



REPUBLIC OF KENYA

# THE JUDICIARY

# BAIL AND BOND POLICY GUIDELINES

National Council on the Administration of Justice



# **Bail and Bond Policy Guidelines**

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## Definitions

**Bail** – An agreement between an accused person or his/her sureties and the court that the accused person will attend court when required, and that should the accused person abscond, in addition to the court issuing warrants of arrest, a sum of money or property directed by the court to be deposited, will be forfeited to the court.

**Bail hearing** – a proceeding in which the court determines whether an accused person should be released or held in custody pending trial.

**Bail Report** - A social inquiry report based on information generated about the background and community ties of an accused person, and its purposes are to verify information provided to the court by the accused person, to assess the likelihood that the accused person will appear for trial, and enable the court to impose reasonable bail terms and conditions.

**Bond** – An undertaking, with or without sureties or security, entered into by an accused person in custody under which he or she binds him or herself to comply with the conditions of the undertaking and if in default of such compliance to pay the amount of bail or other sum fixed in the bond.

**Personal Recognizance** – The release of an arrested or accused person on the undertaking of such a person that he or she will appear in court as and when required.

**Pretrial Detention** – The confinement of arrested and accused persons in custody pending the investigation, hearing and determination of their cases.

**Pretrial Detainees** – Accused persons who have been formally charged and are awaiting the commencement of their trials; accused persons whose trials have begun but have yet to come to a conclusion; persons who have been convicted by a court of first instance but who have appealed against their sentences or are within the statutory limits of doing so.

**Remandee** – An accused person detained in a prison pending the determination of his or her case.

**Security** – A sum of money pledged in exchange for the release of an arrested or accused person as a guarantee of that person's appearance for trial.

**Surety** – A person who undertakes to ensure that an accused person will appear in court and abide by bail conditions. The surety puts up security, such as money or title to a property, which can be forfeited to the court if the accused person fails to appear in court.

## 1. **Introduction**

- 1.1 Article 49(1)(h) of the Constitution of Kenya gives an arrested person the right “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.” Further, Article 49(2) of the Constitution provides that “A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.”
- 1.2 At the same time, the Criminal Procedure Code (CPC) empowers an officer in charge of a police station or a court to admit a person accused of an offence – other than murder, treason, robbery with violence, attempted robbery with violence and any related offence – to bail or release on executing a bond with sureties for his or her appearance.<sup>1</sup> Alternatively, such a police officer or court may, instead of taking bail from the accused person, release him or her upon executing a bond without sureties.<sup>2</sup> Further, the CPC provides that “The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.”<sup>3</sup> It also gives the High Court the power to “direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”<sup>4</sup> Finally, it provides that “Before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and by one or more sufficient sureties.”<sup>5</sup>
- 1.3 A number of other laws also contain provisions that deal with bail. These laws are the Children Act, the Prevention of Terrorism Act and the National Police Service Act. The Children Act empowers courts to grant bail to child offenders pending their appearance before a Children’s court.<sup>6</sup> The Prevention of Terrorism Act 2012 provides that the rights of an arrested person specified under Article 49(1)(f) of the Constitution may be limited in order to ensure the protection of the suspect or any witness, to ensure that suspect avails himself for examination or trial or does not interfere with the investigations, to prevent the commission of an offence under this Act, or to ensure the preservation of national security.<sup>7</sup>
- 1.4 The National Police Service Act gives a police officer investigating an alleged

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1 Criminal Procedure Code, Chapter 75, Laws of Kenya, section 123(1).

2 Ibid.

3 Ibid, section 123(2).

4 Ibid, section 123(3).

5 Ibid, section 124.

6 Children Act, section 185(4).

7 Prevention of Terrorism Act 2012, section 35.

offence, save for an offence against discipline, broad discretionary power to “require any person to execute a bond in such sum and in such form as may be required,” on condition that the person shall duly attend court if and when required to do so.<sup>8</sup> However, this power is to be “exercised in strict accordance with the Criminal Procedure Code.”<sup>9</sup> A person who refuses or fails to comply with the bond requirements commits an offence.<sup>10</sup>

- 1.5 These foregoing provisions of the Constitution and statutory laws seek to regulate administration of the right to bail and pretrial detention, that is the confinement of accused persons in facilities such as police cells or prisons, pending the investigation, hearing, determination or appeal of their cases. Administering these laws entails balancing the rights of suspects and accused persons to liberty and to be presumed innocent with the public interest.
- 1.6 Attaining this much-needed balance has proved elusive for much of Kenya’s history, and complaints abound concerning disparities in the administration of bail and bond. For example, research shows that “there has been little consistency and standards in the application of bail by concerned agencies.”<sup>11</sup> As a result, “there is great public concern that bail (sic) granted across the country lack clear criteria, are exorbitant, unjustifiable and unaffordable by the majority of accused persons who are vulnerable and poor.”<sup>12</sup>
- 1.7 Conversely, in the face of increasing and deadly terror attacks and new crimes such as drug trafficking and piracy, the Government and the public have expressed concern that persons accused of committing such serious crimes are absconding after being granted bail, thereby undermining the administration of criminal justice.
- 1.8 Additionally, for the first time in Kenya’s history, the Constitution now recognizes and seeks to protect the rights of victims of crime. Article 50(9) requires Parliament to “enact legislation providing for the protection, rights and welfare of victims of offences.” Parliament has now enacted this legislation, in the form of the Victim Protection Act 2014. This Act seeks to recognize and give effect to the rights of victims of crime.<sup>13</sup> Second, this Act seeks to protect the dignity of victims of crime through, among other things,

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8 National Police Service Act, section 51(3).

9 *Ibid*, section 53(3).

10 *Ibid*, section 53(2).

11 Republic of Kenya, Office of the Vice President and Ministry of Home Affairs, Draft National Bail Information and Supervision Policy, Task Force Drafting the Victims of Offences Bill and the Bail Information and Supervision Bill 2011 at 19.

12 *Ibid*.

13 Victim Protection Act 2014, section 3(a).

the provision of better information.<sup>14</sup> Third, it seeks to promote cooperation among government departments, organizations and agencies involved in working with victims of crime.<sup>15</sup> In particular, this Act implicates bail decision-making in two significant respects:

- (a) It imposes a duty on the courts to “ensure that every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken”<sup>16</sup>; and
- (b) It gives victims of crime the right “to have their safety and that of their family considered in determining the conditions of bail and release of the offender.”<sup>17</sup>

1.9 For the foregoing reasons, there is a need to establish policy principles that will guide the police and judicial officers as they exercise their powers to grant or deny bond and bail, so that they can ensure that the rights of suspects and accused persons to liberty and to be presumed innocent are balanced with the public interest, including protecting the rights of victims of crime.

1.10 Equally, it is important to appreciate that the exercise of the powers of the police and judicial officers to grant or deny bail and bond impacts on other criminal justice institutions, particularly the prisons. In this respect, it should be noted that pretrial detainees make up almost half of the prison population. A need therefore arises for effective cooperation and coordination among the criminal justice institutions if the problem of overcrowding in prisons is to be resolved.

1.11 It is in this context that the Chief Justice appointed the Task Force on Bail and Bond to formulate these Bail and Bond Policy Guidelines. The Taskforce, under the direct supervision of the Deputy Chief Justice, was placed under the umbrella of the National Council on the Administration of Justice (NCAJ).<sup>18</sup> The Judicial Service Act establishes the NCAJ, and gives it the primary function of “Ensuring a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system.”<sup>19</sup> In particular, this law requires the NCAJ to “formulate policies relating to the

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14 Ibid, section 3(b).

15 Ibid, section 3(c).

16 Ibid, section 4.

17 Ibid, section 10(1)(b).

18 Judicial Service Act, No. 1 of 2011, section 34.

19 Ibid, section 35(1).

administration of justice.

## 2. **Objectives of the Bail and Bond Policy Guidelines**

2.1 These Bail and Bond Policy Guidelines are to guide police and judicial officers in the application of laws that provide for bail and bond. Accordingly, these Policy Guidelines are not intended to fetter the discretion of police officers and judicial officers in bail and bond decision-making.

2.2 In particular, these Bail and Bond Policy Guidelines seek to:

- (a) Ensure that bail and bond decision-making process complies with the requirements of the Constitution.
- (b) Guide bail and bond decision-making by police and judicial officers.
- (c) Balance the rights of the suspects and accused persons with the public interest, including the rights of victims.
- (d) Streamline and address disparities in bail and bond decision-making, with a view to enabling fair administration of bail and bond measures.
- (e) Facilitate effective inter-agency cooperation and coordination in bail and bond administration.
- (f) Enhance conformity with the internationally agreed minimum standards for arrested persons and persons held in detention.
- (g) Address the over-use of pre-trial detention.
- (h) Safeguard the interests of victims of crimes in bail decision-making.
- (i) Facilitate the effective supervision of accused persons granted bail.

### 3. General Principles

3.1 Bail and bond decision-making shall be guided by the following principles, which are derived from international best practices:<sup>20</sup>

- (a) **The right of accused person to be presumed innocent.** Every accused person shall be presumed innocent (Article 50(2) of the Constitution). This is the primary rationale for the requirement of the Constitution that an arrested person has the right to be released on bail or bond. The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible.

The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts. In this respect, the International Covenant on Civil and Political Rights (ICCPR) provides that “accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.”<sup>21</sup> Further, the ICCPR states that accused children should be separated from adults and brought as speedily as possible for adjudication.<sup>22</sup>

- (b) **Accused Person’s Right to Liberty.** Every accused person has the right to liberty. As a general rule, therefore, every accused person should not be detained, but should be released subject to his/her guarantee to appear for trial. Pretrial detention should therefore be a measure of last resort, and the criminal justice institutions should make every reasonable effort to avoid pretrial detention.<sup>23</sup>

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20 The principles have been drawn from the following instruments: (1) United Nations Standard Minimum Rules for the Administration of Non-Custodial Measures; (2) United Nations Standard Minimum Rules for the Administration of Juvenile Justice; (3) United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34 (November 29, 1985); (4) International Covenant on Civil and Political Rights 1966; (5) African Charter of Human and Peoples’ Rights 1981; (6) African Charter on the Rights and Welfare of the Child 1990; (7) European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; (8) United Nations Basic Principles for Treatment of Prisoners, G.A. Res. A/45/49 (December 12, 1990); (9) the United Nations Convention on the Rights of Persons with Disabilities; and, (10) African Union, Draft Guidelines on the Use and Conditions of Police Custody and Pre Trial Detention in Africa – Discussion Document, 21 February 2013.

21 International Covenant on Civil and Political Rights, Article 10(2)(a).

22 *Ibid*, Article 10(2)(b).

23 See United Nations Standard Minimum Rules for the Administration of Non-Custodial

- (c) **Accused's obligation to attend trial.** Bail and bond provide guarantees that accused persons will attend trial. They are securities that aim to procure the release of an accused person from legal custody together with an undertaking that he or she will appear for trial.
- (d) **Right to Reasonable Bail and Bond Terms:** Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial. Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.<sup>24</sup>

Since the ultimate goal of bail or bond is to guarantee that an accused person attends his or her trial, it is important to underscore that Article 49(2) of the Constitution does not necessarily mean that all persons accused of committing offences that are punishable by a fine only or by imprisonment for not more than six months are entitled to free bonds or release on personal recognizance. Accordingly, in this context police officers and judicial officers have the power to impose appropriate bail or bond terms when releasing such offenders. Unless they do so, "there is a real probability that many persons who are charged with offences that attract only fines or that attract imprisonment for six months or less, will not bother to turn up in court for their trials [thereby increasing] the volumes of pending cases in leaps and bounds."<sup>25</sup>

- (e) **Bail determination must balance the rights of the accused persons and the interest of justice.** On the one hand, police officers and judicial officers should endeavor to preserve the liberty of an accused person, who is presumed to be innocent and should be allowed to keep the fabric of his or her life intact by, for example, maintaining employment and family and community ties. Preserving the liberty of an accused person

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Measures, Article 6; United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Article 13.

24 Republic v Taiko Kitende Muinya [2010] eKLR.

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

also permits him or her to take an active part in the planning of his or her defense. On the other hand, the State has a duty to prosecute those who commit crimes, which may entail qualifying the individual right to liberty. The State has a duty to ensure public safety between the time of arrest and trial of accused persons, and a duty to protect the integrity of the criminal justice system. This means that where there is convincing evidence that an accused person may undermine the integrity of the criminal justice system, by, for example, intimidating witnesses or interfering with the evidence, then a need arises to either deny such a person bail or bond, or set stringent bail or bond terms. Equally, where there is convincing evidence that the accused person will endanger a particular individual (for example, victims of the crime) or the public at large, or even commit a serious crime, it also becomes necessary to subject an accused person to pretrial detention. The interests of justice therefore demand the protection of the investigation and prosecution process against probable hindrance by accused persons. It is therefore important for police officers and judicial officers to appreciate that the public have an interest in the effective prosecution of offences.

In appreciating the need to balance the rights of accused persons with the interests of justice, the Constitution states that an accused person can only be denied bail or bond where the court establishes that there are compelling reasons not to be released. That is, while the Constitution stipulates that every accused person is presumptively entitled to bail or bond, it permits the denial of bail or bond where the prosecution presents convincing evidence to justify such denial. In denying an accused person bail or bond, it must therefore be demonstrated with convincing evidence that his or her release will present risks, and that such risks cannot be managed, even with the attachment of appropriate conditions.

- (f) **Consideration for the rights of victims.** Police officers and judicial officers should consider the views of victims before making decisions that affect them. In particular, police officers and judicial officers should consider the safety of victims and victims' families in fixing the amount of bail and the release conditions for suspects and accused persons. Second, victims should be informed about bail conditions imposed on suspects and accused persons, particularly those designed to protect victims and victims' families. Third, victims who have so requested should be kept informed about any bail applications made by suspects and accused persons, and the outcomes of such applications.

## 4. **Bail and Bond Decision-Making**

### **Bail and Bond in the Police Station**

- 4.1 At the Police Station, a suspect may be released on cash bail, with or without sureties, or personal (free) bond or recognizance. The Police Force Standing Orders<sup>26</sup> require the officer in charge of a police station to release any person arrested on a minor charge on the security of cash bail, as a general rule, unless the officer has good grounds for believing that the arrested person will not attend court when required to do so.<sup>27</sup> This cash bail should be handed into court by the date on which the arrested person should appear in court, and a receipt obtained.<sup>28</sup> In case a person who has been released on bail fails to appear in court, the officer in charge of the police station should apply to the magistrate for a warrant of arrest. At this point, the magistrate may either order the cash bail to be forfeited (if it is demonstrated that there are sufficient grounds that justify an order for forfeiture), or retained on court deposit until such time as the accused person appears.<sup>29</sup> It should be noted that the Police Standing Orders are categorical that a person who is released from custody on either bail or bond can only be required to appear before a magistrate on a specified date, and that “Under no circumstances will a prisoner who is released on bond be required to appear at a police station or other place.”<sup>30</sup> Where the accused person violates bail or bond terms, the police should cancel the bail or bond, re-arrest him or her, bring him or her to the police station, and take him or her to court.

### ***Situational Analysis***

- 4.2 In practice, police decision-making on bail and bond can be unpredictable:
- (a) First, police officers sometimes do not give bail and bond on reasonable terms.<sup>31</sup> In some cases, police officers deny accused persons bail as a form of punishment. Further, police officers do not usually explain their bail and bond decisions.
  - (b) Second, police officers only grant bail and bond to persons accused of

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26 At the time of publication of these Policy Guidelines, the Police Service Standing Orders were awaiting parliamentary approval to replace the Police Forces Standing Orders.

27 Police Force Standing Orders, Order 9(i).

28 Ibid, Order 9(ii).

29 Ibid, Order 9(iii).

30 Ibid, Order 9(x).

31 Task Force on Bail and Bond, Meeting with Stakeholders in the Justice Sector, Laico Re-gency, Nairobi, 26 August 2014.

minor offences, and leave bail decision making in serious offences to the courts. In the latter case, the accused person should be produced in court within 24 hours of arrest. Accordingly, a person accused of serious offences such as murder or robbery with violence is likely to be detained in a police cell, and can only be released on bail once produced before court.

- (c) Third, police officers tend to detain persons who have committed petty offences, contrary to Article 49(2) of the Constitution. Included in this category are persons accused of committing offences such as loitering, creating a disturbance, being drunk and disorderly, and possessing illicit liquor. Even more disturbing, some police officers have detained persons accused of committing offences that are not known to law, contrary to section 50(n) of the Constitution, which gives an accused person the right not to be convicted for an act or omission that was not an offence under the law at the time of the commission or omission. A typical example is the offence of “city planning” in respect of which several persons have been arrested and detained at the Kamukunji Police Station in Nairobi.
- (d) Fourth, many accused persons are unable to afford cash bail in amounts as low as Kshs. 1000 due to poverty. Such persons are therefore detained in police custody.
- (e) Fifth, police officers typically do not inform accused persons that they have a right to be released on bail and in some cases even extort bribes from them.
- (f) Sixth, because the public does not understand bail, it sometimes sees the payment of cash bail as a bribe or payment of a fine, and consequently perceives police officers as corrupt and at the same time lynches accused persons released on bail. Indeed, police officers often detain some accused persons for their own protection, on the basis that they might be lynched if released on bail.

4.3 The administration of bail and bond in traffic offences presents special challenges. Decision making here seems arbitrary, and the amount of bail is left to the discretion of the Divisional Traffic Officer. Further, while the police are concerned that there is a high rate of absconding (that is, failing to attend court after paying cash bail), the public find the process of complying with the requirement to attend court unduly punitive, particularly where the offences are committed in locations where they do not reside. This is the case, for example, where an offender is caught over-speeding in Naivasha

on a Sunday whilst heading to Kisumu where he or she resides. Typically, the police would require such a person to appear before a Naivasha court the following day. Court case backlogs and lengthy trial procedures have also given police officers and traffic offenders an incentive to solicit and pay bribes respectively. In such instances, police officers withdraw the charges upon the offenders giving them the amount, or part, of the cash bail.

### ***Policy Directions***

- 4.4 From the foregoing, a need arises to regulate police decision-making with respect to bail and bond. Police Officers should therefore take into account the General Principles stipulated in **Part 3** above whenever they make decisions on bail and bond. In particular:
- (a) Police officers shall inform suspects of the reasons for their arrest, and the offence or offences for which they have been arrested.
  - (b) Police officers shall inform suspects that they have a right to be released on bail on reasonable terms. Further, police officers shall inform arrested persons that they have a right to be issued with an official receipt upon paying cash bail.
  - (c) In granting bail or bond, a police officer may attach such conditions to bail or bond as will be necessary to prevent the suspect from failing to surrender to custody, committing an offence while on bail, interfering with witnesses, or otherwise obstructing the course of justice.
  - (d) In determining the amount of cash bail, police officers should ensure that the amount is such that it will secure the attendance of the suspect to his or her trial.
  - (e) Cash bail shall be reasonable.
  - (f) Police officers shall take into account the circumstances in which the crime in question was committed, the safety and security of any victims, and the circumstances of the accused person, in determining whether or not to grant bail. For example, offences that are committed while an accused person is in transit – such as traffic offences – may require police officers to grant cash bail, since it may be difficult to trace the suspect should he or she fail to attend trial.

- (g) A police officer may place a suspect in protective custody where such a measure is necessary to protect the suspect, for example, where it is demonstrated that the community may harm the suspect if he or she is released from police custody.
- (h) Where a suspect has committed a petty offence, and the police officer determines that he or she is not a flight risk, the police officer should give the suspect a free bond. That is, the police officer should release the accused person on his own recognizance, or with a surety.
- (i) Police officers shall inform suspects of the reasons for the denial of bail or bond, and the conditions attached to bail or bond in cases where they have decided to grant bail or bond.
- (j) Police officers should release suspects who are children or vulnerable persons on a recognizance being entered into by his or her parent or guardian or other responsible person, with or without sureties, for such amounts as will, in the opinion of the officer, secure the attendance of the child or vulnerable person.<sup>32</sup> In the case of suspects who are children, police officers shall consider the best interests of the child in making these decisions.
- (k) In minor traffic cases, police officers may issue a notice to attend court on a day not more than fourteen days from the date of the alleged offence.
- (l) Police officers should establish a system for accounting for all arrested persons. In this regard, each police station should have an electronic register linked to a central data center.
- (m) Victims of crime are entitled to be informed of developments in their case, including the decision to grant a suspect bail or bond, and any conditions attached thereto.
- (n) Police officers shall inform victims of any decision to put suspects in custody, and the date on which he or she will appear in court. Further, police officers shall advise victims to report any alleged violations of the bail or bond terms.
- (o) Once the accused person has appeared in court, or the case file has been sent to the Office of the Director of Public Prosecution (ODPP), it shall be the responsibility of the ODPP to keep victims informed of developments

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<sup>32</sup> Child Offender Rules, Fifth Schedule, Children Act, No. 8 of 2001, Rule 5.

in their case, including court decisions granting an accused person bail or bond, and any conditions attached thereto.

- (p) Any person who alleges that a police officer has violated any of the foregoing requirements of this Policy may report the matter to the Independent Policing Oversight Authority (IPOA) whose function is to “hold the police accountable to the public in the performance of their functions.”<sup>33</sup>

### **Bail and Bond in the Courts**

- 4.5 The courts have powers under the Constitution and the CPC to admit an accused person to bail or to release him or her upon executing a bond with sureties for his or her appearance. The exercise of these powers entails the performance of the following judicial and administrative functions:
  - (a) Determining whether or not an accused person should be granted bail;
  - (b) Determining the amount of bail;
  - (c) Attaching suitable conditions to the grant of bail;
  - (d) Verifying security documents;
  - (e) Approving sureties;
  - (f) Releasing accused persons who have been granted bail from police custody or prisons;
  - (g) Committing accused persons who have been denied bail to police custody or prisons; and
  - (h) Reviewing bail terms and conditions.

### ***Situational Analysis***

- 4.6 The performance of the foregoing judicial and administrative functions has been characterized by numerous challenges.
- 4.7 First, there is no uniformity in how the courts determine whether or not to grant accused persons bail, both in terms of procedure and substance. As a

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33 Independent Policing Oversight Authority Act 2011, section 3(5)(a).

result, it is difficult for accused persons to predict how their bail applications will be determined.

4.8 At present, there is no procedure for applying for bail. In many magistrates' courts, the practice is that an accused person who seeks to be released on bail pending trial will raise his or her hand when arraigned in court and request the presiding judicial officer for bail. Alternatively, the magistrate grants bail to the accused person without any such application, and therefore without establishing from the accused person whether or not the bail terms are affordable. Any accused person who complains about the bail terms is simply told to seek a review from the court that is to conduct the hearing. Although some magistrates' courts inquire from accused persons whether they can afford bail, they find this approach to be time consuming due to their heavy workloads. Conversely, an accused person who seeks to be released on bail in the High Court is required to make a formal application, failure to which the application will often not be considered.

4.9 In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences. According to the decisions of the courts, the determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend his or her trial. In practice, the courts have made this evaluation by considering the following non-exhaustive factors:

- (a) **The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.** Where the charge against the accused person is serious, and the punishment heavy, the courts assume that there are more probabilities and incentives for the accused person to abscond, whereas in case of minor offences there may be no such incentives.<sup>34</sup>
- (b) **The strength of the prosecution case.** An accused person should not be subjected to pretrial detention where the evidence against him or her is tenuous, even if the charge is serious. Conversely, it may be justifiable to subject an accused person to pretrial detention where the evidence against the accused person is strong. For example, where all the prosecution witnesses have testified, and the accused person is

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<sup>34</sup> *Watoro v Republic* (1991) KLR 220; *Republic v Danson Mgunya & another* [2010] eKLR; *Jennifer Atieno Oduol v Republic* [2006] eKLR.

aware of the weight of the prosecution’s case against him or her, it is presumed that such a person has an incentive to abscond and should therefore be denied bail.<sup>35</sup>

- (c) **Character and antecedents of the accused person.** Although the character and antecedents of the accused person do not by themselves form the basis for denial of bail or bond, they may justify the refusal of bail or bond if they are coupled with other adverse factors.
- (d) **The failure of the accused person to observe bail or bond terms** on previous occasions is a good ground for denying bail or bond.
- (e) **Likelihood of interfering with witnesses.** Where there is a likelihood that the accused will interfere with prosecution witnesses if released on bail or bond, he or she may be denied bail or bond. However, bail or bond will only be denied if (i) there is strong evidence of the likelihood of interfering with prosecution witnesses, which is not rebutted, and (ii) the court cannot impose conditions to the bail or bond to prevent such interference. For example, where the accused person has been provided with witness statements, and therefore knows the identities of the prosecution witnesses and the nature of the evidence that these witnesses will adduce at trial, there is a real likelihood that the accused person may contact the witnesses. The likelihood that such an accused person may contact witnesses “could probably inflict genuine fear and anxiety in the potential prosecution witnesses,” and therefore constitutes a compelling reason for the denial of bail.<sup>36</sup> In this regard, defilement cases present a special challenge. The country is not only experiencing an upsurge in defilement cases, but many such cases are compromised as soon as accused persons are released on bail. This happens because the families of the accused person and the victim usually negotiate to settle the cases out of court. Some courts are dealing with this challenge by denying accused persons bail until witnesses, especially the victim, have testified in such cases. The courts have adopted the same approach in murder cases, particularly where the witnesses are closely related to the accused person.<sup>37</sup>
- (f) **The need to protect the victim or victims of the crime** from the accused person.
- (g) **The relationship between the accused person and potential witnesses.** Here, the courts reason that if the accused person is either related to

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35 See, e.g., Republic v Margaret Nyaguthi Kimeu [2013] eKLR.

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

37 See, e.g., Republic v Lucy Njeri Waweru & 3 others [2013] eKLR.

the witnesses or stands in a position of influence vis-à-vis the potential witnesses, there could arise a legitimate anxiety about the impact the accused person might have on the witnesses, if he or she is released pending trial.<sup>38</sup> However, this factor does not inexorably dictate that the accused person should be denied bail. Instead, it may simply require the police or the court to attach suitable bond or bail conditions to ensure that the relationship between the accused person and potential witnesses does not undermine the interests of justice.

- (h) **Child offenders.** Where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the accused person, who is a minor.
- (i) **The accused person is a flight risk.** Where the accused person is a foreigner who does not have a fixed abode or hosts in the country and Kenya does not have an extradition treaty with the accused person's country, there is a presumption that he or she is a flight risk and may therefore fail to attend trial if granted bail or bond.<sup>39</sup> The rationale for this presumption is that it would be impossible to prevail upon such a country to return its national to Kenya to be prosecuted should they abscond after being granted bond or bail.<sup>40</sup>
- (j) **Whether accused person is gainfully employed.** The courts also consider the fact that an accused person is gainfully employed to enhance the likelihood that he or she will attend trial. However, it should not matter whether or not the accused person is a casual laborer or is engaged in permanent and pensionable employment. Accordingly, the fact that the accused person is a casual laborer should not, in itself, constitute the basis upon which the court determines whether or not to grant bail.<sup>41</sup>
- (k) **Public order, peace or security.** Whether the release of an accused person will disturb public order or undermine public peace or security.<sup>42</sup> Pretrial detention may be necessary to preserve public order where it is demonstrated that the public response to an offence is such that the release of the accused person would be likely to lead to a public disturbance.

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38 See, e.g., Republic v Taiko Kitende Muinya [2010] eKLR.

39 See, e.g., Republic v Ahmad Abolafathi Mohamed & another [2013] eKLR.

40 Ibid.

41 See, e.g., Republic v Joseph Wambua Mutunga & 3 others [2010] eKLR.

42 See, e.g., Republic v Pascal Ochieng Lawrence [2014] eKLR.

- (l) **Protection of the accused person.** Whether pretrial detention is necessary to protect the accused person.<sup>43</sup>

Although courts are supposed to be guided by these factors in their bail decision-making, they do not always explain their decisions. This leads, for example, to situations in which one magistrate denies bail while another allows bail in similar circumstances. It is also important for the courts to recognize that due to personnel and resources constraints, accused persons often spend inordinately long periods in detention before their cases are concluded. In addition, courts have tended to deny accused persons bail on the ground only that they face grave charges, without considering other factors.<sup>44</sup>

- 4.10 Courts face a number of challenges in making bail decisions. In the case of bail pending trial, the burden of proof lies on the prosecution to establish the existence of compelling reasons that would justify the denial of bail, or the imposition of suitable bail terms and conditions. Some courts have required the prosecution to present “cogent, very strong and specific evidence” in order to justify the denial of bail.<sup>45</sup> Mere allegations or suspicion will not be sufficient. According to these courts, where the prosecution opposes bail, it must support its objection with cogent reasons and facts, and it is not enough to “make bare objections and insinuations.”<sup>46</sup>
- 4.11 However, what is the appropriate standard of proof? For example, where the prosecution alleges that an accused person will interfere with witnesses, should it prove this allegation on a balance of probabilities or beyond reasonable doubt in order to persuade the court? And what form of evidence should the prosecution present to persuade the courts of the existence of compelling reasons? Although some courts insist that the prosecution must produce an affidavit sworn by the investigating officer,<sup>47</sup> others do not.<sup>48</sup> But even where the prosecution has presented such affidavits, some courts have not been persuaded that they meet the compelling reasons threshold, much to the disappointment of investigating officers. Second, how can the court

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43 Ibid.

44 See, e.g., Jennifer Atieno Oduol v Republic [2006] eKLR.

45 See, e.g., Republic v Muneer Harron Ismail & 4 others [2010] eKLR.

46 Republic of Kenya, Bench Book for Magistrates in Criminal Proceedings 33 (2004).

47 See, e.g., Aboud Rogo Mohamed & Another v Republic [2011] eKLR; Gichuki v Republic [2005] eKLR.

48 See, e.g., Republic v John Kahindi Karisa & 2 others [2010] eKLR (stating that “I do not think it was necessary for the Republic to file an affidavit to prove or substantiate such fears or misapprehensions,” namely that the accused person presented a huge risk of flight and were likely to interfere with witnesses and evidence).

make a bail determination without compromising the accused person's right to a fair and unbiased trial? Third, how can courts obtain the accurate, relevant, and verified information they require to make fair bail decisions? Unfortunately, the nature of our adversarial system is such that the information furnished to the court on behalf of bail applicants is not always reliable, while the prosecution may prefer that the accused person be detained pending trial for various reasons. Further, because courts do not have systems for verifying such information, they may not always make fair and appropriate bail decisions. It may therefore be necessary for courts to seek independent information if they are to make fair and appropriate bail decisions.

- 4.12 Such bail information could, for example, be obtained from the Probation and Aftercare Service, which prepares bail reports at the request of the court. However, the integrity of such independent information cannot be taken for granted. In any case, the courts are not obliged to use bail reports, with the effect that while some courts use them, others do not. Nevertheless, because of severe resource and personnel constraints, it is doubtful whether the Probation and Aftercare Service would manage were the Judiciary to make bail reports mandatory in all cases. A potential drawback of the bail reports is that they may contain information that is prejudicial to the accused person (such as previous convictions), which may make it necessary for the courts to separate bail determinations from the trial. In addition, given the influential role that probation officers increasingly play in bail determinations, accused persons and their families may offer them bribes to influence their reports. Mechanisms should therefore be established to ensure the integrity of bail reports.
- 4.13 All in all, addressing the foregoing challenges may require courts to hold bail hearings. Some courts already hold proceedings akin to bail hearings. These courts require the prosecution to produce an affidavit sworn by the investigating officer, giving what it considers to be the compelling reasons why an accused person should be denied bail, require the prosecution to serve the accused person or his or her lawyer with the affidavit, give the accused person or his or her lawyer an opportunity to respond to the affidavit, call for a bail report, and make a bail decision on the basis of the information obtained from this process.
- 4.14 Courts also face a challenge in enforcing the requirement of the Constitution that an arrested person should be brought before a court of law as soon as reasonably practicable, but not later than twenty-four hours after being arrested. In this respect, it is important to appreciate that the police often work under difficult circumstances. As one court has observed, "In a country where the police/citizen ratio is so low, where investigative facilities... are

wanting, yet crime rate is on the increase, the police have to exert themselves to the full to beat the constitutional time limit of arraigning accused persons in a court of law and occasionally there may be some delay.”<sup>49</sup> Accordingly, where the police have not completed their investigations before the expiry of the twenty-four hour rule, the emerging practice is that the courts will, upon request, allow the police to continue holding the accused person pending the completion of investigations, provided the police give a “genuine and sufficient explanation.”<sup>50</sup> However, the duration of such extended detention is not rationalized and is left entirely to the discretion of the court. And so some courts grant the police only two or three days, while others grant them up to fourteen days. Where the police fail to comply with these timelines, the courts release the accused persons.

- 4.15 It should be noted that the Prevention of Terrorism Act 2012 (POTA) stipulates different timelines for terrorism cases. In the first instance, POTA provides that a police officer who has detained a suspect may apply in writing to the court to extend the time for holding the suspect in custody for a period of up to thirty days.<sup>51</sup> Before this this period expires, the police officer may again apply to the court to extend the period of detention.<sup>52</sup> However, POTA stipulates that the court can only extend the time for remand “for such a period as shall not, together with the period for which the suspect was first remanded in custody, exceed ninety days.”<sup>53</sup>
- 4.16 Second, bail amounts are sometimes unreasonable, or unaffordable for the majority of accused persons. It is not clear how courts determine the amount of bail – for example, whether they consider any factors, and what those factors are. Among other things, this lack of clarity makes it difficult for advocates to advise clients on how much money they should prepare for cash bail. Disparities in the exercise of judicial discretion have also led to the imposition of bail amounts that are either unreasonably high or unreasonably low in comparison to the offence committed. For example, it is not unusual that a person accused of obtaining Ksh. 8,000 will be required to pay a cash bail of Ksh. 50,000. In addition, where two or more persons are accused of the same offence, the courts tend to set uniform bail terms for all of them, without distinguishing their circumstances.<sup>54</sup> Further, there is no uniformity in how courts approach bail. In Nairobi, for example, accused

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49 Erick Mokaya Mochoge & 2 others v Republic [2008] eKLR, per Justice Musinga.

50 Ibid.

51 Prevention of Terrorism Act, section 33(7).

52 Ibid, section 33(8).

53 Ibid, section 33(9).

54 See, e.g., Republic v Muneer Harron Ismail & 4 others [2010] eKLR.

persons prefer to be arraigned before the Makadara courts, which, in contrast to the Milimani courts, are perceived to be more lenient in granting bail. To enhance uniformity in bail decision-making, some courts have tried to standardize their approaches. In Kitale, for example, the courts have a policy of giving cash bail of at least Ksh. 300,000 in defilement cases and Ksh. 500,000 in robbery with violence cases.

- 4.17 Courts sometimes impose stringent bail terms for simple traffic offences, such as Ksh. 30,000 for causing obstruction. There is a strong perception that courts have adopted a punitive policy in traffic offences, whereby accused persons are encouraged to plead guilty and those who plead not guilty are subjected to punitive bail terms.
- 4.18 Third, it is sometimes unpredictable whether or not courts will attach conditions to the grant of bail, and what those conditions will be. Bail conditions do not appear to be rationalized. It is not clear, for example, when the courts will require a bond with surety or sureties, or a personal bond. Courts do not usually justify the requirement of multiple sureties as opposed to only one. Indeed, many accused persons find it difficult to produce two or more sureties, and take the view that a single surety should suffice. Section 124 of the CPC leaves these important determinations to the discretion of the court. Under this provision, the court may impose any bond terms that it deems sufficient. The only explanation the courts have given here is that they ordinarily refrain from granting accused persons free bonds due to high rates of absconding in such cases. Again, there are claims that courts impose onerous bond terms even for petty offences. Another limitation is that the courts do not permit accused persons to rely on their own property to secure their freedom.
- 4.19 Fourth, there are no uniform procedures for processing and releasing accused persons who have posted bail. The process of posting bail, including approving sureties, is sometimes characterized by administrative bottlenecks, which considerably delay the release from custody of accused persons who have been granted bail. Further, the process of approving sureties takes considerable amounts of time, and therefore consumes much of the courts' scarce time.
- 4.20 Fifth, the requirement of property in surety bonds and the verification of security documents have presented considerable challenges. In this respect, section 126 of the CPC provides that "When a person may be required by a court or officer to execute a bond, with or without sureties, the court or officer may, except in the case of a bond for good behavior, require him to

deposit a sum of money to such amount as the court or officer may fix, or to deposit property, in lieu of executing a bond.” Some courts have interpreted this provision to mean that a surety must produce either a title deed, or a motor vehicle logbook, or a pay slip. Accordingly, these courts have declined to accept other forms of security documents. A second challenge is that courts do not have the resources or capacity to verify the authenticity of security documents such as title deeds and motor vehicle logbooks. This has led to many courts holding onto worthless security documents. Many courts have now entrusted the verification of such documents to investigating officers, although they have not established the time-lines within which such verification is supposed to occur. But this procedure means that accused persons will stay in detention for considerable durations. A further challenge is that accused persons or their relatives sometimes compromise investigating officers to give them favorable verification reports. As a result, some courts now require these officers to produce sworn affidavits of verification in an effort to hold them accountable. Even where sureties present genuine security documents but accused persons abscond, courts face considerable challenges in realizing the securities since there are no clear procedures for this exercise.

- 4.21 Sixth, it is not always clear whether or not, and on what basis, courts will review bail terms and conditions. Although some magistrates’ courts continually review their bail decisions as circumstances change, others do not and advise accused persons to seek redress from the High Court, which is empowered by the CPC to review the bail decisions of the police and magistrates courts. But even where the courts review their bail decisions, their reasoning is not always clear. Further, accused persons do not always have sufficient opportunities to request courts to review their bail decisions. For example, because of crowded court diaries, it is not uncommon for an accused person to appear before a judicial officer every three or four months. This is contrary to the proviso to Section 205(1) of the CPC, which clearly states that a court may adjourn the hearing of a case, “Provided that no such adjournment *shall* be for more than *thirty clear days*, or, if the accused person has been committed to prison, for more than *fifteen clear days*, the day following that on which the adjournment is made being counted as the first day” (emphasis supplied).
- 4.22 Seventh, the power of the courts to bond suspects to keep the peace under the CPC is sometimes abused, leading to many individuals being needlessly detained in police custody and prisons. According to section 43(1) of the CPC, where a person informs a magistrate that a person is likely to commit a breach of the peace or disturb public tranquility, or do any wrongful act that

may probably occasion a breach of the peace or disturb the public tranquility, the magistrate can, after examining the informant on oath, require the person in respect of whom the information is laid to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding one year, as the magistrate thinks fit. Further, section 46 of the CPC provides that where the magistrate is informed that a person is a habitual criminal, the magistrate may, among other things, require that person to show cause why he should not be ordered to execute a bond, with sureties, for his good behavior for such period, not exceeding three years, as the magistrate thinks fit. In either case, where the magistrate deems it necessary to require such a person to show cause, section 47 of the CPC requires the magistrate to make an order in writing setting out the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character, and class of securities, if any, required. Further, section 58 of the CPC provides that if a person ordered to give security fails to do so, he shall be committed to prison, although the High Court may review such orders but only where they exceed one year.

- 4.23 Courts do not always adhere to these procedures in practice, with the result that some individuals are detained unlawfully.<sup>55</sup> Nevertheless, the major problem with these procedures is that because many such persons are not able to afford the bond terms set by the court, they end up in prison, sometime for long periods,<sup>56</sup> yet they have not been charged with committing any specific crime.
- 4.24 In many cases, the courts have not involved the victims of crime, or taken their interests into account, in their bail decision-making. This partly explains why the public often sees bail as unconditional release of accused persons, and why it has resorted to lynching such persons in some cases.

### ***Policy Directions***

- 4.25 Courts should hold bail hearings where the prosecution opposes a bail application or where the court deems it fit, proceed to inquire into the

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55 See, e.g., *Mwagona & 3 others v Republic* [1990] KLR; *Antony Njenga Mbuti v Republic* [2013] eKLR; *Martin Wang'ombe Weru & 7 others v Republic* [2013] eKLR (magistrate failed to conduct inquiry to confirm veracity of information presented by police officer); *Jacton Mlaivu Malalo & 6 others v Republic* [2010] eKLR (police found to have abused section 46 of the CPC, and applicants released on basis that they had been penalized on the basis of mere allegations).

56 See, e.g., *Antony Njenga Mbuti v Republic* [2013] eKLR, where the persons bonded to keep the peace were detained in prison for twenty-two months for inability to execute a bond of Ksh. 50,000 with a surety of like sum for two years.

circumstances of the accused person even if there is no opposition from the prosecution.

4.26 The following procedures should apply to the bail hearing:

- (a) The prosecution shall satisfy the court, on a balance of probabilities,<sup>57</sup> of the existence of compelling reasons that justify the denial of bail. The prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:
  - a. That the accused person is likely to fail to attend court proceedings; or
  - b. That the accused person is likely to commit, or abet the commission of, a serious offence; or
  - c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or
  - d. That the accused person is likely to endanger the safety of victims, individuals or the public; or
  - e. That the accused person is likely to interfere with witnesses or evidence; or
  - f. That the accused person is likely to endanger national security; or
  - g. That it is in the public interest to detain the accused person in custody.
- (b) The accused person shall be entitled to the disclosure of any information relied upon by the prosecution in objecting to bail, provided that there is no good reason for withholding such information, such as the protection of witnesses or the preservation of national security.
- (c) The court may request for a bail report where it considers that it does not have sufficient information to make a fair and appropriate bail decision, including the following instances:
  - a. Where there is doubt on the information on the accused person relating to the grant of bail; or
  - b. Where the prosecution objects to bail, with plausible reasons; or
  - c. Where the accused person has been granted bail but fails to meet bail terms and seeks review of those terms; or

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<sup>57</sup> Many countries accept the “balance of probabilities” as the appropriate standard of proof in bail determinations. See, e.g., Bail Act 2013, section 32(1) (New South Wales), which provides that “Any matter that must be decided by a bail authority in exercising a function in relation to bail is to be decided on the balance of probabilities.”

- d. Where the victim of the crime contests the grant of bail or applies for review of bail conditions; or,
  - e. On the court's own motion where it deems necessary.
- (d) Officers of the Probation and Aftercare Service should prepare bail reports as soon as practicable but not later than two weeks from the time of request.
- (e) Where the court has called for a bail report, it shall give the prosecution and the defense an equal opportunity to contest the findings of this report.
- (f) The court shall give the victim or victims of the crime an opportunity to submit any information that, in their view, the court should consider in making its bail decision.<sup>58</sup> Such information shall include information on the safety of victims and their families.<sup>59</sup> The views and concerns of victims are particularly important in the case of offences against the person, such as sexual offences, murder and domestic violence. However, the views and concerns of the victim or victims shall be presented in a manner that is not prejudicial to the rights of the accused person.<sup>60</sup>
- (g) Before deciding whether to grant or deny the accused person bail, the court shall give the accused person an opportunity to rebut the claims of the prosecution and the victim or victims of the crime.
- (h) In addition to the factors stipulated in **Paragraph 4.9** above, the court should consider, as appropriate, the following additional factors in deciding whether to grant an accused person bail:
- a. The period the accused person has already spent in custody since arrest.
  - b. The probable period of detention until the conclusion of the trial if the accused is not released on bail.
  - c. The reason or reasons for any delay in the conclusion of the trial and any role of the accused with regard to such delay.
  - d. Change of circumstances during the trial.
  - e. The maximum custodial sentence in case the accused person is convicted.

Provided that the courts should not deny an accused person bail if the gravity of the charge is the only consideration before it. In other words,

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58 Victim Protection Act 2014, section 20(1)(b).

59 Ibid, section 10(1)(b).

60 Victim Protection Act, section 9(2).

the seriousness of the alleged crime is not sufficient, by itself and in the absence of any other relevant factor or factors, to justify the denial of bail.

- 4.27 The bail report shall only contain information that will assist the court to make a fair decision on whether or not to release the accused person on bail.
- 4.28 In making a bail decision in the case of accused persons who are children and other persons with special needs (such as persons with special mental health care needs, persons with disabilities and transgender prisoners), the court should consider alternatives to remand such as close supervision or placement with a fit person determined by the court.<sup>61</sup> In such cases, courts should resort to detention only as a last resort, taking into account the nature and circumstances of the offence, and the risks that such persons pose to the public.
- 4.29 The High Court may grant anticipatory bail, that is, bail pending arrest, provided the applicant demonstrates that his or her right to liberty is likely to be compromised or breached unlawfully by an organ of the state that is supposed to protect this right.<sup>62</sup> Further, the applicant must demonstrate that the apprehension of arrest is “real and not imagined or speculative.”<sup>63</sup>
- 4.30 With respect to bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an “overwhelming probability” that his or her appeal will succeed.<sup>64</sup>
- 4.31 The court may impose any bail conditions it deems fit, including the following:
- (a) Reporting requirements (for example, requiring the accused person to report to a police station or court periodically);
  - (b) Contact restrictions (for example, requiring the accused person to refrain from contacting victims and/or witnesses or otherwise behaving in a manner that would distress them),
  - (c) Requiring the accused person to vacate his or her residence and reside elsewhere for the duration of the trial,
  - (d) Requiring the accused person to surrender travel documents such as

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61 Child Offender Rules, *supra* note 32, Rule 10(6).

62 See, e.g., Ibrahim Gichuhi Mugo v Inspector of Police [2013] eKLR.

63 See, e.g., Samuel Muciri W' Njuguna v Republic, Miscellaneous Criminal Appeal No. 710 of 2002, High Court at Milimani Law Courts, Nairobi; Joseph Cherere Mwangi v Republic [2004] eKLR.

64 See, e.g., Francis Ngobu v Republic [2013] eKLR; Charles Karuga Wahome v Republic [2006] eKLR; James Nyamosi v Republic [2009] eKLR; Edward Aliau Kivuyo v Republic [2007] eKLR; Imran Mallu v Republic [2006] eKLR; Henry Mbengo Rioba v Republic [2004] eKLR.

passports,

- (e) Requiring accused person to submit to home visits.

Provided that bail conditions should be reasonable, proportionate to the offence for which bail is granted, appropriate to the risks in relation to which they are imposed, and take into account the individual circumstances of the accused person.

- 4.32 In the case of transnational crimes – such as terrorism, drug trafficking and piracy – the court may impose the following conditions to the grant of bail:
  - (a) Requiring the accused, while on release, not to commit an offence, interfere with witnesses or the investigations in relation to the offence for which the suspect has been arrested;
  - (b) Requiring the accused person to avail himself or herself for the purpose of facilitating the conduct of investigations and the preparation of any report to be submitted to the court dealing with the matter in respect of which the suspect stands accused; or
  - (c) Requiring the accused person to appear at such a time and place as the court may specify for the purpose of conducting preliminary proceedings or the trial or for the purpose of assisting the police with their inquiries.
- 4.33 In order to enhance consistency and transparency in bail decision-making, courts have a duty to provide reasons for their decisions to deny bail, and also provide reasons where they have attached conditions to the grant of bail.
- 4.34 Courts have a duty to inform the victims of crime of their bail decisions, including the conditions attached to the grant of bail.
- 4.35 Where a court has granted an accused person bail, it shall issue the accused person with a written notice requiring him or her to appear before a court on a specified day, time, and date, and indicating any conduct requirements it has imposed. The notice should also explain the consequences that may follow should the accused person fail to comply with any of the bail conditions. The accused person should sign this notice before he or she is released, as an acknowledgement that he or she understands the conditions of bail.
- 4.36 Courts shall inform accused persons of their rights to apply for review of bail decisions and conditions. Bail decisions and conditions should be reviewed on a regular basis, as the circumstances of the accused person and the case change.

- 4.37 Where the police wish to continue detaining an accused person following his or her arraignment within twenty-four hours of arrest – for example, because investigations are incomplete – and they are able to satisfy the court that there are reasonable grounds that necessitate continued detention, the court should issue an order for the continued detention of the accused person for a period not exceeding fourteen days. Provided that in issuing this order, the court should justify any such period of continued detention.
- 4.38 In terrorism cases, the court may, in the first instance and upon the written request of a police officer, extend the time for holding the suspect in custody for a period of up to thirty days.<sup>65</sup> Before this period expires, the court may extend the period of detention, upon an application of the police officer.<sup>66</sup> However, the court can only extend the time for remand for a period not exceeding ninety days, which shall include the period for which the suspect was first remanded in custody.<sup>67</sup>
- 4.39 Courts should give reasonable bond terms to suspects whom they have committed to keep the peace. Such bond terms should facilitate the suspects to be released to keep the peace in their communities and not to be held in custody. Further, courts shall ensure strict adherence to the provisions of the CPC governing the bonding of suspects to keep the peace.
- 4.40 When considering the suitability of a proposed surety, the court should take the following factors into account:
- (a) Financial resources;
  - (b) Character and any previous convictions;
  - (c) Relationship to the accused person;
  - (d) Any other relevant factor.

The proposed surety should attest to these factors. Further, the prosecutor should participate in this process of approving sureties.

- 4.41 Courts should ensure that sureties understand their obligations and the risks they assume when they undertake to serve as sureties. Once the court accepts a person as a surety, it should explain his or her obligations, and require him or her to sign a notice of undertaking of bail, setting out the accused person's bail conditions and the consequences for the surety if the accused person breaches those conditions.

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<sup>65</sup> Prevention of Terrorism Act, section 33(7).

<sup>66</sup> *Ibid*, section 33(8).

<sup>67</sup> *Ibid*, section 33(9).

- 4.42 Where an accused person applies for a review of the conditions of bail, the surety should be informed of the application and the nature and likely consequences of the variation sought.
- 4.43 Courts may accept the following as security documents, among others: title deeds, motor vehicle log books, pay slips, bank drafts, insurance bonds.

## 5. **Supervision of Bail and Bond Terms and Conditions**

### **Situational Analysis**

- 5.1 Once a court has granted an accused person bail, and attached the conditions thereto that are deemed necessary to ensure that the accused person attends court as and when required, there ought to be mechanisms for effectively monitoring the accused person in appropriate cases. This is the objective of bail supervision, whose aim is not only to assist such accused persons to attend court as and when required, but also to comply with bail conditions, such as refraining from interfering with witnesses. In this sense, the mechanisms for monitoring an accused person should be based on the risks he or she poses as determined at a bail hearing. Bail supervision entails tasking a Probation Officer to supervise an accused person who has been released on bail, with the goal of ensuring that the accused person complies with bail conditions and attends court as and when required.
- 5.2 Unfortunately, Kenya does not have a bail supervision system at present. As a result, the enforcement of bail conditions is not effective. This partly explains why there is a high rate of absconding among persons granted bail or bond, particularly free bonds and cash bail.<sup>68</sup>
- 5.3 The problem of absconding is exacerbated by lapses in the approval of sureties, who should play a critical role in ensuring that accused persons attend court and adhere to bail conditions. It is the responsibility of the court, working together with the prosecution and the police, to determine the suitability of sureties. However, it seems that there are no clear procedures for the approval of sureties, given the different practices adopted by the subordinate courts and the High Court. Indeed, the police have complained that the courts do not involve them in the verification of sureties, yet somehow expect them to trace accused persons who have absconded.

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68 Migai Akech & Sarah Kinyanjui, "Pretrial Detention in Kenya: Balancing the Rights of Criminal Defendants and the Interests of Justice" 71 (2011).

## Policy Directions

5. 4 Accused persons released on bail will be placed under the supervision of the Probation and Aftercare Service, or chiefs or police officers, in appropriate cases to ensure that he or she adheres to bail or bond terms and conditions.
5. 5 Where it is brought to the attention of the court that an accused person has failed to adhere to the terms of bail, the court shall summon the accused person to show cause why the terms of bail should not be revoked. Where the accused person does not honor the summons, or furnish the court with a reasonable explanation, the court may vary or revoke the bail terms.
6. **Inter-Agency Coordination, Oversight of Places of Detention, and Public Awareness**

### Situational Analysis

- 6.1 Protecting the pretrial rights of accused persons and safeguarding the interests of justice requires effective coordination and cooperation among the criminal justice institutions.
- 6.2 In addition to the right to be presumed innocent, and the right to bail on reasonable conditions unless there are compelling reasons not to be released, the Constitution grants accused persons the right to be held separately from persons who are serving a sentence, the right to be brought to court as soon as reasonably possible but not later than twenty-four hours after being arrested, the right to legal counsel, and the right to have the trial begin and conclude without reasonable delay.<sup>69</sup> As we have noted, the CPC also seeks to protect the right to a speedy trial of an accused person who has been detained in prison by stipulating that a court shall not adjourn the hearing of his or her case for more than fifteen days.<sup>70</sup> It should also be emphasized that a pretrial detainee “retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained.”<sup>71</sup> For this reason, the Constitution stipulates that pretrial detainees must be treated humanely, in accordance with the relevant international human rights instruments.<sup>72</sup> However, these safeguards are not extended to accused persons in many cases. For example, cases are usually adjourned for periods

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69 Constitution of Kenya 2010, Articles 49(1)(e), (f) & (h), Article 50(2) (e), (g) & (h).

70 Criminal Procedure Code, section 205(1).

71 Constitution of Kenya 2010, Article 51(1).

72 Ibid, Article 51(2) & (3).

of three to four months. Further, serious cases – for example murder – take an average of four years to conclude.

- 6.3 Pretrial detainees often remain in custody for lengthy periods without having been convicted of any offence thereby undermining the principle of the presumption of innocence. In general, accused persons who are mentally ill tend to experience longer periods of detention than their normal counterparts since the judicial process of determining whether they are of sound mind and hence capable of making their defense is not regulated.<sup>73</sup> In practice, this process can take up to five years.
- 6.4 The conditions of police stations and prisons are poor. These places of detention are overcrowded since they house many more inmates than they were designed to hold, and pretrial detainees make up almost half of the prison population. Further, accused persons are detained in worse conditions than convicts. This may be attributed to two factors. First, pretrial detention is seen as a temporary circumstance with the ultimate goal being the dismissal of charges, acquittal or conviction after trial. As a result, pretrial detention occurs in facilities that are ill equipped to deliver health services or to house long-term residents, particularly police stations. Second, the law does not allow pretrial detainees to participate in prison programs that facilitate recovery and reentry into the community, since these programs are characterized as rehabilitation programs. But a person who has not been convicted cannot by definition be rehabilitated. Accordingly, there is an urgent need to open up the conditions of pretrial detention to wider scrutiny, and to establish regular monitoring and public reporting mechanisms.
- 6.5 The majority of pretrial detainees in Kenya are young, come from poor families, and have little or no education.<sup>74</sup> A good number of these pretrial detainees are persons who have been charged with petty offences such as creating a disturbance, loitering, brewing illicit liquor, touting, minor traffic offences, simple thefts such as shoplifting, being drunk and disorderly, and trespass.
- 6.6 Children are mixed with adults in the places of detention, contrary to the requirements of the law. In some cases, these are children who are not in conflict with the law, but have no one to take care of them outside the places of detention. Nevertheless, such children are treated as prisoners, if only for

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<sup>73</sup> Section 162(1) of the Criminal Procedure Code provides that “When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.”

<sup>74</sup> *Ibid* at 61.

purposes of accounting and providing for them. Another common problem is that not only do boys and girls tend to reside in the same remand homes, but also children in need of care and protection are often mixed with child offenders. Indeed, it is not uncommon to find a boy who has been accused of defilement being detained in a remand home together with the girl he is accused of defiling. In such cases, the girls are often vulnerable from attack by the boys.

- 6.7 As far as the transportation of detainees from places of detention to court is concerned, the existing division of responsibility is that the National Police Service (NPS) is responsible for transporting pretrial detainees, while the Kenya Prisons Service (KPS) is responsible for transporting convicted persons. In practice, however, the KPS transports pretrial detainees in some cases, while in other cases the NPS collects pretrial detainees from prison precincts and transports them to court. This arrangement is fraught with considerable challenges. For example, the NPS sometimes delays or fails to transport pretrial detainees, for example, due to lack of suitable vehicles or fuel. As a result, the affected pretrial detainees end up missing their court dates, thereby prolonging the duration of their detention and delaying their trials. This problem also affects child offenders: the officers in charge of children remand homes sometimes fail to take child offenders to court on their scheduled dates, primarily due to the shortage of personnel.
- 6.8 Idleness among pretrial detainees is a major problem in prisons, since the law prohibits them from working while in prison. Many pretrial detainees see it as a severe form of enforced punishment. In this environment, it is easy for petty offenders to be radicalized. And although the prisons endeavor to stem such radicalization by separating petty offenders from serious offenders, they are not usually successful given the high levels of congestion, and the difficulty of preventing prisoners from interacting in the prison precincts.
- 6.9 Women have specific health and hygiene needs related to reproductive health, including sanitary and washing facilities, and provision of hygiene items such as sanitary towels, all of which they should be able to access without embarrassment. Further, pregnant women detainees have specific health needs and are entitled to adequate ante- and post-natal care. The failure to meet these needs can amount to degrading treatment.
- 6.10 Accused persons with special needs (such as persons with special mental health care needs, persons with disabilities and transgender prisoners) face considerable challenges in places of detention, such as discrimination and undignified treatment. Further, places of detention often do not accommodate the needs of such accused persons.

6.11 There is little understanding of bail and bond amongst the public. Many Kenyans have no knowledge of bail or bond, while a good number of those who claim to understand bail and bond think it is money paid to the police or the court for an accused person to be released from detention.<sup>75</sup> Further, a significant number of Kenyans view the grant of bail or bond to person's accused of serious crimes as a great injustice. A need therefore arises to enhance public understanding of bail and bond, with a view to increasing the public's understanding and confidence in the process.

### **Policy Directions**

6.12 In order for the rights of accused persons to be observed, cases should be investigated and prosecuted in a timely manner, and pretrial detainees should be transported to court on time whenever their cases are scheduled for mentions or trials, and accused persons should be treated humanely in places of detention.

6.13 The NPS and the KPS will ensure that every detained accused person is treated humanely and with respect for his or her dignity. In this respect, the NPS and the KPS have a duty to ensure that the detention of an accused person is lawful, and that pretrial detainees enjoy their human rights, subject only to the restrictions that are unavoidable in a closed environment. These rights include the right not to be subjected to any form of torture or degrading treatment. In particular, women should not be subjected to physical, sexual or psychological violence while in detention. Further, all prisoners are entitled to medical care according to their needs.

6.14 Judicial officers shall exercise their powers as visiting justices to ensure the conditions of the places of detention meet the internationally recognized minimum standards.<sup>76</sup>

6.15 Every police station should have a female police officer on duty at all times.

6.16 Women should be kept in separate quarters from men, and girls in separate quarters from boys. Further, mothers with children should be provided with separate accommodation.

6.17 The NPS and the KPS have a duty to ensure that the gender-specific health and other needs of female detainees are met.

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75 Akech & Kinyanjui, *supra* note 68 at 71.

76 Prisons Act, Chapter 90, Laws of Kenya, section 72(2).

- 6.18 Only female officers should attend to female detainees. Although male officers may be assigned to detention premises set aside for women, a female officer should always accompany them. But where this is not feasible, the NPS and the KPS will ensure a minimum of female personnel and develop clear procedures that minimize the probability that female detainees will be abused or ill treated in any way.
- 6.19 In order to ensure that accused persons are treated in a manner that is consistent with the Constitution and international human rights standards, it is important for the NPS and KPS to keep proper records for each pretrial detainee. Proper record keeping is an essential tool for preventing human rights violations, such as the denial of due process, torture, or enforced disappearance in custody.
- 6.20 Every police station and prison shall keep a register of all persons detained therein, which shall contain the following information:
- (a) The particulars of every detainee;
  - (b) The reasons for his or her detention, and the authority for his or her commitment to detention;
  - (c) The date when regular reviews are due, whether the review took place, and the outcome of the review;
  - (d) Any requests for access to medical or legal assistance;
  - (e) Any complaints made by the detainee;
  - (f) Health status of detainee at the time of entry into the detention; and
  - (g) Any other relevant information.
- 6.21 Every pretrial detainee has the right to complain to the NPS, the KPS, the Independent Policing Oversight Authority (IPOA), the Commission on the Administration of Justice (CAJ) and the courts, which should respond without undue delay. All such complaints should be recorded, and investigated promptly and impartially. In particular, women alleging sexual abuse should receive immediate protection and supervision during the investigation and for as long as needed.
- 6.22 The NPS and KPS will respectively furnish the courts with monthly accounts of the accused persons held on pretrial detention. These accounts should include lists of those who have been granted bail but are unable to meet the conditions set by the courts. The courts should use this information to ensure that no accused persons are detained for unreasonable periods, they are treated humanely in places of detention, and to facilitate the decongestion of places of detention.

- 6.23 Where a pretrial detainee disappears during detention, the court shall undertake a prompt inquiry into the disappearance.
- 6.24 The Judiciary will establish a case management system for criminal trials, which will build on section 205(1) of the CPC and whose objective will be to facilitate the timely disposal of cases, thereby ensuring that accused persons are not held in places of detention for unduly long periods.
- 6.25 The NCAJ will streamline the process of transporting pretrial detainees.
- 6.26 Where the detention of a child offender is unavoidable, police officers should not to detain such a child with adults, and ensure that the child does not associate with adults who are not the child's relatives while the child is in detention.<sup>77</sup>
- 6.27 The Director of Children's Services has a duty to supervise children's remand homes, and places of safe custody,<sup>78</sup> and shall report to the NCAJ on a regular basis.
- 6.28 The NPS and the KPS will integrate the protection of the rights of accused persons with special needs in their management practices.
- 6.29 The NPS and the KPS will take into account the risk of abuse by other pretrial detainees when determining the allocation of accused persons with special needs to ensure their protection.
- 6.30 The NCAJ will coordinate with relevant institutions to ensure that the conditions and services of places of detention are designed to protect the well being of prisoners with special needs.
- 6.31 The NCAJ will work with relevant institutions to raise the awareness police officers and prisons officers on the protection of the rights of prisoners with special needs.
- 6.32 The NCAJ will initiate a campaign to educate public on issues relating to bail and bond. In this respect, the NCAJ will work with the Probation and Aftercare Service to make the public aware that the grant of bail does not amount to the acquittal of an accused person.
- 6.33 The NCAJ will coordinate with relevant institutions to enhance the provision of legal aid to pretrial detainees, with a view to safeguarding their pre-trial rights.

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<sup>77</sup> Child Offender Rules, Rule 6.

<sup>78</sup> Children Act, section 51.



REPUBLIC OF KENYA

# THE JUDICIARY

Supreme Court of Kenya,  
City Hall Way,  
P. O. BOX 30041 - 00100  
Nairobi, Kenya

[info@judiciary.go.ke](mailto:info@judiciary.go.ke)  
[www.judiciary.go.ke](http://www.judiciary.go.ke)