

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 101: CRIMINAL LITIGATION

TUESDAY 13TH NOVEMBER, 2012

DURATION: 3 HOURS

Instructions to Candidates

- (a) Answer question **ONE** and **any other three (3)** questions
- (b) All questions carry 15 marks each.
- (c) Marks shall be lost for illegibility

PLEASE TURN OVER

1. The following was recorded as court proceedings that took place on 12th October 2012 before the Honorable Mr. Justice Byron Kasaine at the High Court of Kenya in Marsabit.

“Coram

The Honorable Justice Byron Kasaine presiding
Accused person present (Ms Shupavu Noma)
Principal State Counsel, Prosecuting (Ms Lelei Rama)
Defence Counsel, present (Mr. Bonny Andanje)
Court Clerk (Mr. Ndere Namwakira)

Court Clerk

Ms Shupavu Noma, I want to read out to you the information. What language do you understand?

Ms Shupavu Noma

I am a Ugandan by birth; speak Luganda, excellent English and Luniakole. Since I got married to a Kenyan in the year 2000, my Swahili has greatly improved.

Court Clerk

Ms Shupavu Noma, you are charged with the offence of treason contrary to Section 40 of the Penal Code (Cap.63 of the Laws of Kenya). Particulars of the offence are that on 29th December 2007 in Kirinyaga County, Central Province of the Republic of Kenya you together with other persons not before court invented and or intended the maiming and restraint of his Excellency the President of the Republic of Kenya with the sole aim of deposing his excellency from his position as President and Head of State and Commander-in-Chief of the Kenya Defence Forces.

Ms Shupavu Noma

Yes. It happened.

Court

Accused person convicted on her own plea of guilt. Prosecution may outline the facts.

Prosecution:-

Your honor, on 29th December, 2007 following the intensely contested and disputed presidential elections in the Republic of Kenya, the Director of the National Intelligence Service (NIS) received intelligence that the accused person with the help of several Libyans were holed up in a hotel in Kirinyaga County called Kiamutugi Hotel. The intelligence brief was to the effect that the accused was planning to levy war in Kenya against the Republic. The Libyans, who are believed to have been around 20, are known mercenaries who fought in the Ugandan Liberation War of 1986 and have previously engaged in combat in the Central African Republic and the Democratic

Republic of Congo. A raid conducted by Kenya's Special Forces on the said hotel on 29th December, 2007 managed to recover a document titled "Change of Guard." In the "Change of Guard", the accused person had laid out an elaborate plan on how an amphibious assault force of 1,000 men would land at the Port of Mombasa as another group of 'airmen' numbering 800 would land at the Jomo Kenyatta International Airport at the crack of dawn on 10th January, 2008 with the aim of capturing State House, the official residence of the President of Kenya.

Your honor, the "Change of Guard" is produced as an exhibit before this court and marked as Prosecution Exhibit Number 1.

After the raid on the hotel by the Special Forces, all the occupants of the East Wing of the said hotel escaped arrest and are believed to have escaped to the lawless Somalia. However on 5th October, 2012 the Kenya Defence Forces (KDF) captured Kisimayu, a port city in Somalia. While pacifying the said city, the accused person was found hiding in a bunker that previously served as the command and control centre of the Al Shabaab militia. She was arrested and handed over to the Military Police at Afmadow who later flew her to Kenya to answer to those charges.

Accused Person:

Yes I was arrested in Kisimayu by the KDF. I was part of the Mujahedeen fighting infidels.

Court

Plea of guilty entered. I have looked at Section 40 (3) of the Penal Code (Cap.63 of the Laws of Kenya). I have no choice but to sentence you to death by firing squad. Since the death penalty is mandatory, it is not necessary to invite you or your counsel to mitigate. It is so ordered.

Right of appeal within 14 days from today's date.

12th October, 2012"

Signed.

Ms Shupavu Noma has instructed you to prepare the necessary instrument of appeal for filing to the court with the requisite appellate jurisdiction. Proceed.

(15 marks)

2. Madam Rebecca Mbuthia loves attending parties, going to discotheques and attending weddings. Her friends generally refer to her as "a party animal". On 6th October, 2011 Ms Mbuthia decided to explore what she described as the 'ends of the world.' She drove to Kisii town, from Nairobi, in the company of her boyfriend called Mr. Yallow Kiche. They arrived in Kisii town at about 6.00p.m. and checked into a hotel called The Storm. After taking some rest, Ms Mbuthia and Mr. Kiche left their hotel room at about 8.30p.m. and headed to a discotheque called Havanna, at the heart of Kisii town. After about one hour, Ms Mbuthia claimed that the music at Havanna was boring and that their alcohol was not as 'sweet'. She prevailed upon Mr. Kiche to agree to relocate to another discotheque within town called 'Dallas'.

On arriving at 'Dallas' discotheque Mr. Kiche submitted to security inspection by way of metal detectors. Mr. Kiche was inspected by Mr. Nyang'au, the male security guard on duty. On the other end of the building Ms Mbuthia adamantly refused to submit to security inspection by Ms Grace Momanyi, the female security guard on duty. During the altercation Ms Mbuthia pinched Ms Momanyi's nose while remarking that Ms. Momanyi 'should know people'. Ms Mbuthia's father the Honorable Steve Biko Mbuthia is the Minister for Internal Security. Hon. Mbuthia has ensured that his daughter is provided with a gun for what he describes as 'self-protection'. Ms Mbuthia whipped out of her handbag a Beretta pistol and used the pistol's butt to hit Ms Momanyi on the forehead. Ms Momanyi bled and was taken to hospital where she was treated and discharged.

On 7th October, 2011 she made a report to Kisii Central Police Station regarding the incident. In the meantime, as soon as a crowd started milling around Ms Momanyi after the gun incident, she fled to her room at the Storm Hotel on a motorcycle. The motorcycle rider, who dropped Ms Mbuthia at the Storm Hotel, is Ms Momanyi's ex-boyfriend one James Msafiri. After dropping Ms Mbuthia, Mr. Msafiri rode to the hospital where Ms Momanyi was under treatment and later escorted her to the police station to make a report. Ms Momanyi's report was booked in as OB.No.4/7/10/2011.

The Officer Commanding Station (OCS) – Kisii Central Police Station Mr. Kutima Mutegi instructed Corporal Macktone Tugee to arrest the culprit immediately. Mr. Msafiri, in the company of Corporal Tugee went to the Storm Hotel and arrested Ms Mbuthia. Her gun was confiscated. Mr. Kiche immediately called the Hon. Mbuthia and gave him a brief of what had happened. Hon. Mbuthia called the OCS and instructed him to not only return the firearm to Ms Mbuthia but to give her armed escort out of Kisii town. Mr. Mutegi obeyed Hon. Mbuthia's instructions. Upon release from police custody at about 10 p.m. Ms Mbuthia and Mr. Keche drove back to Nairobi.

Ms Momanyi has made several trips to the police station seeking police action, in vain. On 12th January, 2012 she wrote a letter to the Kisii Resident Principal State Counsel in the office of the Director of Public Prosecutions (DPP). She followed up with a reminder on 18th May, 2012. The office of the DPP has not responded to her request. Ms Momanyi has called on you in your chambers to draft necessary documents to set in motion the criminal justice system. Proceed.

(15 marks)

3. The following statement was recorded from Ms Sandra Yonga at a police station in Dandora Phase 1 Nairobi County.

"I am Ms Sandra Yonga a business woman dealing in an assortment of merchandise. I mostly ply my trade along Tom Mboya Street in Nairobi. To be precise, I am a hawker, although I call myself a business woman to give myself some stature. I remember very well the events of 20th September, 2012. I belong to a Women's welfare Group (popularly known as chama). We had a meeting in the house of one of our senior most members and founder Ms Winnie Thuku at Landi Mawe Estate in Nairobi. The Chama meeting ended at about 7.30p.m. Since I had taken my motor vehicle (Toyota Prado) to Toyota Kenya for service, I decided to board a taxi to town. The taxi that I boarded plies the South B Estate to Nairobi Central Business District route. The taxi had around eight passengers on board. On reaching Nyayo Stadium, the man seated right behind the driver whipped out a pistol and commandeered the taxi to Mukuru Kwa Njenga

slums. On reaching the slum the man's accomplices inside the taxi - I think they were two - systematically went through each passenger's personal effects taking money and mobile telephones. I lost to the three men Kshs.3,000/= which I had been given at the chama. They also took away my iPhone 3. It was bought by my husband Mr. Yonga on our first wedding anniversary last year.

The man who was seated behind the driver was tall, slender and had a scar on his right cheek. The other two men were of a dark complexion, potbellied and spoke English with a British accent. The robbers abandoned us in the slum. The other passengers and I walked to Industrial Area Police Station where we reported the incident.

On 28th September, 2012, I was called to Industrial Area Police Station to attend an identification parade. I attended three different parades. I positively identified the man who whipped out a pistol and two of his assistants. I later recorded this statement at the Industrial Area Police Station. That is all I wish to state."

Signed.

- a) Draft seven questions that you would pose to the witness while conducting examination in chief.
(7 marks)
 - b) Draft three questions that you would pose to the witness while conducting cross-examination.
(3 marks)
 - c) While leading Ms Yonga in her examination-in-chief, what issues would you highlight to confirm that the identification parade process is unimpeachable.
(5 marks)
4. Mr. Mvuta Toza and his wife Hasusa run a hardware business at Dagoretti Market near Kikuyu. On 08/08/2012 they closed their business at 7.45.p.m and drove in their Toyota Hillux pick-up REG. No.XYZ 333 to their residence at Waithaka, getting there at 8.00.p.m. Mr. Toza was driving.

When Mr. & Mrs. Toza reached their gate but before entering the compound, a car suddenly pulled up. Three men emerged from it, surrounded the pick-up and pointed pistols at Mr. & Mrs. Toza, threatening to shoot them dead if they dared raise any alarm. The three gangsters demanded from Mr. & Mrs. Toza mobile phones and ATM cards. Mr. & Mrs. Toza duly surrendered their mobile phones but said ATM cards were in the house. The gangsters started escorting Mr. & Mrs. Toza to their house but before leaving the gate the gangsters threw some keys to a man in the car and ordered him to drive off. It later transpired that the man was a carjack victim.

Inside the house, the gangsters took away Mr. Toza's ATM card, a TV set valued at Kshs.30,000/= and a refrigerator valued at Kshs.40,000/= and loaded them onto the pick-up valued at Kshs.1,000,000/=. They (gangsters) gagged Hasusa, locked her up in the house, forced Mr. Toza into the pick-up and drove away with him to Kikuyu where they withdrew Kshs.7,000/= from his bank account using his ATM card. The gangsters then bound Mr. Toza's hands and feet and tied him up in the luggage space of the pick-up and drove towards Karen via Dagoretti Market. It

was the gangsters' intention eventually to dump Mr. Toza somewhere after Dagoretti Market but before reaching Karen Trading Centre.

As the three-man gang approached Dagoretti Market, it was intercepted by a rival four-man gang armed with AK-47 rifles and there was a shoot-out between the two gangs. One member of the three-man gang Mr. Sina Bahati was shot dead during the shoot-out while the remaining two members sustained broken legs. Mr. Toza only sustained bruises to his body. The four-man gang then took over Mr. Toza's pick-up with its cargo, abandoned the dead man and his two colleagues who were by then unconscious plus Mr. Toza who was still bound up but otherwise conscious and drove off towards Karen.

Mr. Toza then took advantage of the death of one member of the three-man gang and the unconsciousness of the remaining two members of the gang and shouted for help. Some people in the neighbourhood came to Mr. Toza's rescue. They lent him a mobile phone and he reported both incidents to the police. Following the report, Inspector Fanya Fujjo Uone and Senior Sergeant Njugu Karanga intercepted the four-man gang near Karen at about 10.00p.m. the same evening and arrested the four gangsters. The surviving members of the three-man gang are Messrs Jambazi Sugu and Chaleoleo Mdaku, while the members of the four-man gang are Messrs Mtaka cha Mvunguni, Maskini Halali, Jicho Pevu and Sitaki Goigoi.

Mr. & Mrs. Toza subsequently positively identified Jambazi Sugu and Chaleoleo Mdaku; while Mr. Mvuta Toza, Inspector Fanya Fujjo Uone and Njugu Karanga positively identified Mtaka cha Mvunguni, Maskini Halali, Jicho Pevu and Sitaki Goigoi.

a) What offence(s) is/are disclosed in the above narrative?

(3 marks)

b) Draft the requisite charge(s).

(12 marks)

5. Hon. Jungu Kuu is the Member of Parliament for Shika Lako Constituency of Mbalamwezi County in the Republic of Kenya.

On 21/09/2012, during heated campaigns for the parliamentary by-elections for Shika Lako Constituency, he made certain remarks which did not go down well with some of his political rivals. It was alleged against him that he made remarks to the effect that the indigenous locals had been discriminated against and oppressed for ages during successive regimes of immigrant communities and that time had come for such practices to stop.

A non-governmental organization (NGO) apparently representing the "maligned" immigrant communities formally took exception to the remarks, deeming them to pose a threat to the concerned communities, such as to constitute hate speech within the meaning of Section 13 of the National Cohesion and Integration Act No.12 of 2008 (**extract of the section attached for ready reference**). The NGO began to agitate for Hon. Jungu Kuu's prosecution under that law, maintaining that his remarks were intended to stir up ethnic hatred and that having regard to all the circumstances, ethnic hatred was likely to be stirred up. Consequently, on 28/09/2012 Hon. Jungu Kuu was arraigned before Sitaki Mchezo Chief Magistrate's court in Mbalamwezi County for hate speech.

Hon. Jungu Kuu's initial rejoinder was that in making the impugned remarks he was airing his views on historical injustices and wrongs suffered by his people, which it was his constitutional right to point out, so that such wrongs may be righted.

Subsequently, however, it appears that efforts were made at conciliation of the parties, which is permissible under the Constitution generally and under Sections 49, 51, and 52 of the National Cohesion and Integration Act (**Extract of the three sections attached for ready reference**) and Hon. Jungu Kuu tendered a public apology for the remarks. The apology was publicly acknowledged and accepted by the complaining NGO which said the parties had reached a conciliatory agreement and it (NGO) was now urging the Director of Public Prosecutions (DPP) to terminate the criminal proceedings against Hon. Jungu Kuu after a meeting held between the parties with a view to an out of court settlement.

You are an assistant Director of Public Prosecutions in the DPP's office and have been asked to write a legal opinion on whether or not it is within the DPP's legal powers to terminate the criminal proceedings against Hon. Jungu Kuu and, if so, how and whether it is proper to do so.

- a) What would be your advice to the DPP as to the legality and propriety of terminating the criminal proceedings against Hon. Jungu Kuu?
(5 marks)
 - b) What options are available to the DPP for terminating the criminal proceedings? Which option would you recommend that he takes and why?
(4 marks)
 - c) Draw up the requisite legal instrument for termination of the criminal proceedings against Hon. Jungu Kuu.
(6 marks)
6. John Mugu and his wife Eliza stand charged before the High Court at Kaa Chonjo with murdering Ruth Wairimu, contrary to Section 203 as read with Section 204 of the Penal Code, (Cap.63). The particulars of the offence allege that on the night of 6th/7th October 2012, (1) John Mugu and (2) Eliza Mugu at Matatizo Village in Tiririka County within the Republic of Kenya murdered Ruth Wairimu.

The evidence on record may be summarized as follows:-

PW.1 Scholastica Mumbi, testified that she is the granddaughter of the deceased Ruth Wairimu who was aged about 95 years at the time of her death and that accused 1 is her son. That about a month prior to the deceased's death, her entire family agreed on a scheme to take care of her in monthly turns or shifts. That both accused initially did not want to play any role in the proposed scheme but were pressured to join the scheme and they reluctantly agreed to participate in it. That she (Mumbi) was the first to take the deceased to her home, about 5 kilometres from the accused persons' home and began to take care of her under the scheme. That Mumbi's shift expired on 04/10/2012 and on 05/10/2012 she took the deceased to the accused persons' home at Matatizo village, handed her over to both accused and returned home. That a part from being frail, the deceased was in comparatively good health for her age when Mumbi handed her over to the accused persons.

That on 07/10/2012 Mumbi went to the accused persons' home at about 9.00a.m. for a casual check on the deceased's condition but found her missing. That both accused said the deceased had been admitted in Sina Chuki Government Hospital, some 10 kilometres away. That Mumbi proceeded to the hospital but she was told there was no record of such patient there. That Mumbi then returned to the accused persons' home to question them regarding the deceased's disappearance, and found both accused covering with dry grass a recently dug ground in their shamba, some 20 metres from their house. That both accused said they were planting potatoes but could not explain why they were doing it on that one spot. That when Mumbi insisted on knowing the truth about the deceased's fate, accused 2 told her to ask accused 1. That when Mumbi asked accused 1, he replied in the presence of accused 2 that the deceased had said that since she had become a burden to the family, the accused persons should feel free to bury her and even never bother to tell anybody about it; that the deceased had died the previous night; and that the accused persons buried her the same night.

Mumbi further testified that she was not only horrified about what the accused persons had done but she was also not convinced that they were telling the whole truth. Accordingly, Mumbi straight away went to report her discovery to the area Chief Sitaki Matata who accompanied her to Kalahari Police Station nearby and reported the matter, whereupon the Police took it over and launched investigations into the deceased's disappearance.

PW.2 Chief Sitaki Matata of Changamoto location within which Matatizo village falls testified and corroborated the evidence given by PW1 regarding the report she made to him and how the two of them had gone to report the matter to the police.

PW.3 Simon Jua Kali testified to being a neighbor of the accused persons. That he was present when the deceased was brought to the accused persons' home on 05/10/2012 and that a part from looking frail, the deceased seemed to be in reasonably good health. That PW.3 visited the deceased next in the afternoon of 06/10/2012 and she said she was fine. That PW.3 visited the accused persons' home again at about 8.00a.m. on 07/10/2012 and found the deceased missing. That both accused said the deceased had been admitted in Sina Chuki Hospital. That the accused persons looked restless when they gave PW.3 that report but since he was busy he did not pursue the matter.

PW.4 Chief Inspector Jicho Pevu of Kalahari Police Station testified that after the deceased's disappearance was reported to the police, he conducted investigations into the matter. That in the course of the investigations he, *inter alia*, recorded statements under inquiry from both accused on 10/10/2012. That after he administered the usual caution to them, each accused elected to say nothing. That the investigations included arranging for exhumation of the deceased's body for post-mortem examination, which was conducted by Dr. Msema Kweli, Government Pathologist. That later he (PW.4) handed the accused persons over to superintendent Joackim Nyamachoma for charge and caution statements.

PW.5 Dr. Msema Kweli testified that he is the Government Pathologist. That on 09/10/2012, following a court order, he supervised exhumation of the deceased's body from the accused persons' shamba, about 20 metres from their house. That from that exercise he noted that the grave was shallow and its length shorter than the deceased's stretched body by about 10 centimetres. That thereafter he conducted a post-mortem examination of the body which revealed that the deceased had sustained broken legs before her death. That there were

indications that the deceased had put up a struggle inside the grave as the soil around her body looked disturbed; that the deceased inhaled and swallowed loose soil matching that which surrounded her body which choked her airways; and that in his (PW.5's) opinion the immediate cause of death was suffocation.

PW.6 Superintendent of Police Joackim Nyamachoma testified that on 10/10/2012 PW.4 handed over to him both accused persons for charge and caution statements. That he (PW.6) charged both accused for murdering the deceased. That after he (PW.6) administered the usual caution to them, each accused confessed deliberately killing the deceased on the night of 6th/7th October, 2012 and burying her remains secretly in their shamba at a spot about 10 metres from their house the same night. The court record shows that at the trial both accused retracted their confessions but that both confessions were admitted in evidence after trial-within-a trial.

Assume you are the trial judge before whom the evidence summarized above was tendered. Write your judgement.

(15 marks)

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ANNEXTURE

Section 13 of the National Cohesion and Integration Act No.12 of 2008

Hate Speech

- (1) A person who-
 - (a) Uses threatening, abusive or insulting words or behavior, or displays any written material;
 - (b) Publishes or distributes written material;
 - (c) Publishes or directs the performance the performance of a play;
 - (d) Distributes, shows or plays, a recording of visual images; or
 - (e) Provides, produces or directs a programme,

which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behavior commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.

- (2) Any person who commits an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.
- (3) In this section, “**ethnic hatred**” means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

Section 49 of the National Cohesion and Integration Act No.12 of 2008

Commission to refer complaints for conciliation

- (1) If the Commission considers it reasonably possible that a complaint may be conciliated successfully, the Commission shall refer the complaint to the Secretary.
- (2) Subsection (1) does not apply to a complaint-
 - (a) that the Commission has declined to entertain under section 45 or dismissed under section 47;
 - (b) that the Minister has referred to the Commission under section 48; or
 - (c) if an application to the Commission by a respondent under section 46 is pending.

Section 51 of the National Cohesion and Integration Act No.12 of 2008

Conciliation by Commission

The Commission shall make all reasonable endeavours to conciliate a complaint referred to it under section 49 and may, by written notice, require any person to-

- (a) attend before the Commission for the purpose of discussing the subject matter of the complaint;
or
- (b) produce any documents specified in the notice.

Section 52 of the National Cohesion and Integration Act No.12 of 2008

Conciliation agreements

If, following conciliation, the parties to the complaint reach agreement with respect to the subject matter of the complaint, the Secretary shall record the agreement and the parties shall be bound to comply with such agreement as if it were an order of the commission.