



Bail conditions in the criminal justice systems in Kenya, Uganda, Rwanda and Tanzania

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7 August 2020

Question

Please provide a comparative overview of bail conditions in the criminal justice systems in Kenya, Uganda, Rwanda and Tanzania

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1. Summary

This rapid literature review finds evidence of varied bail conditions in Kenya, Uganda, Rwanda and Tanzania. The African Charter, which all the states have ratified, supports the right to bail, as do other international instruments. Most of the countries surveyed allow bail, but conditions vary as do practical applications.

The review finds:

- In Kenya, there is a right to bail for all offences (serious offences by a court only), but much discretion is granted to the authorities, and research has found that the rules are applied inconsistently and there is a high rate of pre-trial detention.
- In Uganda, bail is a right for most, but bail for some serious crimes can only be granted by the High Court. However, in practice, it is hard to get bail and there is a high rate of pre-trial detention.
- In Rwanda, bail may be given for all offences provided conditions are met. The rate of pre-trial detention is relatively low, although there is evidence that some are detained outside of the judicial system and without a trial or the option of bail.
- In Tanzania, bail can be granted with certain mandatory restrictions. There is an on-going legal dispute about whether the right to bail extends to those accused of certain serious crimes. Research shows refusal of bail is being used against critics of the government. There is a high rate of pre-trial detention.

Pre-trial detention is the act of depriving someone of their liberty in connection with an offence they are alleged to have committed, before they have been tried or sentenced (Heard and Fair, 2019). The detention of individuals before they have been tried in a court of law should be minimised, with bail and bond among the most commonly used alternatives. Bail is defined as where an accused person is allowed to continue living in their community if they 'provide a guarantee, financial or otherwise, that they will not abscond and will be available when needed for investigation and for trial' (United Nations, 2005). A bond is "an undertaking, with or without sureties¹ 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" (National Council on the Administration of Justice, 2015, p. 3). Bail is usually paid in advance whereas bond is usually a promise to pay, or a promise by the sureties to ensure the accused attends court (UNODC, 2007, p. 20).

This review surveys the law on bail, as well as evidence on how the laws are enacted in practice. Legal documents, as well as academic and policy analysis have been used. This includes some analysis of "wider structural socio-political contexts, existing institutions/rules of the game (both formal and informal), associated incentive and interest structures and the particular features of the balance of power between relevant actors and stakeholders" (Domingo & Denney, 2013, p. 2). Key influences on bail, beyond the law, include the role of bribes, the time and resources needed to assess bail claims, and awareness of the rules among the accused and in the justice system. If the accused are not aware of their rights, or made aware by those detaining them, they may be less able to access bail on fair terms (Domingo & Denney, 2013). While the laws are

¹ A third party acting as a guarantor, in this case to bond or bail conditions.

readily available for each country, there is less evidence on the practice of pre-trial detention and bail, particularly for Rwanda where research on criminal justice is focused on genocide trials.

2. Background

The limitation of pre-trial detention is widely held as an international standard, following from the presumption of innocence. The United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)² states that "Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings."³ Similar principles are found in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (United Nations, 2005, pp. 188–189); the International Convention on Migrant Workers (article 16);⁴ Convention on the Rights of the Child (article 37);⁵ the International Covenant on Civil and Political Rights (ICCPR), article 9⁶. The UN Human Rights Committee General Comment 35 (2014) elaborated on the ICCPR, noting the use of bail as an alternative to pre-trial detention (see also Hausler & McCorquodale, 2014).⁷

A number of African standards assert similar principles including a presumptive right to bail. The African Charter on Human and Peoples' Rights does not mention bail, but it is implicit in Article 6 setting out the right to liberty (Chigovera et al., 2016, p. 48). The African Commission, established by the Charter, also sets out the following standards (Chigovera et al., 2016, pp. 48-52):

- Principles on Fair Trial in Africa, Section M(1)(e).⁸
- Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines), Paragraphs 1(b), 4(i), 6(a), 7, 10-11, 31, 32(a).⁹

² Adopted by General Assembly resolution 45/110 of 14 December 1990

³ <https://www.un.org/ruleoflaw/files/UNITED~2.PDF> - rule 6.2

⁴ <https://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf>

⁵ <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁶ <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement

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https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en

⁸ <https://www.achpr.org/legalinstruments/detail?id=38> "Unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial. However, release may be subject to certain conditions or guarantees, including the payment of bail."

- Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 3(C).¹⁰

All accept that release may be subject to certain conditions. However "the burden rests with the State to prove the need for such conditions for release or detention" (Chigovera et al., 2016, p. 49).

As well as contravening these conventions and guidelines, it is widely agreed by scholars that excessive pre-trial detention can have negative effects on the prison system, the health of the detainees, their economic situation, and trust in the justice system (Domingo & Denney, 2013). It causes overcrowding, with significant proportions of many African countries' prison populations consisting of pre-trial detainees; and disproportionately affects the poor (Berry & English, 2010, p.; Penal Reform International, 2005).

3. Kenya

Laws on bail

Article 49(1) of the *Constitution of Kenya*, (2010) states that a person has the right (h) "to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons."¹¹ Bail and bond policy guidelines interpret this to mean that "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 condition" (National Council on the Administration of Justice, 2015).

The rules on bail are set out in the Criminal Procedure Code (CPC) (2014). Section 36 of the CPC sets out that when a suspect has been taken into custody for any offence except murder, treason, robbery with violence and attempted robbery with violence, then the police may release them on executing a bond. Those accused of serious offences can only be granted bail by a court (Dereymaeker, 2016, p. 38). Sections 123-132 set out the rules on bail. 123 states that "the amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive".¹²

According to a report, changes to the CPC have defined "compelling reasons widely" to make detention the norm and bail the exception (Wahiu, 2016, p. 14). Changes have made it easier to detain suspects, particular with regards to certain crimes, and "an order to release an arrested

⁹ <http://apcof.org/wp-content/uploads/2017/04/guidelines-on-the-conditions-of-arrest-police-custody-and-pre-trial-detention-in-africa.pdf>

4(i) of the Luanda guidelines on the rights of arrested persons is: "The right to apply for release on bail or bond pending investigation or questioning by an investigating authority and/or appearance in court". 6(a) states "Detention in police custody shall be an exceptional measure. Legislation, policy, training and standard operating procedures shall promote the use of alternatives to police custody, including court summons or police bail or bond" and 7(a) that "All persons detained in police custody shall have a presumptive right to police bail or bond".

¹⁰ <https://www.achpr.org/legalinstruments/detail?id=9>

¹¹ <https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke019en.pdf>

¹² <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2075>

person made by a subordinate court or the High Court may be stayed for 14 days to allow the Director of Public Prosecution to appeal against the bail order, on the ground that the charges contemplated relate to terrorism, narcotics, organised crime, human trafficking or money laundering" (Wahiu, 2016, p. 13).

The Children Act, the Prevention of Terrorism Act and the National Police Service Act also have provisions on bail. The National Police Service Act gives an officer investigating an offence "broad discretionary power" to require a bond, as long as it is in line with the CPC (National Council on the Administration of Justice, 2015, pp. 4-5). The Security Laws (Amendment) Act (SLA) (2014) amended the Criminal Procedure Code (CPC) 36(a) to allow the police to hold a suspect longer than 48 hours provisionally on an application to a court.¹³

Practice

Kenya has the best-developed infrastructure in East Africa to implement alternatives to imprisonment (Allen, 2012, p. 9). Nevertheless, Kenya does not have a bail supervision service and there are no procedures for the approval of sureties (National Council on the Administration of Justice, 2015, p. 30).

As of 2019, there were 23,552 people in Kenyan prisons awaiting trial or on remand, equivalent to 44.1% of the prison population.¹⁴ Interviews on pre-trial detainees in Nairobi found that they were likely to be migrant workers, with lack of a fixed abode or unaffordable bail common reasons for detainment (Muntingh & Redpath, 2016).

In 2015, the National Council on the Administration of Justice developed Bail and Bond Policy Guidelines to try and reduce the use of pre-trial detention and ensure consistency in the use of bail, among other things. Some of the problems they identified were little consistency in how bail conditions were applied and a public concern that bail was unaffordable for many (p. 5). It also noted fears that serious offenders such as terrorists were absconding (p. 5). Pre-trial detainees make up about 48% of the prison population (Heard & Fair, 2019, p. 3; National Council on the Administration of Justice, 2015, p. 6).

On bail and bond amounts, the guidance states (National Council on the Administration of Justice, 2015, p. 9):

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

¹³ <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2075>

¹⁴ <https://www.prisonstudies.org/country/kenya>

Its situational analysis of police practice suggests that (National Council on the Administration of Justice, 2015, pp. 10-11):

- the police can deny bail as a form of punishment, can give bail on unreasonable terms, and do not usually explain their decisions.
- There may be a delay before those accused of serious offences are brought before a court.
- Many are unable to afford even relatively low bail amounts (see also Muntingh & Redpath, 2018, p. 159)
- The police do not inform the accused they have a right to bail, and may extort bribes.
- Sometimes the public "lynches" suspects released on bail, believing bail to be a bribe.

Its situation analysis of the courts' use of bail suggests that the courts' decisions on bail lack consistency in the following ways (National Council on the Administration of Justice, 2015, pp. 15-18):

- There is no procedure for applying for bail. In some courts, the accused must raise their hand and ask. In others, magistrates grant bail without being asked, without asking if the accused can afford the amount.
- Courts do not always explain their decisions, or consider all the necessary factors (e.g. likelihood that accused will abscond, nature of the offence, strength of the prosecution case, the likelihood of interfering with witnesses, the need to protect victims, the need to protect the accused, public order).
- It is unclear what the standard of proof for these factors is. The Probation and Aftercare Service prepares bail reports for the court, but the court is not obliged to use them.
- Courts often extend the amount of time that the police may hold a suspect before presenting them before a court, but the time given varies by court. According to the constitution, an accused person should be brought before the court within 24 hours. However, resource constraints mean the police have not always completed their investigations within this time. The court will extend the holding period if the police give 'a genuine and sufficient explanation'.
- Bail amounts are sometimes unreasonable or unaffordable. They do not always match the crime, or the circumstances of the accused.
- There is no uniformity between courts in setting bail amounts.
- Courts can impose stringent bail terms for traffic offences.
- There is no uniformity between courts on conditions attached to bail, e.g. how many sureties will be required. Accused persons cannot use their own property.
- There is no set process for releasing bailed persons. It is often time-consuming.
- "the requirement of property in surety bonds and the verification of security documents have presented considerable challenges". For those depositing property, some courts require a title deed, motor vehicle logbook or pay slip, but refuse other documents. Courts do not have the capacity to verify these documents.
- Not all courts review bail terms and conditions and it is not clear on what terms this is decided, or the reasoning behind review decisions.

- Courts do not always adhere to procedures on applying a bond to suspects to keep the peace. This decision can be based on information passed to the magistrate, including that the accused is a "habitual criminal".
- Courts do not involve the victims of crime in their decision-making. This leads the public to see bail as an unconditional release.

4. Uganda

Law

The right to bail is guaranteed by the Constitution of the Republic of Uganda (1995), article 23(6). It states: "Anyone arrested 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" (*Bail in Uganda*, n.d.).¹⁵ The Magistrates Court Act states that the accused should be informed of their rights to bail.

Bail is not available for persons accused of certain crimes at magistrates courts. The Magistrates Court Act (sections 75-84) includes that (75) a magistrates court may release a person on bail if the offence is not triable by the High Court only, relating to terrorism, cattle rustling, imprisonable under the Firearms Act for 10 years or more, abuse of office, rape and defilement, embezzlement, causing financial loss, corruption, bribery.

Bail may only be refused for certain reasons. These are the nature and severity of the crime, "antecedents of the applicant", whether s/he has a fixed abode, and the likeliness of interfering with witnesses, when considering a bail application. If bail is refused, the reasons must be recorded and the applicant must be told of the right to apply for bail to a higher court if applicable (*Avocats sans frontieres*, n.d.).

The Magistrates Courts Act, section 76, states that that the accused must be released on bail if they have been remanded in custody for 60 days, or 180 days if they are being tried by the High Court (African Policing Civilian Oversight Forum, 2017).

A citizens' handbook on bail sets out the following principles, among others (Republic of Uganda, 2007, pp. 64–65):

- The right to bail is based on the legal principle that an accused person is innocent until when proved guilty.
- Bail cannot be granted for accusations of murder, treason, rape, defilement, embezzlement, causing financial loss and corruption.
- The accused will be required to give security. The security may be in form of cash or some other property.
- In most cases the accused will be required to have sureties before being released on bail. Court however, can grant bail without sureties.
- Bail is given on terms imposed by court, for instance payment of money as a security to the court.

¹⁵ <https://ulii.org/ug/legislation/consolidated-act/0>

- An official receipt called a General Receipt must be issued upon payment.
- Where an accused has been remanded without trial for 60 days in Non-capital offences or 180 days for capital offences, the Court shall release him or her on bail.

Practice

In 2004, 65.7% of Uganda's prison population consisted of pre-trial detainees (King's International Centre for Prison Studies, 2004, p. 3). As of 2019, there were about 27,500 people in Ugandan prisons awaiting trial, equivalent to 49.8% of the prison population (Walmsley, 2020, p. 4).¹⁶ According to a report by APCOF, many prisoners are detained longer than the 48 hours allowed by the constitution and "If bail were to be used appropriately, the number of pre-trial detainees in Uganda would be significantly reduced" (African Policing Civilian Oversight Forum, 2017, p. 153).

Research suggests that bail is not applied according to the law, and many suspects remain in prison for long periods before trial (Karugonjo-Segawa, 2012, p. 6). Reasons include that public opinion prefers suspects to be incarcerated, bail requirements are difficult, and some bailed suspects abscond (Karugonjo-Segawa, 2012, p. 6). Moreover, the constitutional requirement that suspects should be brought to court within 48 hours is often ignored in practice, as is prompt access to judicial review; and there is inadequate access to an independent complaints mechanisms (African Policing Civilian Oversight Forum, 2017, p. 153). APCOF argues that police bail is not, in practice, a presumptive right (African Policing Civilian Oversight Forum, 2017, p. 154).

5. Rwanda

Law

Rwanda's constitution does not mention bail. However, article 21 sets out the right to be presumed innocent and to appear before a court and article 24 sets out the right to liberty.¹⁷

Rwanda's criminal procedure law was amended in 2019. **Nº 027/2019 - Law relating to criminal procedure sets out the rules on bail.**¹⁸ Bail may be deposited on all offences (article 82). It may take the form of cash, immovable property or a guarantee by a third party (article 83). "Bail is determined in consideration of the damages caused by the offence, the good conduct of the suspect attested by the local authority of his or her residence and on whether he or she has never been condemned by a court. If the offence is against property, bail must be at least double the value of the property which he or she is required to retribute. For other offences, bail is determined at the discretion of the competent authority in consideration of the gravity of the offence committed and the wealth of the guarantor" (article 84).

¹⁶ This may include time after conviction and before sentencing, as well as pre-trial and during trial.

¹⁷ https://www.judiciary.gov.rw/fileadmin/_migrated/LAWS/Constitution_of_the_Republic_of_Rwanda_-_Revised_2015.pdf

¹⁸ <https://gazettes.africa/archive/rw/2019/rw-government-gazette-dated-2019-11-08-no-Special.pdf>

Article 80 states that, as an alternative to detention, suspects may be instructed to adhere to requirements including:

- To reside in a territorial jurisdiction of the authority who subjected him or her to certain conditions;
- Prohibition from going to or going beyond a prescribed area without prior authorization from the authority who subjected him or her to certain conditions;
- To refrain from going to a given area or not to be in a given place at a given time;
- To report to a specified authority in a prescribed period of time;
- To report whenever required to do so;
- To post bail;
- To be monitored through technology;
- To surrender his/her identification papers to a prescribed authority

A judge or magistrate may modify these conditions at any time, upon request by the prosecutor or suspect, or order re-detention.

Practice

As of May 2017, there were 4,354 prisoners awaiting trial, equivalent to 7.5% of the prison population. The proportion of pre-trial detainees has fallen significantly following the resolution of large numbers of genocide cases over the last two decades (Walmsley, 2020, p. 4).¹⁹

However, there is also evidence that 'transit centres' are used to detain street children, street vendors, sex workers, beggars and homeless people without judicial process. The authorities 'refuse to acknowledge that people deprived of liberty in [the centre] are in detention', meaning it is not subject to judicial oversight (Human Rights Watch, 2020, p. 39). There is evidence of detention of political prisoners in unofficial detention centres run by the military ("*We Will Force You to Confess*", 2017). There is some evidence of detention without due process (Amnesty International, 2019b).

6. Tanzania

Law

The Constitution of Tanzania (1977) states that no person shall be detained "save only- a) under circumstances and in accordance with procedures prescribed by law; or (b) in the execution of a judgment, order or a sentence given or passed by the court following a decision in a legal proceeding or a conviction for a criminal offence".²⁰

¹⁹ This may include time after conviction and before sentencing, as well as pre-trial and during trial.

²⁰ <https://www.wipo.int/edocs/lexdocs/laws/en/tz/tz008en.pdf>

The Criminal Procedure Act (CPA) outlines the procedures for bail (64-69 and 148-160).²¹

Police may grant bail under certain conditions (the offence is 'not of a serious nature', inquiries cannot be quickly completed; where the accused is under 15, they may be released to a parent's protection). All suspects must be informed of their right to bail (article 64).

Police should take into consideration: the probability of the accused appearing in court; community ties and previous conduct; the seriousness of offence and strength of evidence; how long the accused will be in custody if bail is refused; the accused's need to arrange their defence; need for physical protection; protection of the community or witnesses (article 65).

The conditions of police bail are that: the bailee agrees in writing to appear at court, or other place as asked by police; "undertakes in writing to observe specified requirements as to his conduct"; someone who is acceptable to the police officer says he knows the accused and regards him as responsible; the accused or another person, agrees to forfeit money if he does not appear; or deposits money to be forfeited if he does not appear (article 66).

A police officer shall record in writing the reasons for refusing bail. When bail is refused or the accused cannot comply, they should be brought before a magistrate "as soon as it is practicable to do so and not later than the first sitting of a court at a place to which it is practicable to take the person for that purpose." Any person refused bail may request the police provide him with facilities to make an application to a magistrate for bail (article 67).

A police officer may revoke bail if they believe the bailee is absconding, or is failing to, or about to fail to, comply with a condition of release (article 68).

The amount of bail shall be fixed with due regard to the gravity and circumstances of the case, but shall not be excessive. The Director of Public Prosecutions can block bail if s/he certifies in writing that the safety or interests of the country will be prejudiced (article 148).

Bail is only available for certain offences and persons. A suspect cannot be bailed for murder, treason, armed robbery, or defilement; illicit trafficking in drugs; terrorism as defined by the Prevention of Terrorism Act; money laundering; if the accused has been imprisoned for a term of longer than three years; if they have failed to comply with bail before; for protection; for offences involving more than 10 million shillings, unless the person deposits money or equivalent half the value, and the rest is secured by a bond (article 148).

The court shall impose conditions on bail - surrender of passport or travel documents; and restrictions on accused to his town or village [both mandatory]. It may also impose the following: a need to report at specified intervals; to abstain from certain places or meeting certain people; 'any other condition which the court may deem proper and just to impose in addition to the preceding conditions' (article 148).

A higher court may alter terms of bail set by lower court (article 149). A judge or magistrate may re-arrest a bailee and, after hearing him or her, commit him to prison or bail again, where a police officer or prosecutor sees new circumstances that would justify refusal of bail (article 150). Article 157 gives the police powers of arrest if there are "reasonable grounds" for suspecting the bailee will break conditions of bail.

²¹ https://www.tanzania.go.tz/egov_uploads/documents/CRIMINAL%20PROCEDURE%20ACT.pdf

The Police Act also provides for police bail, although does not define reasonable or proportionate bail conditions (African Policing Civilian Oversight Forum, 2017, p. 128).

Practice

As of December 2019, there were 18,256 people in Tanzanian prisons awaiting trial, equivalent to 51% of the prison population (Walmsley, 2020, p. 4).²²

An Amnesty report suggests that bail is denied or made excessively costly for government critics "by imposing unreasonably costly bail and bond conditions and using provisions that allowed courts to unreasonably deny bail or bond or to subject defendants to unnecessary and repeated court appearances" (Amnesty International, 2019a). There are numerous and credible reports that suspects are not generally brought before a judicial officer within the prescribed time period (African Policing Civilian Oversight Forum, 2017, p. 128).

Tanzania has not ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). According to an African Policing Civilian Oversight Forum (APCOF) report, there is "strong evidence that torture and ill-treatment are systematic in the context of police custody and pre-trial detention" (African Policing Civilian Oversight Forum, 2017, p. 124).

The issue of unailable offences and unailable persons is being contested in the courts.

The Criminal Procedure Act denies bail for murder, treason, terrorism, money laundering, and drugs offences. In May 2020, the High Court declared this unconstitutional as it violates the presumption of innocence, and granted the government 18 months to rectify the CPA, but the government has said it will contest the ruling (*Tanzania to Appeal Ruling on Denial of Bail*, 2020).²³

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²² This may include time after conviction and before sentencing, as well as pre-trial and during trial.

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Acknowledgements

We thank the following experts who voluntarily provided suggestions for relevant literature or other advice to the author to support the preparation of this report. The content of the report does not necessarily reflect the opinions of any of the experts consulted.

- Jean Redpath, African Criminal Justice Reform

Key websites

- African Commission on Human and Peoples' Rights: <https://www.achpr.org/>
- African Criminal Justice Reform: <https://acjr.org.za/>
- Avocats sans frontières: <https://www.asf.be/>
- Barefoot Law: <https://barefootlaw.org/>
- Gazettes Africa: <https://gazettes.africa/>
- World Prison Brief: <https://www.prisonstudies.org/>

Suggested citation

Kelly, L. (2020). *Bail conditions in the criminal justice systems in Kenya, Uganda, Rwanda and Tanzania*. K4D Helpdesk Report 863. Brighton, UK: Institute of Development Studies.

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