.[107] Many children charged of grave offences were granted bail on account of their infancy.[108] Bail was also granted on purely public policy considerations like

[103] *Solomon Muhirwa v Uganda* [2003] UGHC 12.
[104] Section 9, Constitution (Amendment) Act 11 of 2005.
[105] *S Ruparelia v Uganda* [1992-1993] HCB 52.
[106] *Haruna Kanabi v Uganda* [1994-95] HCB 45.
[107] *Gerald Bakojja v Uganda* [1996] HCB 42.
[108] *Tenywa v Uganda* [1995] UGHC 28; *Kaara Kasim V Uganda* [1995] UGHC 14 (16 years); *Okuku v Uganda* [1995] UGHC 31 (17 years); *Bijja Robbert V Uganda* [1995] UGHC 13 (17 years); *Uganda v Robert Serugo* [1999] UGHC 4 (16 years).

the 'need to decongest prisons'.[109] Judges were not shy to depart from earlier precedents and, in light of the new Constitution, held that an overstay on remand for a long time without trial entitled a person to automatic bail.[110] The time for mandatory bail would now be computed to include the time that the applicant spent in unlawful or incommunicado detention. Courts found that although the grant of bail was discretionary, this discretion was to be exercised according to reason and justice and not in a manner that was arbitrary, vague, fanciful or irregular.[111] It had to be 'without any malice, ill will, ulterior motives or regard to external influence or circumstances'.[112]

Courts were also not shy to confront the executive in order to secure the right to liberty of the accused. In *Col (Rtd) Dr. Kiiza Besigye v Uganda,* the applicant was a presidential candidate charged with treason and rape.[113] A core constitutional question was raised as to whether bail under the 1995 Constitution was a discretionary or an automatic right.[114] Justice Ogoola decided to grant interim bail to the applicant and refer the matter to the constitutional court. He held that:

> Liberty is the very essence of freedom and democracy. In our Constitutional matrix here in Uganda, Liberty looms large. The liberty of one, is the liberty of all. The liberty of any one must never be curtailed lightly, wantonly or even worse, arbitrarily. Article 23, Clause (6) of the Constitution grants a person who is deprived of his or her liberty, the right to apply to a competent Court of law for the grant of bail. The courts from which such a person seeks refuge and solace should be extremely wary of sending such a person away empty handed – except of course for good cause. Ours are courts of justice. Ours is the duty and privilege to jealously and courageously guard and defend the rights of all, in spite of all.[115]

However, as the judiciary was becoming progressive in realising the rights of Ugandans, the Executive was stuck in the past of '1986' and was not ashamed to unleash the military on the Judiciary. Once the accused were granted bail, the military swung into swift action to prevent them from being released. A unit of heavily armed Uganda Peoples' Defence Forces commandos dressed in black T-shirts and army fatigue trousers were deployed to the High Court. Lawyers of the

[109] *Kaboyo v IGG* [2007] UGHCCRD 2.
[110] *Ssewajjwa Abdul v Uganda* [1997] HCB 11 Ogoola J. The applicant had been arrested and held incommunicado for 150 days, charged with treason and remanded for another 340 days, then committed and further remanded for 545 days. In light of the illegal detention, the Court found it prudent to immediately grant bail; *Shabahuria Matia v Uganda* [1999] UGHC 1 (charges dismissed because of long stay on remand); *The Republic of Uganda v Opoka Pyenlyce David Nicholas* [2009] UGHC 118 (6 years on remand, investigations incomplete, charges dismissed).
[111] *Andrew Muwonge v Uganda* [2001-2005] 2 HCB 21. This decision should however be criticised to the extent that it found that a person of 50 years was not of advanced age, thereby refusing to follow previous precedents.
[112] *Solomon Muhirwa v Uganda* [2003] UGHC 12.
[113] *Col (Rtd) Dr. Kiiza Besigye vs. Uganda*, High Court Criminal Misc Appl No. 228 and 229 of 2005,
[114] Judges held two views, one was that under the new Constitution bail was automatic and another that it was discretionary. For instance, in *Layan Yahaya v Uganda*, High Court Miscellaneous Criminal Application No. 96/2005 Lugayizi. J. held 'when a suspect applies for bail a court of law would act unconstitutionally if it refused to grant him or her bail. A refusal to grant bail would contradict the suspect's inherent right of innocence'.
[115] *Besigye* (n 113 above).

accused were prevented from processing the bail documents in the criminal registry. The accused were taken to Luzira and then produced in the court martial on similar charges. One account of the horrifying events was that it was like:

> [T]he shedding of blood in the premises of the High Court, brutal assaults on prisoners who had been released on bail, violent arrest and manhandling prisoners as they were thrown on lorries as if they were sacks of potatoes, unlawful confinement of the Deputy Chief Justice, the Principal Judge and other frightened Judges and Registrars who were confined and besieged for over six hours in the High Court buildings and the unrepentant attitude of the Executive Arm of this Republic.[116]

The Constitutional Court found that this conduct constituted an outrageous affront to the Constitution, constitutionalism, and the Rule of Law in Uganda and that the actions of the security forces were unconstitutional to the core.[117] However, this has not deterred executive excesses and attacks whereby persons granted bail are rearrested and whisked away to unknown detention centres. I discuss this in the next section.

The aspect of Judicial discretion in bail applications was also exhaustively examined by the Constitutional Court in *Besigye v Uganda*.[118] The Court held that Article 23(6)(a) gives the accused a right to apply for bail and the court has a discretion to grant or to refuse to grant bail. Bail is not an automatic right. Second, under 23(6)(b) and (c), the court has no discretion to grant or not to grant bail after the accused has shown that he/she has been on remand in custody for 60 days before trial or 180 days before committal to the High Court. In the latter two cases however, the court has discretion to determine the conditions of bail. The court also found that exceptional circumstances were regulatory and only applied in the case of Article 23(6)(a). The Court further held that:

> The applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the applicant the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially. Bail should not be refused mechanically simply because the state wants such orders. The refusal to grant bail should not be based on mere allegations. The grounds must be substantiated. Remanding a person in custody is a judicial act and as such the court should summon its judicial mind to bear on the matter before depriving the applicant of their liberty. Courts

[116] *Uganda Law Society v Attorney General* [2006] 1 HCB 80.
[117] As above.
[118] *Kiiza Besigye v Uganda* [2006] 1 HCB 17.

> have wide discretionary powers to set bail conditions which they deem reasonable, though we would caution this must be done judicially.[119]

Section 14 of the Trial on Indictments Act was also found to be merely regulatory and not mandatory.[120] In *Andrew Muwonge v Uganda,* the High Court held that under the new constitutional order, the Trial on Indictments Decree had no fettering effect on the discretion of the court under Article 23(6)(a) of the Constitution.[121] In *Ssemanda Alex Burton v Uganda,* Justice Engonda Ntende too held that the requirement of exceptional circumstances was no longer mandatory and the court retained the discretion to release an accused on bail even where no exceptional circumstance was proven.[122] He found that such a rule that exceptional circumstances had to be proven unfairly limited the right to bail and was unconstitutional as it made a mockery of the bill of rights, reducing the words of the new constitution to 'merely paper rights, not worth the paper they are inscribed on'.[123]

Further, in *Foundation for Human Rights Initiatives v Attorney General,* Sections 14, 15 and 16 of the Trial on Indictments Act were challenged as unconstitutional.[124] It was argued by the petitioners that those sections were unconstitutional because the requirement to prove exceptional circumstances narrowed, abridged and negated the right to bail. The Court disagreed and found that since bail was not automatic and was granted according to the discretion of court, the requirement to prove exceptional circumstances was not unconstitutional.[125] However, it was no longer mandatory and courts had to be cautious so that any condition they set on an accused did not erode the presumption of innocence and was acceptable and demonstrably justifiable in a free and democratic society.[126]

However, even in the aftermath of the new constitution, some judicial officers stuck to the old legal order that unjustly restricted the right to personal liberty. They continued to interpret the requirement for exceptional circumstances as mandatory and on the basis of that denied bail.[127]

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[119] As above.
[120] Note that in order to bring it into conformity with the Constitution, in 1998, Parliament amended Section 15 of the Trial on Indictments Decree to make the requirement of exceptional circumstances permissive and not mandatory. See Trial on Indictments (Amendment) Act No. 9 of 1998.
[121] *Andrew Muwonge v Uganda* [2001-2005] 2 HCB 21.
[122] *Ssemanda Alex Burton v Uganda* [2000] UGHC 1.
[123] As above.
[124] *Foundation for Human Rights Initiatives v Attorney General* [2008] UGCC 1. The Court however found that Section 16 of the TIA and 76 of the MCA violated the constitution because it set a higher remand of 480 days than the constitution for grant of automatic bail. Before this case, an earlier petition in *Charles Mubiru v Attorney General* [2001-2005] HCB 102 on the same grounds but it was unfortunately dismissed on the flimsy grounds that it did not disclose a question of constitutional interpretation and that a judge could not be sued for refusing to grant bail.
[125] Both Sections 14 of the Trial on Indictments Act and Section 75 of the Magistrate Courts Act are worded in similar terms.
[126] As above.
[127] *Kyambadde v Uganda* [2003] UGHC 101, In this case, bail was denied because of failure to prove advanced age and grave illness or any other special circumstance.

An accused had the onus to prove to the satisfaction of the court that exceptional circumstances existed[128] or that there were more than just ordinary considerations for bail.[129] Some judges even cautioned themselves that exceptional circumstances were no longer mandatory, but nevertheless denied bail when these were absent.[130] The failure to prove exceptional circumstances resulted in the dismissal of bail applications even if they had other requirements and had proven that they would not abscond.[131]

Other judges also resorted to technicalities and rigid rules of evidence to dismiss bail applications and defeat substantive justice.[132] In *Muhwezi v IGG,* the court strangely held that a government-issued passport (which had a date of birth) could not be relied on to prove the age of the applicant because it was not a birth certificate.[133] In another case, an affidavit was rejected (and bail denied) because the accused had thumbprinted instead of signing it.[134] He had explained to the Court that in prison he was not allowed to use a pen for writing and that the prison authorities had refused to avail him with one but this plea fell on deaf judicial ears. Bail was also denied on the mere assumption that, because the charge was a serious one, the accused would abscond.[135]

Judges used case law that was decided long before the Constitution and which was contrary to it to defeat the right to liberty. The old harsh rule that bail would not be granted pending appeal except unusual or exceptional reasons were shown was resurrected in *Jayesh Thakker v Uganda* by the application of *Girdher Dhanji Masrani Vs. R [1960] EA 320.*[136] This position had no basis in the modern law. In 2003, the Supreme Court in *Arvind Patel v Uganda* superseded the archaic principles in the *Masrani* case and laid down better and more flexible principles for courts to consider in granting bail pending appeal.[137] Proof of exceptional and unusual circumstances was

128 *Opio Bua James v Uganda* [2008] UGHC 85.
129 *Tolit James v Rep. Of Uganda* [2008] UGHC 97; *Komakech Vincent v Uganda* [2008] UGHC 90.
130 *Opio Bua James v Uganda* [2008] UGHC 77; *James Oketch v Uganda* [2008] UGHC 101.
131 *Col. Onen Kamdulu Alfred Ayella Patrick v Uganda* [2008] UGHC 84.
132 *In the Matter of Bail Application by Tigawalana Bakali Ikoba* [2003] UGHC 89 (Medical report was declared inadmissible because it was a photocopy and not the original); *Mubone Sam v Uganda* [2002] UGHC 81 (lack of evidence).
133 *Muhwezi v I.G.G* [2007] UGHCCRD 1; Compare with *Kamugisha v Uganda* [2007] UGHCCRD 3.
134 *Odeke George v Uganda* [2008] UGHC 38.
135 *Ociti Tom Oryema & 4 ors v Uganda* [2008] UGHC 132 (murder); *Musoke Jackson v Uganda* [2008] UGHC 44 (aggravated robbery); *Malibano Abdul & Anor v Uganda* [2008] UGHC 42 (murder).
136 *Jayesh Thakker v Uganda* [2007] UGHC 36 The conditions for bail pending hearing would be different from those of bail pending appeal. 'Bail pending appeal should only be granted for exceptional and unusual reasons; neither the complexity of the case nor the good character of the applicant; nor alleged hardship to his dependants can justify grant of bail pending appeal.'
137 *Arvind Patel v Uganda* [2003] UGSC 25 These were; the character of the applicant; whether he/she is a first offender or not; whether the offence of which the applicant was convicted involved personal violence; the appeal is not frivolous and has a reasonable possibility of success; the possibility of substantial delay in the determination of the appeal and whether the applicant has complied with previous bail conditions. All these criteria need not be there, a combination of two or more was sufficient. See *Nkula Moses v Uganda* [2008] UGCA 13.

not one of them.[138] Other courts, however, granted bail pending appeal on the principles of the *Patel* case.[139]

One of the challenges was the concept of trial by military courts, which rarely or never granted bail. The Judiciary early on was subservient and initially refused to interfere with military courts so as to protect the right to personal liberty. In *Re Lt Ephraim Tusiime*, the Court dismissed an application for habeas corpus on the pretext that if the applicant wanted to gain their liberty, they only had one remedy and that was to apply for bail before the military Court.[140] This was absurd, since the Court could grant bail as the position in the case of *Joseph Tumushabe v Attorney General* is that Court Martials are subordinate to the High Court. Article 23 of the Constitution also applies to military courts.[141]

Further, since the Court Martial does not have a committal procedure like the High Court only Article 23(6)(b) applies to it, and not Article 23(6)(c). This means that the Court Martial must grant an accused mandatory bail after they have spent 60 days on remand, regardless of the charge. Military Courts cannot keep an accused on remand for more than 60 days before their trial has commenced.

4. Current Challenges: The Requirements and Conditions for Liberty

Currently, the law on bail seems settled, but it is far from perfect and even far from guaranteeing the right to liberty to the fullest extent possible as required by the Constitution. This is because the concept that bail is discretionary has led to inconsistencies in the jurisprudence as to the conditions and the requirements for bail.

This section attempts to reconcile those inconsistencies and argues that to secure the right to liberty, judges should not use multiple tests to grant bail. They should only use one test, the guarantee that the applicant will not abscond once granted bail.

[138] See *Alimanzani Semaganyi v Uganda* [2008] UGHC 45 for view that the principles in *Patel* superseded those of *Masrani*.
[139] *Frank Iga v Uganda* [2009] UGCA 33; *Kavuma Freddies Schoof V Uganda* [2009] UGCA 39; *Teddy Sseezi Cheeye v Uganda* [2009] UGCA 25; *Anthony Sempijja v Uganda* [2010] UGCA 2; *David Chandi Jamwa Vs. Uganda* [2011] UGCA 5.
[140] *In Re Lt Ephraim Tusiime* [2001-2005] 2 HCB 93.
[141] *Joseph Tumushabe v Attorney General* [2001-2005] 2 HCB 97. Also note that Sections 219, 231 and 248 of the UPDF Act which mechanically refused Military Courts to grant bail were declared unconstitutional in *Foundation for Human Rights Initiatives v Attorney General* [2008] UGCC 1.

4.1. Judicial Discretion

Courts have held that bail is discretionary because it is impossible to lay down an 'invariable rule or a straitjacket formula'.[142] While that may be the case, judicial discretion must be exercised 'without any malice, ill will, ulterior motives or regard to external influence or circumstances.'[143] Discretion is an exercise of judicial power. Article 126 provides that Judicial power is derived from the people and is exercisable by the courts in the name of the people and in conformity with law and with the values, norms and aspirations of the people.[144] The People of Uganda hold the right to personal liberty in high value as reflected in their bill of rights. This right may only be limited for a temporary time and for specific reasons laid down in the constitution. This means that any discretion to grant bail must be exercised in favour of the constitutional right to liberty, and not against it, it must be exercised judiciously and objectively.

4.2. The Right to Bail or the Right to Apply for Bail?

In addition, some courts have determined that the Constitution only protects the right to apply for bail, and not the right to bail.[145] That is, a person can apply for bail, but it is within the discretion of the Court to grant or reject bail. There are many problems with this argument. First, the fundamental rights and freedoms of the individual are inherent and not granted by the State.[146] This means that the rights in Chapter Four (including the right to bail) are not 'granted' by any organ of the State, including the judiciary. The right to bail is not something that is given, or taken according to the whims of the judge, no, it is a right vested in the human person by the constitution, and cannot be taken away in any way that is not prescribed by the constitution.

Article 23(6)(a) provides that a 'person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable'. This has been interpreted to mean that there is only a right to apply, but not a right to be given. This is because of the use of the phrases 'entitled to apply' and 'may grant'. But that is a simplistic way to interpret the Constitution. It is absurd to suppose that the framers intended to create a right that was not inherent in Chapter Four. That is; a right to apply, but not a right to be given. Such a right is meaningless and is not a 'right' in the sense of the word. There would have been no use to place it in Chapter Four of the Constitution as all rights in that chapter are inherent and not 'granted' by the state. It would have been reckless for the framers to place a right that is so central

[142] *Kapasi Fred & Another v Uganda* [2020] UGHC 11.
[143] *Igira v Uganda* [2012] UGHC 405.
[144] Constitution of Uganda.
[145] *Kisembo Tito & 2 Ors v Uganda* [2024] UGHC 411; *Mutalya Moses Kyabirye V Uganda* [2019] UGHC 8.
[146] Article 20.

and directly linked to the right to equality, liberty, presumption of innocence and fair trial under the whims of the state to grant and reject as it thinks reasonable. Why then did they entrench the right to presumption of innocence and a fair trial as non-derogable under Article 44(c) of the Constitution if it could be easily extinguished by a denial of bail?

A more liberal and wholesome interpretation is that the use of the word 'may' there only means that the right is not absolute. This means that the right to bail, like all other rights, can be limited under Article 43 of the Constitution. However, any limitation imposed on the right to bail must not go beyond what is acceptable and demonstrably justifiable in a free and democratic society. For any limitation to pass, it must be legitimate, proportionate and necessary.[147]

The presence of an inherent right to bail shifts the burden and the standard of proof. The right to bail means that once a person applies to court for bail, the duty is on the prosecutor to convince the court why he should not be released on bail, and in that way, he limits his right.[148] A person should not be required to prove why he is deserving of bail, or have the onus of proving why he should be released on bail; instead, it is the prosecution that must prove why it is demonstrably justifiable in the circumstances to limit the right to bail. After that burden is discharged, then and only then should a person be required to refute the case of the prosecution. This is a better way to realise the right to bail under the Constitution as opposed to the current model.

4.3. Proof of Exceptional Circumstances

The requirement for exceptional circumstances in capital offences as seen in the previous section was declared as a permissive requirement, one that the courts are not obliged to enforce at all. This notwithstanding, majority Ugandan Courts have not followed these binding precedents.[149] In cases where an applicant had all other requirements to show that they would not abscond such as substantial sureties and a fixed place of abode, courts have still adamantly refused to grant bail on the sole basis that no exceptional circumstances have been proven.[150] Refusing to grant bail on that one aspect alone shows that they (like their counterparts in the 1970s) still treat the requirement as mandatory.[151] Some judges have held that even if exceptional circumstances are not mandatory, an applicant who proves them will be more favoured and has a better chance of

147 *Onebe v Uganda* [2022] UGHCCRD 166.
148 J Mujuzi 'The Supreme Court of Uganda and the Right to Bail Pending Appeal: Understanding Nakiwuge Racheal Muleke v Uganda (Criminal Reference No.12 Of 2020)' (2021), 427.
149 Only a few cases like *Mulongo Namubiru v Uganda* [2014] UGHCCRD 86, *Sekabira & 2 ors v Uganda* [2014] UGHCCRD 88 espoused this principle.
150 See *Mayanja v Uganda* [2012] UGHC 152; *Mutemele v Uganda* [2013] UGHCCRD 53; *Nsangwe v Uganda* [2013] UGHCCRD 102 (being a student not an exceptional circumstance); *Wabwire v Uganda* [2014] UGHCCRD 90; *Okello v Uganda* [2015] UGHCCRD 456; *Kanyamunyu & Ors v Uganda* [2017] UGHCCRD 1; *Byamukama Abel & Another v Uganda* [2020] UGHC 9.
151 *Kajaana v Uganda* [2012] UGHC 146; *Kamya v Uganda* [2016] UGHCCRD 26.

getting bail.[152] In the face of the new constitutional order, this is not only strange and absurd but also discriminatory.

In principle, courts should lean 'in favour of and not against the liberty of the accused as long as the interests of justice will not be prejudiced.'[153] It is for that reason that a court of law is empowered to exercise its discretion to grant bail even when none of the exceptional circumstances have been proved. Courts are reminded that proof of exceptional circumstances is not mandatory.[154] The problem with maintaining a strict and inflexible rule that exceptional circumstances must be proved is that they are by nature exclusionary. The exceptional circumstances are only three, i.e. grave illness, a certificate of no objection from the DPP and advanced age or infancy. Any person who does not fall into any of the three categories would never be released on bail. The Court of Appeal increased the definition of advanced age from 50 years to 60 because allegedly life expectancy in Uganda was now at 60.[155]

According to the Bail Guidelines 2022, advanced age means 60 years and above. The effect of this is that persons who are 50 and were previously eligible are now being denied bail by courts.[156] Even for those who would fall in these categories, the circumstances are so hard to prove and place the right to bail out of reach. For instance, a grave illness has to be certified by a medical report from prison, which shows that the medical condition is not manageable from prison.[157] No report issued by Uganda Prisons has ever said this.[158] For the sake of liberty, some judges have had to become ingenious and rule in their opinion that the condition is very severe.[159] The overriding consideration should not be whether there are any exceptional circumstances to release the accused, but whether they will faithfully attend court and not abscond when granted

[152] *Mackenzie Leigh Mathis Spence and Another v Uganda* [2023] UGHCCRD 15; *Kabayiza v Uganda* [2024] UGHCCRD 37.
[153] *Abacha v Uganda* [2016] UGHCCRD 82.
[154] *Lutalo v Uganda* [2016] UGHCCRD 137; *Ocakacon v Uganda* [2016] UGHCCRD 9; *Keitesi Katurebe v Uganda* [2020] UGHC 23; *Kayongo Bashir v Uganda* [2020] UGHCCRD 3.
[155] *Mubale Peter v Uganda* [2018] UGCA 16.
[156] *Bakulha & 48 Others v Uganda* [2022] UGHCICD 8; *Obita v Uganda* [2024] UGHC 75.
[157] *Wabwire v Uganda* [2014] UGHCCRD 90; *Kiwanuka v Uganda* [2014] UGHCCRD 85; *Rwetunga v Uganda* [2015] UGHCCRD 51; *Mutebi v Uganda* [2021] UGHCCRD 38.
[158] In *Otim v Uganda* [2017] UGHCCRD 79, the court rejected a medical report because it was prepared by a clinical officer and that he was a 'junior'. *Musede v Uganda* [2015] UGHCCRD 17; *Bigugu v Uganda* [2015] UGHCCRD 452; *Onebe v Uganda* [2022] UGHCCRD 166.
[159] *Onebe v Uganda* [2022] UGHCCRD 166 where Court held that '. In assessing whether the medical facilities in prison are adequate, the court must examine the efficacy of the functionality of the facility to manage or combat a disease that the accused is reported to be suffering from. Where, for example, medical facilities exist, it is important to establish whether the facilities have the right personnel, medicine, equipment, and facilities to treat the accused's illness with reasonably positive outcomes. If this question is answered in the affirmative, then the illness is not grave, and the reverse is true if the question is answered in the negative.' See also *Kemigisha Adrine v Uganda* [2020] UGHC 12; *Rajiv Kumar v Uganda* [2023] UGSC 38 (Not 'conducive' interpreted to mean prison hospital cannot handle).

bail.[160] As long as an applicant shows that they have sufficient guarantees like sureties and a place of abode and are unlikely to abscond, they should be released on bail.[161]

4.4. Gravity of the Offence

Courts have also based on assumptions and stereotypes to foreclose the right to liberty. The argument that if an offence is serious, then bail should not be granted because the accused will most likely abscond is based on nothing else but mere assumption and conjecture. This argument may perhaps have been tenable in an age when the death penalty was mandatory, but that is no longer the case.[162] Nevertheless, in *Mayanja v Uganda*, the High Court assumed that 'the more serious the offence, the higher the temptation for an accused to abscond when released on bail' and went on to deny bail on the mere pretext that the charges were serious.[163] There is a pattern of this kind of judicial reasoning in many other cases.[164] In one case, even where there was no objection to bail from the prosecution, the judge refused to grant bail because the charges were serious.[165]

The right to bail is open to all persons regardless of the offence for which they are charged.[166] The constitution guarantees the presumption of innocence, and that is why all offences are bailable. This principle is so cardinal that if an applicant fulfils the conditions for bail, it would be very unfair, even unconstitutional to deny him bail simply because the court feared that the gravity of the offence may tempt him to abscond.[167] Bail should not be denied as a form of punishment or on account of unsubstantiated allegations as to a persons' perceived course of action once granted bail.[168] In *Abacha v Uganda*, it was decided that the degree of temptation to abscond or the risk of failing to surrender owing to the severity of the likely sentence, if convicted is a matter to be assessed in the light of other relevant factors. The likely sentence could not of itself provide grounds for denying bail.[169] There has to be other factors showing that a person will abscond. Besides, the severity of a charge should not prevent a bail application from succeeding. A charge

[160] *Okello v Uganda* [2012] UGHC 119.
[161] *Byabagambi v Uganda* [2021] UGHCCRD 22.
[162] Capital punishment is no longer a mandatory sentence. See *Attorney General v Susan Kigula & 417 Ors* [2009] UGSC 6.
[163] *Mayanja v Uganda* [2012] UGHC 152.
[164] *Omusugu & Anor v Uganda* [2015] UGHCCRD 59 (aggravated robbery); *Mujuni Benard v Uganda* [2020] UGHC 18; *Byamukama Abel & Another v Uganda* [2020] UGHC 9; *Tumwekwase Owen v Uganda* [2020] UGHC 25; *Meliserina Furaha v Uganda* [2020] UGHC 15; *Asiimwe Didas alias Hajji v Uganda* [2020] UGHC 6; *Kyarikunda Adrine v Uganda* [2020] UGHC 13.
[165] *Ngobi v Uganda* [2022] UGHCCRD 69.
[166] *Ruhangana alias Kahima v Uganda* [2020] UGHC 22; *Kizza v Uganda* [2021] UGHCCRD 29.
[167] *Wabwire v Uganda* [2014] UGHCCRD 90.
[168] *Bamanya v Uganda* [2013] UGHCCRD 66.
[169] *Abacha v Uganda* [2016] UGHCCRD 82; See also: *Hurnam v State of Mauritius* [2006] 1 WLR 857; R *(Thompson) v Central Criminal Court* [2006] A.C. 9; *Oliobe & Ors v Uganda* [2016] UGHCCRD 15.

remains just that, a charge, and the prosecution will still be expected to prove it at a very high degree.[170]

4.5. 'Substantial' Sureties

The concept of sureties is still murky ground. This is where the individual opinion and whims of the judges reign most. Courts have declared sureties not to be substantial for a number of reasons. These include the fact that the sureties and the applicant do not stay in the same place,[171] that they do not know where the applicant's house is,[172] they were of advanced age,[173] had retired and were assumed unable to pay the recognizance,[174] were employees of the accused,[175] had a disability,[176] were not very confident,[177] did not know the accused well,[178] did not impress the judge,[179] were younger than the applicant,[180] were merely cousins,[181] did not know their duties,[182] and were merely business partners.[183] All of these reasons are not substantial enough to reject a surety. The right to liberty has been so easily eroded because a surety 'did not impress the judge.'

The test of control that a surety possesses has been insanely and discriminatorily interpreted. The High Court has held that an LC I chairperson must have sureties who are his supervisors such as LC 2, LC 3, and LC 5.[184] Ordinary people cannot stand surety for him. A civilian cannot stand as a surety for a person in the military. A soldier must have another soldier of superior rank as their surety because 'a UPDF officer is not an ordinary citizen and by his position is intimidating to ordinary citizens and fellow ranked officers'.[185] This is discriminatory and unconstitutional.

To provide some clarity on this, certain postulations might be made. On the issue of a disability, it is important to note that Article 21 of the Constitution prohibits discrimination on the basis of disability. Section 49(1) of the Persons with Disabilities Act in 2020 amended Section 17 of the Trial

[170] *His Majesty Omusinga Mumbere* v Uganda [2017] UGHCCRD 11; *Opiyo Nicholas v Uganda* [2020] UGHCACD 9.
[171] *Kajaana v Uganda* [2012] UGHC 146; *Walusimbi Mansur V Uganda* [2019] UGHC 2; T*umwesigye v Uganda* [2021] UGHCCRD 53; *Rusoke v Uganda* [2021] UGHCCRD 46.
[172] *Nsangwe v Uganda* [2013] UGHCCRD 102.
[173] *Obey & Ors v Uganda* [2015] UGHCCRD 43; *Kalule v Uganda* [2018] UGHCICD 1; *Ntananga v Uganda* [2021] UGHCCRD 43.
[174] As above. Sureties in monetary cases must demonstrate the ability to pay high amounts.
[175] As above.
[176] *Musazi v Uganda* [2015] UGHCCRD 16 (disqualified surety because he was elderly and had a disability) In this decision, the judge also stated that the applicant had been on remand for only five months and so he could do more months!
[177] As above.
[178] *Musede v Uganda* [2015] UGHCCRD 17.
[179] As above
[180] *Masaba v Uganda* [2016] UGHCCRD 136; *Kaganda v Uganda* [2023] UGHC 275.
[181] *Tumusiime David v Uganda* [2020] UGHC 24.
[182] *Omach v Uganda* [2021] UGHCCRD 44.
[183] *Mugera v Uganda* [2023] UGHCICD 11.
[184] *Musisi v Uganda* [2021] UGHCCRD 37.
[185] *Private Sserwadda v Uganda* [2021] UGHCCRD 45.

on Indictments Act to read as 'a person with a disability shall not on the basis of the disability, be taken to be an insufficient surety.'[186] The High Court has since held that 'a disabled person has all the rights and privileges of an able-bodied person and can stand surety for an accused person.'[187] It is immaterial that sureties reside in different places, as long as both of them are within the jurisdiction of the Court.[188]

Sureties are lay people who do not come to court with the foreknowledge of their duties, but only a willingness to stand with the accused person. They should not be expected to magically know their duties. The duty is on the court to explain to them their duties and ensure that they have understood them.[189] Practice Direction 16 now requires the Court to carry out this function. On the issue of age, if advanced age under the law is 50 years, then no one above 50 can act as a surety because they are of advanced age. This is absurd.

In *Besigye v Uganda,* it was held that the duty of a surety is not merely to assist a friend or relative to get out of prison. The sureties have a duty to the court, which duty is to ensure that the accused does not abscond.[190] What amounts to a substantial surety is not clear.[191] Such a surety must have a nexus or bond with the applicant.[192] A blood relation is preferred.[193] They should be able to prevail over the applicant to ensure that he shall not abscond.[194] They should have the means to pay the bond and should be persons of reputation and good social standing in the community.[195] The ability to pay the cash bond can be proved by leading evidence such as proof of ownership of property or being gainfully employed.[196] They may adduce evidence of passport photographs, national identity cards, valid passport, employment details or from religious leaders and other community leaders confirming any information.[197]

4.6. Fixed Place of Abode

The accused must also have a fixed place of abode or else the bail application will be dismissed. This is proven by documentary evidence such as by letter from the Local Council Chairperson at

[186] Section 49, Persons with Disabilities Act Cap 115.
[187] *Onebe v Uganda* [2022] UGHCCRD 166.
[188] *Bisaso v Uganda* [2021] UGHCCRD 21.
[189] *Ocen v Uganda* [2021] UGHCCRD 54; *Kawanguzi v Uganda* [2024] UGHCCRD 13.
[190] *Besigye v Uganda* [2016] UGHCCRD 7; See also *Kyokusiima Monica v Uganda* [2020] UGHC 14.
[191] It has been noted that this is relative and depends on the circumstances of each case. See *Alinda v Uganda* [2023] UGHCCRD 31.
[192] *Annet Namwanga Vs Uganda* [2011] UGHC 39 (being of the same political party is insufficient).
[193] *Twedede & Anor v Uganda* [2019] UGHCCRD 22; *Ndagirimana Blesson v Uganda* [2020] UGHCCRD 152; *Mugera v Uganda* [2023] UGHCICD 11.
[194] *Tumwesigye v Uganda* [2011] UGHC 171.
[195] B Odoki, *A guide to Criminal Procedure in Uganda* (2006) LDC Publishers at p.91 as cited in *Sentongo v Uganda* [2013] UGHCCRD 4; *Mugisha v Uganda* [2019] UGHCCRD 19.
[196] *Opiyo Nicholas v Uganda* [2020] UGHCACD 9; *Okanya v Uganda* [2021] UGHCCRD 20.
[197] *Aganyira v Uganda* [2013] UGHCCRD 31.

the village level.[198] It has been held that a national ID does not prove a fixed place of abode because it is not a recent document.[199] An ambiguous letter with the mere slogan 'the bearer of this letter, whose particulars appear above, is currently a resident of this locality' will be rejected.[200] The LC letter should contain the exact location of the residence,[201] how long they have been there and whether it is a permanent residence or rented premises, if rented, the names of the landlord would be added value.[202] The LC Chairman should also include their contact details in the letter.[203]

The fixed place of abode must be within the jurisdiction of the Court. But this has received a strange interpretation. An applicant with a residence in another district from that in which the High Court building is located has been held to be out of the jurisdiction of the court.[204] This is strange considering the fact that the high court has unlimited territorial jurisdiction all over Uganda. Foreigners must have an attachment to the jurisdiction such as immovable property to prove that they are not a flight risk.[205] However, just because a person is a foreigner does not mean that they are a flight risk. Bail should not be denied exclusively on that fact.

Under the spirit of the right to liberty, a place of abode does not have to be fixed or permanent, provided it is known to the court. If an applicant wants to move, they can simply inform the court that they are moving. Further, the requirement of a fixed place of abode is increasingly irrelevant as there is free movement of people from one place to another. It also presents no guarantee that an accused will come back to court. It should be in any place of Uganda and not the jurisdiction of the court as it is currently interpreted.

4.7. Interference with Investigations

This is one of the most abused grounds. Courts have denied the right to bail on the basis of mere allegations. In *Obey & Ors v Uganda*, the Judge was of the view that in cases of such allegations, the state was not obliged to produce evidence in the true sense and is not bound by formality. The Court could take into account any information presented to it. The judge then relied on a newspaper article that alleged that the accused had bribed some persons.[206] It is important to

198 *Okello v Uganda* [2015] UGHCCRD 456; *Mugume Edson v Uganda* [2020] UGHC 17; *Bisaso v Uganda* [2021] UGHCCRD 21.
199 *Lumala v Uganda* [2016] UGHCCRD 138.
200 *Balikagira Patrick and Anor v Uganda* [2022] UGHCCRD 41.
201 On the question of precise location, the Court held in *Ochaya v Uganda* [2013] UGHCCRD 67 that the applicant must state 'the Village, Parish, Sub- County, county and district of his stated fixed place of abode.'
202 *Aganyira v Uganda* [2013] UGHCCRD 31.
203 As above.
204 *Omach v Uganda* [2021] UGHCCRD 44; *Loboka v Uganda* [2021] UGHCCRD 30; *Nduhukire v Uganda* [2023] UGHC 292.
205 *Awandal v Uganda* [2016] UGHCCRD 11.
206 *Obey & Ors v Uganda* [2015] UGHCCRD 43.

state at the outset that courts should not rely on media reports that undermine the presumption of innocence.[207] In another case, on the mere fact that the accused was an LC Chairman, the court assumed that he had such great power to interfere with witnesses.[208] As long as investigations were still ongoing, an accused had to remain behind bars.[209]

Allegations that an accused will interfere with investigations once released on bail have to be proved. In the old case of *Panju v R*, it was held that 'If the Courts are simply to act on allegations, fears, or suspicions, then the sky is the limit and one can envisage no occasion when bail would be granted whenever such allegations are made.'[210] These allegations must be reasonably substantiated so that a court can properly exercise its 'discretion when balancing the rights of the applicant and the interest of society to protect it from lawlessness.'[211] Even if there was a real risk of interfering with witnesses, this can be prevented by forbidding contact between the accused and the witnesses and not by denying bail.[212]

4.8. Cash Bail

Courts have also set excessively high cash bail amounts. In *Namuyimba v Uganda*, the Court granted cash bail of 100 million Uganda Shillings, yet the accused was gravely ill and required medical treatment.[213] The unfair effects of excessive cash bail amounts were seen in the case of *Wanyenze v Uganda*.[214] In this case, the Chief Magistrate granted an accused bail on condition that she paid a cash bail of three million shillings. However, due to poverty, the accused was not able to meet the bail conditions and remained in prison. The High Court on revision held that while judicial officers have discretion to set bail conditions, the same must be reasonable and must reflect the economic realities of the accused. The condition for the grant of bail should not be stiff so as to render the right illusory. Here was an accused who had spent six months sitting in prison because of unreasonable cash bail terms. The High Court revised the bail conditions and freed the accused on a non-cash bond.

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[207] UN Human Rights Committee (HRC), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para 30.
[208] *Adimule v Uganda* [2016] UGHCCRD 104.
[209] *Kavuma v Uganda* [2021] UGHCCRD 24; *Ssentongo v Uganda* [2021] UGHCCRD 51.
[210] *Panju vs R* (1973) EA 282; *Tumwirukirire Grace v Uganda* [2020] UGHC 26.
[211] *Hon. Godi Akbar H. Akbar v Uganda* [2009] UGHC 13.
[212] *Ochima v Uganda* [2016] UGHCCRD 78.
[213] *Namuyimba v Uganda* [2012] UGCA 35; See also *Muwadu v Uganda* [2012] UGHC 246 (50 million Uganda shillings); *Birete Sarah v Uganda* [2017] UGSC 27 (700 million shillings although not cash).
[214] *Wanyenze v Uganda* [2021] UGHCCRD 114. See also *Charles Onyango Obbo & Andrew Mwenda v Uganda* (1997) 5 KALR 25 'while court should take into account the accused's ability to pay, in exercising its discretion to grant bail on certain conditions, the court should not impose such tough conditions that bail looks like a punishment to the accused'.

Wazenye is just the face of many indigent accused persons sitting in the various government prisons because they cannot afford bail. As the rich buy their way out, the poor languish in prison, unable to 'purchase' their freedom. To avoid discrimination, other conditions of release other than cash bail could be more effective, more efficient, and fair.[215] At the writing of this paper, there is a pending petition before the constitutional court of Uganda that argues that the requirement of cash bail is unconstitutional and discriminates against persons on the basis of financial status.[216]

To worsen matters, many accused persons are not given a refund of their bail money once the case is concluded. In Circular No. 3 of 2021, the Principal Judge decried that many courts were not making orders of bail refunds upon conclusion of criminal cases, and as a result, many remained unaware that they were entitled to a bail refund where it was not forfeited by the state and large amounts of money remain unclaimed on the cash bail account of the Registrar of the High Court.[217] He directed judicial officers to inform accused persons on the procedure for applying for a bail refund at the grant of bail. The Bail Practice Directions also elaborate on the procedure for refund.[218]

Courts have also asked for other kinds of security, the sole effect of which is to make it harder for the applicants to comply with the terms. This should not be the case. Judges have asked bail applicants and sureties alike to deposit their passports,[219] land titles,[220] and national identity cards with the court. No law empowers the Court to ask for these documents. In Circular No. 3 of 2021, the Principal Judge expressed concern that many courts were retaining the original national identification cards of the accused and sureties as a condition for the grant of bail.[221] He stated that since the law does not require the deposit of national identification cards as a condition for grant of bail, judges were forbidden from continuing with the practice.[222] The requirement to deposit a land title too is not founded on any law.[223]

4.9. Bail Pending Appeal

The conditions for the grant of bail pending appeal have been stricter than those for bail pending trial. The Court of Appeal has held that in applications of bail pending appeal, the presumption of

[215] Uganda Law Reform Commission
[216] Daily Monitor 'Court asked to declare cash bail illegal' https://www.monitor.co.ug/uganda/news/national/court-asked-to-declare-cash-bail-illegal-4533376
[217] Circular No 3 of 2021
[218] Practice Direction 26
[219] *Muwadu v Uganda* [2012] UGHC 246.
[220] *Muwadu v Uganda* [2012] UGHC 246; *Mubale Peter v Uganda* [2018] UGCA 16.
[221] Circular No 3 of 2021.
[222] Under Article 141(1)(a) of the 1995 Constitution, the Principal Judge is the administrative head of the High Court and subordinate Courts
[223] *Sendagi and 2 Others v Uganda* [2021] UGHCCRD 96; *Dhiba and Another v Uganda* [2021] UGHCCRD 113.

innocence is absent or suspended and as such, the applicant has a much greater burden of proof, they must prove that there are exceptional circumstances to warrant their release on bail.[224] A conviction has been assumed to be a strong incentive for an applicant to abscond.[225] Bail pending appeal will not be readily granted and the applicant must satisfy the court that they deserve to be granted bail. It will also not be granted when the appeal has already been heard and is awaiting judgement.[226]

In the case of *Kairu & Anor v Uganda*, Justice Kakuru held that since the right to be presumed innocent was extinguished upon conviction, an applicant for bail pending appeal had to prove the exceptional circumstances in Section 15 of the Trial on Indictments Act.[227] He reasoned that it would be illogical to require an applicant for bail pending trial to prove exceptional circumstances and then claim that after conviction, a person was not required to do so. He distinguished the authority of *Arvid Patel vs Uganda* and found that it was per incuriam to the extent that it did not take into account the provisions of Section 15 of the Trial on Indictments Act.

With the greatest of respect, the learned judge misdirected himself when he argued that an applicant for bail pending trial had to prove exceptional circumstances. Since the advent of the Constitution, this requirement was merely regulatory. Further, the use of the word 'may' in Section 15 of the Trial on Indictments Act means that the provision is not mandatory in all bail applications, whether during trial or appeal. Third, the Trial on Indictments Act applies to criminal trials before conviction in the High Court, not criminal appeals.[228] The question then is why should a person prove exceptional circumstances after conviction if they were not required to prove the same before?

An appeal is a constitutional right by which a person may set aside a conviction. The very implicit recognition in creating the right of appeal is that a conviction may be erroneous. It therefore does not abrogate the presumption of innocence.[229] Even if the burden of proof shifts, the rules of evidence as to proof do not affect this right.[230] The presumption of innocence forms part of the content of the right to a fair hearing, which is non-derogable under Article 44(c). A person who has been convicted but has pending appeals does not lose their right to the presumption of innocence. To claim that a convicted appellant does not enjoy the presumption of innocence and

[224] *Walubi v Uganda* [2013] UGCA 8; *Namaisi Muddu v Uganda* [2013] UGHCCRD 58; *Kabugo Anor v Uganda* [2014] UGHCCRD 1 (applicant no longer shielded by presumption of innocence, they are convicts); *Namuremwe & Ors v Uganda* [2014] UGHCCRD 29; *Muhale Peter v Uganda* [2018] UGCA 16; *Kaganda v Uganda* [2022] UGHCCRD 29; *Rajiv Kumar v Uganda* [2023] UGSC 38.
[225] *Igamu Joanita v Uganda* [2013] UGCA 6.
[226] *Mellan Marere v Uganda* [2023] UGSC 24.
[227] *Kairu & Anor v Uganda* [2015] UGCA 115.
[228] Mujuzi (n 148 above) 427.
[229] *Oundo v Ouma and Ors* [2016] UGHCEP 61.
[230] Article 23(4)(a).

thus has to show cause why they are deserving of bail would be to 'prematurely extinguish one's right before one's fate is finally determined by the final appellate court.'[231] This offends the very nature and fabric of the Constitution.

Further, the Supreme Court in *Kyeyune v Uganda* held that the presumption of innocence continues as long as someone decides to exercise his or her right of appeal. It does not stop at the trial level. The fact that courts can make errors because they are composed by human beings is the very essence why this presumption must be maintained at all stages.[232] For its part, the Court of Appeal has rejected this decision as per incuriam and has held that in line with the literal interpretation of Article 23 of the Constitution, the presumption of innocence only ends at the trial stage.[233]

Nonetheless, it appears that the *Kyeyune* position is more constitutionally sound. A constitutional provision that guarantees a fundamental right should not be interpreted literally. The principles of interpreting the Constitution are well settled. In *Okello John Livingstone and 6 Others vs Attorney General*, it was held that a constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive, liberal, and flexible interpretation keeping in view the ideals of people, their social economic and political, cultural values to extend the benefit of the same to the maximum possible.[234] Using this test would lead to the opposite conclusion that the presumption of innocence is not eroded on appeal. This right is cast in stone and a convict does not lose that right until their conviction is upheld by the highest appellate court.[235]

Therefore, the requirement that an applicant prove exceptional circumstances on bail pending appeal is an unwarranted departure from the principles in *Arvind Patel*. The *Patel* case set elaborate constitutional guidelines for the grant of bail pending appeal. These are: the character of the applicant, whether the applicant is a first offender or not, whether the offence for which the applicant was convicted involved violence, the appeal is not frivolous and has a reasonable possibility of success, the loss incurred by the complainant or the victim, the possibility of substantial delay in the determination of the appeal; or whether the applicant has complied with the bail conditions granted by the trial court before the conviction of the applicant.[236] The applicant only needs to satisfy any two and not all of them. Some lower courts still apply these

[231] *Akutta Olupot v Uganda* [2013] UGCA 22; *Lubyayi & Anor v Uganda* [2015] UGHCCRD 54.
[232] *Kyeyune v Uganda* [2017] UGSC 24; *Kajubi v Uganda* [2018] UGSC 74; *Walusimbi Mansur V Uganda* [2019] UGHC 2; *Mugerwa and Another v Uganda (URA)* [2023] UGSC 25.
[233] *Sheikh Muhamad Yunusu Kamoga v Uganda* [2018] UGCA 17; *Kawanguzi v Uganda* [2024] UGHCCRD 13.
[234] *Okello Okello John Livingstone and 6 Others vs Attorney General* - Constitutional petition No. 1 of 2005.
[235] *Lugomba & Ors v Uganda* [2019] UGHCCRD 23; See also the arguments in *Kasango v Uganda* [2020] UGCA 2138.
[236] See also Practice Direction 19

principles.[237] However, the majority have disregarded *Patel* and now require that on top of the grounds in *Patel*, an applicant also has to prove exceptional circumstances and that they will not abscond.[238] These are three burdens of proof. They have set more stringent conditions for the grant of bail pending appeal. The Bail practice directions do not require proof of exceptional circumstances.[239] Therefore, the principles in *Patel* are good law and the courts should exclusively rely on that, nothing else.

4.10. Mandatory Bail

The Constitution also provides for mandatory bail. According to Article 23(6) (b-c), a person who has spent either 60 days for non-capital offences or 180 days for capital offences on remand before their trial starts is entitled to automatic bail. This provision was meant to cure the burdens faced by individuals through delayed prosecutions. The court has no discretion to refuse to grant this type of bail.[240] However, it has been said that courts have the discretion to set the conditions for the grant of automatic bail and so may hold an accused for a longer period until they fulfil the conditions set.[241] An applicant does not have to prove any exceptional circumstances for the grant of mandatory bail.[242] Mandatory bail will not apply where the trial has already begun.[243]

Under Section 15 of the TIA, the Court can grant bail without sureties and even on the recognisance of the applicant. The conditions set by the Court for the grant of mandatory bail should not be so stringent as to impair the enjoyment of the right. For instance, cash bail should not be excessively high. Many accused persons who wait to get out on mandatory bail are too poor and as such, have to wait for mandatory bail because the ordinary bail granted in the aftermath of arrests is coupled with many onerous conditions.

The Children Act also creates a statutory right to bail for children.[244] Section 136(5) provides that remand in custody for children shall not exceed 3 months in case of a capital offence and 45 days in case of any other offence. After this period, a child is entitled to mandatory bail. In Namata v Uganda, the Court held that it is a rule to avoid institutional detention as much as possible for

[237] *Asibuku v Uganda* [2016] UGHCCRD 126; *Abima & Ors v Uganda* [2016] UGHCCRD 10; *Alenyo v Uganda* [2017] UGSC 79.
[238] *Kwagala Gonza v Uganda* [2018] UGCA 22; *Mugisha v Uganda* [2022] UGHC 151; *Kubiita v Uganda* [2023] UGHCCRD 165; *Aryampa v Uganda* [2024] UGSC 33.
[239] Practice Direction 19.
[240] *Nyangoma v Uganda* [2022] UGHCCRD 34; *Kawuki v Uganda* [2022] UGHCCRD 163; *Kavuma v Uganda* [2024] UGHCCRD 36.
[241] Such as having substantial sureties: *Sentongo v Uganda* [2013] UGHCCRD 4; *Komakech v Uganda* [2024] UGHCCRD 35.
[242] *Kinyambila v Uganda* [2013] UGHCCRD 3; *Opio Abunya v Uganda* [2013] UGHCCRD 54; M*usene Peter v Uganda* [2013] UGHCCRD 52; *Chelimo & 2 Others v Uganda* [2023] UGHCICD 8.
[243] *Okoth v Uganda* [2023] UGHCCRD 110.
[244] Children Act, Cap 62.

children who have come into conflict with the law and as a general rule children are entitled to bail unless there is a serious danger to the child.[245]

4.11. Cancellation of Bail

The cancellation of bail in subordinate courts such as Magistrate Courts is a problem. In recent times, bail has been cancelled on flimsy and unsubstantiated reasons.[246]

In the case of *Rebecca Wamboka v. Uganda*, the accused did not show up in court during the morning of the hearing; she, however, sent a surety who explained to the Court that the accused had gone very far to attend the funeral of a relative.[247] In the afternoon, as the magistrate was having a stroll around Mbale town, he chanced upon the accused and was infuriated that he had been deceived. He immediately rushed back to court, donned on the judicial robe and cancelled the bail of the accused and remanded her. The High Court quashed this decision and explained that the magistrate could not import into the trial extraneous matters.[248] Bail is a constitutional right and once granted, it can only be cancelled for the most grave reasons, such as the breach of the conditions on which it was granted.[249] There has to be an application by the prosecution to cancel the bail and the accused should be given a chance to defend themselves. The right to a fair hearing is a non-derogable right under Articles 28 and 44 of the Constitution.

Another aspect is the automatic lapse of bail. Section 168(4) of the Magistrate Courts Act previously required that once a person on bail is committed to the High Court for trial, their bail would automatically lapse and be cancelled by the magistrate committing them. This was done without any hearing. In *Hon Sam Kuteesa & 2 Ors v Attorney General*, this provision was declared to be unconstitutional as it violated the right to liberty, to bail, and to a fair hearing.[250] Bail no longer lapses upon committal to the High Court for trial.[251] Ten years later, however, when magistrates are committing accused persons, they cancel their bail.[252] This is regrettable and should not continue.

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[245] Practice Direction 17. See also *Namata v Uganda* [2021] UGHCCRD 68; *Busobozi v Uganda* [2023] UGHC 274; *Taremwa & 3 Others v Uganda* [2024] UGHC 941. See also Section 135 of the Children Act.
[246] In *Yang Zheng Jun v Uganda* [2013] UGCA 17, the Magistrate cancelled bail because it was his practice to cancel bail once he started hearing cases. This order was overturned.
[247] *Rebecca Wamboka Vs. Uganda* [2010] UGHC 150.
[248] As above.
[249] *Swali & Anor v Uganda* [2017] UGHCCRD 37; *Mugerwa v Uganda* [2023] UGHCCRD 18; *Kaaya Vicent v Uganda* [2024] UGHCCRD 3.
[250] *Hon Sam Kuteesa & 2 Ors v Attorney Genera*l [2012] UGCC 2.
[251] *Muwadu v Uganda* [2012] UGHC 246; *Asea v Uganda* [2016] U GHCCRD 125; *Yali v Uganda* [2017] UGHCCRD 107; *Kalisa and Another v Uganda* [2022] UGHCCRD 160.
[252] See recent cases above.

4.12. Other Considerations

Bail cases have also been dismissed on other technical and whimsical grounds such as having a defective affidavit,[253] or that the case has already been fixed for hearing,[254] the assumed need to protect the applicant from mob justice (without any evidence),[255] or domestic violence.[256] Courts have assumed that victims will be further hurt if an accused is released on bail yet they have not sought the views of those particular victims to have a bearing on the case.[257] The determinations have been made exclusively on the nature of the charge. This erodes the presumption of innocence. In cases involving domestic violence, an accused can be released on bail under a contract that they will not have any contact with the victims.

Substantive justice should be administered without any regard to technicalities.[258] The enforcement of a right under Chapter Four of the Constitution cannot be rejected because of failure to adhere to a technicality.[259] Further, there is no rule that once a case has been fixed for hearing, a person should not get bail. The need for public safety and to protect the victims of the crime should be backed up by some evidence and not be solely based on assumptions.[260] In *His Majesty Omusinga Mumbere v Uganda,* the court rejected the argument that the release of the applicant would threaten peace. It is the duty of the government to maintain that peace and prevent further escalation into violence.[261]

Where bail is denied, a fresh application can be brought either to the same court or a superior court.[262] While an applicant is free to apply for bail as many times as possible, Justice Odoki has imported a doctrine from India that restricts this. In *Opiyo & Another v Uganda*, he held that a new application should only be brought if there is a material change in the circumstances that led to the rejection of the first application.[263] He relied on the Indian case of *Kalyan Chandra Sarkar v Rajesh Rajan A.I.R. 2004* S.C for the position that 'successive bail applications are maintainable but there has to be material change in the fact situation and not mere cosmetic change. Successive bail applications on the same grounds which were available to the accused at the time of

[253] *Uganda v Serwamba & Ors* [2015] UGHCACD 16.
[254] *Kaweesi v Uganda* [2015] UGHCCRD 67.
[255] *Bidong & Ors v Uganda* [2016] UGHCCRD 8; *Abindi & Anor v Uganda* [2017] UGHCCRD 49.
[256] *Oringi v Uganda* [2016] UGHCCRD 101; *Abacha v Uganda* [2016] UGHCCRD 82 ; *Atwijyukire Miria & Another v Uganda* [2020] UGHC 7.
[257] *Andama v Uganda* [2016] UGHCCRD 105; *Besesya Francis alias Kateta v Uganda* [2020] UGHC 8; *Mugarura Julius v Uganda* [2020] UGHC 16; *Mulindwa v Uganda* [2021] UGHCCRD 36; *Sseruwuge v Uganda* [2021] UGHCCRD 52.
[258] Article 126(2)(e). See also *Ochima v Uganda* [2016] UGHCCRD 78 (failure to date affidavit does not vitiate right to bail).
[259] Human Rights Enforcement Act Cap 12.
[260] *Oliobe & Ors v Uganda* [2016] UGHCCRD 15.
[261] As above.
[262] *Besigye & Another v Uganda* [2022] UGHCCRD 167.
[263] *Opiyo & Another v Uganda* [2024] UGHC 91.

consideration of the earlier bail application would not be maintainable.' This has been affirmed in another case by the same judge.[264] This doctrine has the effect of limiting and foreclosing the right to bail. In Uganda, where bail is denied at the whim of a judicial officer, this should not be the case.

4.13. Executive Attacks on Bail

There have been recent attacks on the right to bail by the executive. The President of Uganda has argued against the 'over grant of bail to persons accused of capital offences like murder, kidnap, and terrorism' and that 'easy access to bail leads to recidivism, impunity and enables hard-core criminals to walk freely on the streets and do further damage.'[265] He has also argued that they should be kept in prison for at least six months before any bail application is entertained by courts.[266] The petition of *Prof. Dr. Kanyeihamba and 5 Others v Attorney General and 2 Others* was lodged in the Constitutional Court, challenging this threat to bail.[267]The petitioners contended that the statements made by the President of Uganda to amend the law on bail were in contradiction with the constitution. Unfortunately, the petition was dismissed for failure to disclose a question of constitutional interpretation.

The Executive has recently directed the security forces to rearrest suspects minutes after they have been granted bail. In *Ssewanyana and Another v Uganda,* the appellants, two members of parliament, were granted bail and thereafter kidnapped and abducted by security forces. They were taken back to prison and brought before another judge who denied them bail.[268] The Court of Appeal refused to hear their appeal on the technicality that bail orders are not appealable.[269] Unlike those two other Courts, the High Court has not been timid. The High Court has categorically come out against this practice by security forces of rearresting Ugandans after they have been granted bail by the Courts. In *Kalule v Uganda*, the High Court had this to say:

> Judicial Power is derived from the people of Uganda, and it is exercised by the Courts on their behalf. The people have never said that a person accused of terrorism related offences should never be released on bail. Nor have they said that a person who is arrested by Counter-terrorism officers or a combination of security organs should never be released by Court on bail. Players in the criminal justice system have specific roles. It is important that we recognise, understand and respect each other's roles. Some public officers carry out their roles with the aid of weapons. Others do so with the aid of pens. As the different

[264] *Oryem v Uganda* [2024] UGHC 104.
[265] Uganda Law Reform Commission "Review of Bail in the Criminal Justice System" 2021 at 5
[266] As above at 8
[267] *Prof. Dr. Kanyeihamba and 5 Others v Attorney General and 2 Others* [2023] UGCC 4.
[268] *Hon. Ssewanyana and Another v Uganda* [2022] UGCA 181.
[269] As above.

> players execute their functions, they should have clear vision and observance of the Constitutional provisions and the law. We should not believe in the existence of any "above" who gives orders which violate the Provisions of the Constitution and the Laws. For example, there is no "above" who can give Orders to overrule and render nugatory the Orders of any Competent Court. It is only bad or uninformed officers in the security organs who can flagrantly disrespect Court Orders. We should all bow our heads to the governance of the Rule of Law.[270]

To remedy this violation, the courts can grant anticipatory bail whenever the rights of an accused are threatened or they are in fear of imminent unlawful and arbitrary detention. Courts have rejected the doctrine of anticipatory bail as being alien to our legal system.[271] Anticipatory bail is where the court grants bail before a person is arrested or appears in court for charges to be read out to them. In *Kyagaba Charles (Suing through Mulindwa) v Uganda*, the Court noted that while anticipatory bail is not backed by any law in Uganda, a court dealing with such an application would have to apply the threshold of a violation or a threatened violation of a right under Article 50 of the Constitution.[272] The Court rejected the doctrine and argued that:

> To bar the police, an agency charged with detecting and preventing crime from arresting the applicant if they have reasonable suspicion that the applicant has committed or is about to commit a criminal offence under the law of Uganda would amount to interference with their mandate. Such a direction would not only affect the conduct of the investigations by the Police but would undermine the proper administration of justice.[273]

The High Court also held that even where rights are abused, the applicant is at liberty to apply for bail as many times as possible whenever he is arraigned in court.[274] This is regrettable as anticipatory bail would not be preventing a lawful exercise of police power but an unlawful one. There is a need to revisit the concept of anticipatory bail. This kind of bail would be effective to curb state abuses of rearrests and the trial of civilians in the Court Martial. The Court Martial is a subordinate to the High Court, but as a practice, it does not grant bail to accused persons. It also tries civilians unconstitutionally yet there are binding court precedents to the contrary.[275] In *Kitata v Uganda*, however, the Court held that it would not interfere with the proceedings of the Court Martial and if the applicant wanted bail, they were at the mercy of the Court Martial for such a right.[276] Anticipatory bail is the solution to this.

[270] *Kalule v Uganda* [2018] UGHCICD 1.
[271] *Kananura & Ors v Uganda* [2013] UGHCCRD 1.
[272] *Kyagaba Charles (Suing through Mulindwa) v Uganda* [2023] UGHCCRD 180 (9 January 2023)
[273] As above.
[274] As above.
[275] *Kabaziguruka v Attorney General* [2021] UGCC 45.
[276] *Kitata v Uganda* [2018] UGHCCRD 130.

5. Conclusion

The right to liberty is sacrosanct. No one should be arbitrarily or unlawfully deprived of their right to liberty. This paper has shown that the current law and judicial practice on bail unjustifiably impairs the enjoyment of the right to liberty of accused persons. Uganda is not a land of freedom in its current state. It is a land of bondage. Reforms have to be made so as to secure the liberty of the person.

It is recommended that, to achieve the fullest enjoyment of this right, judges should depart from archaic, unworkable, and unconstitutional tests that have hitherto characterised bail applications. Instead, they should realise that an accused has an inherent right to bail and they should not plead for it.

This right may be limited in the public interest, but it is the burden of the state to prove that the limitation is justifiable. In adjudicating bail applications, the only test should be whether the accused will not abscond once released on bail.[277] A court of law must be careful not to wantonly deprive the right to liberty.

[277] *Ntale v Uganda* [2019] UGHCCRD 24.

chapter four

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DEFENDING FREEDOMS

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