



KENYA SCHOOL OF LAW

PROFESSIONAL ETHICS

PROJECT ASSIGNMENT ALL CLASSES 2017

INSTRUCTIONS

1. This project work will be carried out by each Firm in each class and submitted to **Christine Mwanza, Administrative Assistant, Advocate Training Programme, Kenya School of Law on Friday 2nd June, 2017 at 3 pm**
2. This paper consists of **two** questions
3. Firms are required to attempt any one of the two questions
4. In answering questions in this paper, ***you are expected to identify the key legal issues, discuss them logically and exhaustively, and make reference to or cite relevant authorities and legislation.***
5. The firm leaders shall be in charge of meetings and ensure that minutes are taken to capture individual member's contributions. The same shall be collected together with the final project.
6. The project should be between 10-15 typed pages, Times New Roman font size 12, double spaced (**excluding** annexures, introduction and cover pages)
7. Each question carries equal value – **20 Marks.**

PROJECT QUESTIONS

Question A

Hugh Kingstone has approached the Disciplinary Tribunal to file a complaint against Mike Ross, currently a non-practising advocate for the past 2 years. In his complaint, Hugh records that Mike Ross represented him 8 years ago, prior to Hugh being convicted and sentenced to a 7 year jail term.

Hugh, a former embassy official, had approached Ross for representation on a charge of abetting the illegal entry of the Artur brothers into Kenya. During their talks Hugh who had been denied bail, directed Mike Ross to access his Swiss numbered account and withdraw funds to facilitate the legal fees.

Initially, Mike Ross was convinced of Hugh's innocence. However, after Mike Ross found his dog murdered and a paper attached to the dog's neck directing that he "LOSE THE CASE!" Mike Ross lost his enthusiasm and interest in the case. As a result of this complacency, the case was lost and Hugh was jailed for 7 years.

In the course of their conversations, Hugh and Mike Ross discovered that they both had a passion for writing and they eventually agreed to co-write a book on Hugh's account of the Artur saga. Infact, Hugh divulged all the juicy details he knew of the Artur saga to Mike. After Hugh's conviction, Mike Ross advised him that it would be wise not to appeal the sentence as they were not likely to succeed in either quashing or lessening the conviction.

Hugh has now finished his term only to find that while he was incarcerated, Mike Ross wrote a book on the Artur brothers, and that the book has remained on the bestseller list for 3 years now. Additionally, Mike Ross had continued to access and overdraw money from Hugh's accounts and invested the funds in real estate developments.

You are an expert in professional conduct and ethics and the Disciplinary Tribunal has approached you for consultancy services. Using relevant authorities prepare a paper discussing, among others:-

- a) The duties of an advocate to a client
- b) Elements of client-attorney privilege and confidential information, and instances in which the privilege can be waived

Question B

During the course of a trial before a single judge, the Hon. Justice Chai Tumbo, the defendant's advocate Kombo Mwendakasi, Esq. was in the course of cross-examining the main witness for the plaintiff. The witness gave an answer that was non-responsive to a question and then included an accusation which was highly detrimental to the defendant. Mwendakasi immediately sought that the answer be struck out and not form part of the evidence in the matter.

After some argument between both counsel and the bench, his Lordship decided to allow the answer into evidence. Thereafter, numerous heated exchanges took place between Mwendakasi and the judge, which on one occasion culminated in Mwendakasi shouting at the judge and slamming his papers on the bar table.

On another occasion, his Lordship instructed that the court would not adjourn over the lunch period and that the matter would continue through the luncheon adjournment. Mwendakasi argued with the judge that he had other business to attend to during the lunch break and refused to be in court during that time.

Again, an exchange between the judge and Mwendakasi ensued, with Mwendakasi ridiculing the judge and being repeatedly sarcastic towards him. The judge stood his ground and insisted that the matter proceed. In the meantime, as Mwendakasi reviewed the plaintiff's evidence, he realized that there was a high probability that his client was likely to lose the case.

The next day, Mwendakasi was promised by an anonymous source that before 4pm that he would receive documents that would be "very important" to his client's case. Mwendakasi continued with a somewhat obscure and aimless cross-examination of the witness in the hope that the documents would arrive and somehow "salvage" his case.

They arrived in his chambers after 4pm but luckily he was able to draw out the cross-examination so that the witness was still under cross-examination for the next morning. The next morning, Mwendakasi made an oral application for the judge to disqualify himself on the basis that the judge's wife was in the same church committee as the wife of the plaintiff in the case. He presented a copy of minutes of the deliberations of the committee with the names of the judge's wife and the plaintiff's wife clearly highlighted. The judge adjourned the matter for 15 minutes to deliberate on the application. When he came back he declined to disqualify himself from the case but offered no reasons save that there was no conflict disclosed to

warrant his recusal. What the judge did not disclose however, was that he had been estranged from his wife for several years although they were not formally divorced.

In his closing address at the end of the trial, Mwendakasi made unfounded submissions labelling the plaintiff's claim as an "attempted fraud and extortion", even though no such accusation or evidence was raised during the trial.

You have been engaged as a judicial researcher in the High Court, and the judge in this instance seeks your assistance in determining how to handle the conduct of the Advocate. He requests you to assist him prepare an opinion discussing the duties and obligations of an advocate to the Court. He reminds you of the following dictum to guide you:

"[the Advocate]... has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants, or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that is fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court." - Lord Denning MR in *Rondel v Worsley* [1967] 1 QB 443 at 502

- (a) In light of these circumstances, explain by reference to the Code of Conduct, applicable legislation and any relevant authorities whether Mwendakasi has breached, if at all, his duties as an advocate.
- (b) Did Mwendakasi's attitude and behavior towards the judge amount to mere inadvertent discourtesy or did it cross the boundaries to become something more serious? What options were available to the judge to check this behavior.
- (c) Should the judge have disqualified himself from hearing the matter? Support your position with relevant authorities.

(20 marks)