

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 101: CRIMINAL LITIGATION

TUESDAY 15TH NOVEMBER, 2011

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. Mr. Mwanyikira Mwadume was charged with the offence of theft by servant contrary to Section 28 of the Penal Code (Cap. 63 of the Laws of Kenya). He was tried and convicted of the offence and sentenced accordingly. The typed and certified proceedings read as follows:

13th December, 2009

Coram
 Before the Honourable Matata SRM
 Accused present (in person)
 Prosecutor Present – Ndume
 Court Clerk Ms Chapa

The substance of the charge was read to him (the accused person).

Accused Person: I did not steal the computer. I bought it from an office auction conducted on 10th December, 2009

Court: plea of Not Guilty Entered
 Hearing to proceed on 16th December, 2009 before this court

Accused: I wish to apply for cash bail, witness statements of all prosecution witnesses and copies of prosecution exhibits

Prosecutor: I have nothing to say in response to the application

Court: Cash bail of Kshs.50, 000 granted, prosecution to supply defense with all the documents they intend to rely on at the trial together with witness statements.

Signed by Hon. Matata:
 13.12.2009

Coram
 Hon Matata
 Accused present (in person)
 Prosecutor present (Ndume)
 Court Clerk (Aisha)

Prosecutor: I am ready to proceed, I have two witnesses.

Accused: I am not ready to proceed. I do not have any good reason but I just do not feel like proceeding with this matter today.

Court: Matter to proceed at 11.00 a.m.

At 11.00 a.m.

Prosecutor: your honour I am ready to proceed.

PW1 I am Mr. Mutesi Marijuana. I remember very well on 10th December, 2009. I was on duty at Papa Ltd offices in Industrial area along Enterprise Road Nairobi discharging my duties as a guard. It was at about 4.30 p.m. when the accused person, Mr. Mwadume, left the office complex and walked towards the gate. He was carrying a brown bag. I was suspicious of the contents of the said bag and I immediately caused him to avail it to me for a random inspection. He initially resisted to submit to the proposed inspection but he eventually agreed. On searching the bag, I came across a computer. I retrieved the computer and then arrested him. I took him to the Managing Director's office and handed him over to the Managing Director of Papa Ltd. I also left the computer in the Managing Director's office. I have since not seen the material computer. That is all I have to say.

Signed by Hon. Matata
16.12.2009

Cross examination of PW1 by Accused:

I do know you very well. The computer the subject of the charges is not in court.

Signed by Hon. Matata
16.12.2009

Prosecutor: I have no re-examination

PW2 I am Police constable S.K. Waweru force number 102010 based at Industrial Area Police Station. Yes I remember on 10.12.2009 at about 1.00 p.m. I was manning the report desk at the Dudu Police Station when the accused person was brought to the station for having been found in possession of a computer reportedly stolen from his employer. He was brought by the Managing Director of Papa Ltd one Mr. Gabi Mwash. I immediately rearrested him prepared the present charges facing him and brought him to court. That is all.

Signed by Hon. Matata
16.12.2009

RULING

I have evaluated the evidence on record; my conclusion is that the accused person has a case to answer. Defence hearing to take place on 04.01.2010

Signed by Hon. Matata
16.12.2009

Coram
 Hon. Matata
 Accused Person (Absent)
 Prosecutor present (Ndume)
 Court Clerk Ms Chapa

Prosecutor: the accused person is remanded in Industrial Area Prison. He should have been here to conduct his defence hearing. In his absence I urge this court to treat his defence as closed and proceed to give a date for judgement.

Court: As a judicial officer, I discharge my duties independent of prison authorities. I do not know why the officer in charge of Industrial Area Remand Prison failed to produce the accused person in court. Nevertheless I order defence closed. Judgement will be delivered on 20th January, 2010 at 9.00 a.m.

Signed by Hon. Matata (SRM)
 04.01.2010

Coram
 Hon. Matata SRM
 Accused Present (in person)
 Prosecutor (Absent)
 Court Clerk (Absent)

Court: judgement of this court is ready.

JUDGEMENT

The accused person, Mr. Mwanyikira Mwadume was charged before this court on 13.12.2009 with the offence of theft by servant contrary to Section 281 of the Penal Code. The prosecution called two witnesses. Their testimony was very credible. The defence did not adduce any evidence to controvert prosecution evidence. I accordingly find the accused person guilty and accordingly convict him.

Delivered on this 20th January, 2010

Signed by Hon. Matata (SRM)

Court: convict do you have anything to say in mitigation?

Convict: no. I have nothing to say.

Court: I sentence you to 16 years in prison with hard labour and 10 strokes of the cane. It is so ordered. The sentence to be executed by the officer in charge of Industrial Area Prison.

Signed by the Honourable Matata (SRM)
 20th January, 2010

You have been instructed by Mr. Mwadime to file an appeal against the conviction and sentence.

- a) Prepare the necessary instrument of appeal. (8 marks)
 - b) Assuming you receive instructions to appeal and typed proceedings on 20th January, 2011 prepare the necessary application to file the appeal out of time. (7 marks)
2. Mr. Ali Makame is a resident of Kibera's Sarah Ng'ombe Estate. He is a prominent butcher owning a string of butcheries across the Kibera neighbourhood. His business is headquartered at Sarah Ng'ombe at a butchery called 'Republic of Kibera.' Mr. Makame also sells boiled goat heads and traditional sausages commonly known as Mutura. On 15th of March, 2011, one of Mr. Makame's most consistent customers Madam Babe visited 'Republic of Kibera' and ordered a mug of soup and one quarter kilo of boiled meat. She was served by her favourite waiter, Mr. Kabita.

As soon as she settled down to enjoy her soup Mr. Makame entered the butchery and immediately noticed her presence. Mr. Makame was not pleased to see her because of the events of the evening of 14th of March, 2011. Madam Babe and Mr. Makame had gone to a local bar and called 'Sina Chuki' and had several drinks. After taking several drinks Madam Babe noticed Sarah Ng'ombe's reigning wrestling champion Bwana Osama seated at a corner alone. She moved from Mr. Makame's table to join Osama. This move infuriated Mr. Makame so much. He moved towards Osama's table but on recognizing Osama as the famed wrestling champion he backed off. He started shouting obscenities at Madam Babe, from a safe distance asking for a refund for his drinks in vain. In disappointment, he had staggered to his house.

Makame, on 15th March, 2011, stealthily moved to Madam Babe's table grabbed the mug of hot soup and then poured it on Madam Babe's face scalding her. He punched her on the face, breaking her nose. He kicked her in the abdomen after which Mr. Kabita intervened and pushed Mr. Makame away, facilitating Madam Babe's quick exit from the 'Republic of Kibera.' Bleeding profusely, Madam Babe went to Ungawa Clinic within Kibera for first aid. After her bleeding was controlled she was referred to Kenyatta National Hospital for further treatment. She was admitted to Kenyatta National Hospital for several days and discharged. On being discharged she went to Sarah Ng'ombe Police Station on 2nd of April, 2011 and reported the incident. The incident was booked as OB No.2/2/04/2011. She was eventually given a P3 from which was duly filled by a government doctor clearly certifying the injuries sustained as grievous. Madam Babe returned the P3 form to the Police Station and the same was received. Having recorded her statement as has Mr. Kabita, she has since then visited the said Police Station over ten times to press for the arrest and charge of Mr. Makame with no success. During the last visit, on 30th July, 2011, Madam Babe met the officer commanding Sarah Ng'ombe Station, Inspector Afande. Inspector Afande categorically told Madam Babe that he was not going to arrest Mr. Makame because he was an important member of the society. He (Inspector Afande) did not elaborate. Madam Babe has, since 2nd of August, 2011 camped at the office of the Director of Public Prosecutions (DPP) seeking the arrest and trial of the said Mr. Makame. She made it a daily habit to visit the DPP's offices. On 6th August, 2011, she was briefly arrested for allegedly trespassing at the DPP's office and was thereafter released without any charge being preferred against her.

On 8th August, 2011 she was once more arrested for allegedly making noise at the reception of the DPP's office. She was, once more, released without any charge. On 9th August, 2011, she was arrested for being a 'general nuisance' at the DPP's office but once again released without charge. On 10th August, 2011, the DPP's spokesman Mr. Kwenu released a press statement in which he said that the DPP had called for Madam Babe's file, reviewed it and concluded that events of 15th March, 2011 did not constitute an offence known to Kenyan Law. Accordingly, the DPP had directed the closure of Madam Babe's file.

Madam Babe is so distraught. She calls on you in your chambers.

(a) With the help of case law, advise Madam Babe on the possible remedies at her disposal and preconditions necessary to achieve the remedy.

(5 marks)

(b) Draw the necessary documents to achieve the remedy/remedies contemplated at (a) above.

(10 marks)

3. On 16th of March, 2011 the Minister for Internal Security issued the following legal notice that appeared in the Gazette Notice, Special Edition of the said date:

"Legal Notice No. 120 of 2011

Pursuant to the powers vested in me by Section 40 of the Penal Code Cap. 63 of the Laws of Kenya and pursuant to executive powers inherent in the holder of the office of Minister for Internal Security, I hereby proclaim Mr. Moodi Moodi a terrorist and designate him as such. Pursuant to this Legal Notice and in further exercise of my inherent powers I hereby direct the Commissioner of Police to shoot to kill the said Mr. Moodi Moodi on site upon being sighted.

Signed by Hon. Tumbo Mbele

Honourable Minister in Charge of Internal Security, Republic of Kenya"

As soon as the Legal Notice is published Mr. Moodi learns of the terror designation and the shoot to kill order made by the Minister. On surfing the internet, Mr. Moodi learns that he is on the Anti-Terror Police Unit's (ATPU) website as a most wanted terror suspect. On the said ATPU website Mr. Moodi is described as a Senior Military Commander of an outfit called Sabaot Land Defence Force, a rag tag gang that is believed to have caused terror amongst villagers in Bungoma County in the year 2007. Mr. Moodi's profile indicates that he was in charge of the central command of the rag tag army and he is believed to have led a raid on Cheichei village during which men, women and children were killed and a large section of the population forcibly displaced on grounds that they had invaded Mr. Moodi's ancestral land 'without his permission as the Governor General.'

On 17th of March, 2011 the Commissioner of Police was quoted by a local daily called *NewsBash* saying at a passing out parade at Kiganjo Police Training School that he had received the order from the Minister for Internal Security and that he would later on release a press statement. Later in the afternoon, he released the following press statement:

Members of the press and public at large, I have received several inquiries on the action the Police Service will take regarding Legal Notice No. 120 of 2011. May I inform the general public and Mr. Moodi, wherever he may be hiding, that we will deploy our capabilities that have a vast reach throughout the Republic of Kenya to execute the Honourable Minister's directive. I have said from time to time that in keeping with the new constitution the police service is subordinate and shall at all-time remain subordinate to democratically elected civilian authority. That being the case I have instructed all the Provincial Police Officers to ensure Honourable Tumbo's directive is complied with fully, without exception. Mr. Moodi and his type be warned. You will see fire.

Signed by the Commissioner of Police
17th March, 2011"

Mr. Moodi has been hiding in caves in Mt. Elgon in Western Kenya since he learnt of this Legal Notice. He is now tired of hiding in caves as last night he was almost killed by a cobra bite in one of the caves known as *Tora Bora*.

Mr. Moodi comes to your chambers today in Kitale Town, Trans Nzoia County and recounts the foregoing sequence of events to you. He has now instructed you to take the necessary legal proceedings in a court of law to secure his life and liberty as various demonstrations by human rights activists in his support have borne no positive results.

- (a) What remedies will you propose to him in protection of his rights to life and liberty
(2 marks)
- (b) Draft the necessary papers for **LEAVE STAGE ONLY** in effectuating the proposed remedies.
(13 marks)

4. Papa Soni, a Kenyan national has just graduated with his Masters in International Law (International Criminal Law) from the prestigious Yale Law School in the United States of America. He was last in Kenya in 1999 when he had attended his grandfather's funeral, and it has been now over a decade since he visited Kenya. Upon his graduation he deemed it fit to return home and take his fiancée Lisa Bayle to his rural home and basically to demonstrate to her his humble background. They both arrived in Nairobi on 27th November, 2010 for their holiday cum Christmas vacation. On the 28th November, 2010, Papa Soni was informed that the place to revel and hang out is called "Biders Lounge" situated on the second floor of Dinn Plaza in the Kilimani Suburbs of Nairobi.

On the evening of 28th November, 2011, Soni and Lisa in the company of Soni's cousin Allan and his girlfriend Catherine took Allan's Toyota Land Cruiser VX and drove to Biders Lounge. It was a very good night as they all compared notes while consuming alcoholic beverages at the bar and restaurant. There was also a group nearby of five men who were also taking alcoholic drinks. Soni being a snooker/pool enthusiast decided to play a game of pool. In the course of playing pool, Soni realized that a member of the other group had approached his fiancée and a lively discussion had ensued. He remained calm as it was evident that Allan was in control. It soon became apparent that this gentleman was adamant and defiant. His defiance prompted Soni to politely request him to get back to his table but he remained adamant prompting a scuffle. Naturally, Soni was furious and started shouting. The shouting and exchange of words quickly

metamorphosed into a fist fight between Soni and the stranger. Eventually the scuffle turned to a full blown war between Soni's group and the other group in the bar. The Chief Security Officer was called and he immediately instructed two guards, Phillip Musau and John Verdi to calm the situation. This was around 3.00 a.m. in the morning. Both Phillip and John swiftly took action and removed the common enemy (Wesley) and gave him marching orders outside the club. The said guards escorted Wesley to his car and remained vigilant to stop him from coming back to the club. In the meantime, another guard (Tony) escorted Soni and his group out of the club up to the parking but the two camps kept on shouting at each other.

While outside the club, Wesley came out of his car and dared Soni to a fist fight. Wesley and Soni were again restrained by the Security Officers and Allan drove off towards the City Centre in the company of Soni and their girlfriends.

On approaching the Hurlingham roundabout Allan saw a maroon Mercedes Benz Reg. KBS 201H blocking him at the front. Upon close scrutiny it became apparent that this was Wesley, the same individual who had caused a fracas in the club. Wesley immediately came out of the car fuming with rage and claimed that Soni was under arrest and as a police officer he had the right to arrest Soni. Soni came out of the car and questioned the rationale and the basis for the arrest. When it was evident that he was resisting arrest Wesley fished out his firearm and shot Soni on the chest, and drove off. Allan, obviously shocked by the turn of events drove to Nairobi Women's Hospital where Soni was pronounced dead on arrival. Allan immediately rushed to Kilimani Police Station to lodge a complaint. Apparently, Wesley was a police reservist and had driven to Central Police Station where he reported that he had shot a gentleman who had resisted arrest. Investigations on the fatal shooting of Papa Soni were launched leading to the arrest of Wesley Mbugua who was arraigned in court and charged with murder contrary to Sections 203 and 204 of the Penal Code.

During the trial PW1 (Phillip) testified that at around 3.00 a.m. he was called to calm the situation as two groups were engaged in a fight, and he managed to send the two groups out of the club. PW2 (John) and PW3 (Tony) basically reiterated the evidence of PW1. PW4 (Allan) gave a detailed account of how Wesley approached Lisa in the club without Soni's consent thereby provoking Soni and which provocation resulted to a commotion. He also testified on how Wesley followed them outside the club and was restrained by the guards. He also stated how Wesley followed them and blocked them as they approached Hurlingham roundabout. PW5 (Lisa) also emphasized what Allan had stated in his testimony. PW6 was the medical doctor (Dr. Dan) who examined Soni and pronounced him dead. He produced an autopsy report which states the cause of death was as multiple organs injuries from gunshot wounds.

PW7 was Inspector Gordon Scholla who received the complaint, conducted investigations and also visited the scene of crime. He confirmed in evidence that Inspector Wesley Mbugua had confessed to shooting Soni on the ground that he had resisted arrest.

PW8 (Mr. Vincent Apollo) a fireman examiner attached to the C.I.D confirmed that he had examined the pistol and it was Belgian made caliber 9mm gun. He further confirmed that two expended cartridges were fired from the pistol.

PW9 (Mr. Garang Ayudo) was the only independent eye witness and was working as a pump attendant at the nearby Kobil Petrol Station and he could witness the events at the scene of crime.

At the close of prosecution case, the accused person was placed on his defence and he gave an unsworn testimony to the effect that he was in the circumstances provoked by the insults hurled at him by the deceased and was as a matter of fact assaulted and as a law enforcement agent he thought it fit that the deceased should be arrested. He said he did not pull the trigger that resulted in the fatal shooting of the deceased. He also took issue with the firearm that was produced in court and contended that it was not the one that was issued to him.

In the light of the facts narrated above, and in your capacity as the presiding judge, prepare the judgement.

(15 marks)

5. Shem Achuodho and Millicent Akinyi are Kenyan nationals who have been working for gain as an Accountant and Administrative Assistant respectively with Kabongo Safaris Limited, a tour and travel company based in Morogoro area in the outskirts of Dar-es-Saalam, in the United Republic of Tanzania. During the Easter vacation, both Shem and Millicent were left in charge of the office. Upon resumption of duty the manager established that some travellers cheques worth £350,000 were missing. When investigations were conducted, it became apparent that Shem and Millicent might have played a role in the disappearance of the said cheques. They were both suspended from duty pending the outcome of investigations.

Shem and Millicent apparently apprehensive at the outcome of the said investigations elected to move away from Dar-es-Saalam and sought refuge in Kenya. They both relocated to Kenya and rented an apartment in the posh Kilimani area of Nairobi

In the meantime, the investigations revealed that Shem and Millicent were culpable and it was recommended that they be questioned on their role since that they were the custodians of the office at the time the cheques disappeared. It is at this juncture that the Morogoro police officers realized that Shem and Millicent were missing and accordingly prepared warrants of arrest for them. Further investigations have revealed that Shem and Millicent are in Nairobi. The warrants of arrest were endorsed by the Chief Magistrate in Morogoro, Dares-Saalam as well as a charge sheet reflecting that Shem and Millicent have been accused of conspiracy to commit a felony and stealing travellers cheques worth £350,000. The said police officers have made up their mind that they should seek the assistance of the Kenyan authorities to have both Shem and Millicent taken to Dar-es-Saalam to face trial.

- (a) You were recently appointed a state Counsel in the office of Director of Public Prosecutions; and the DPP has instructed you to initiate the process of surrendering both Shem and Millicent to Morogoro. Advise the DPP on the requisite practical steps that would ensure you have properly executed his instructions.

(7.5 marks)

- (b) With reference to relevant and appropriate statutory and case law, what kind of evidence do you need to tender in the appropriate court bearing in mind the applicable principles to ensure the surrender of Shem and Millicent.

(7.5 marks)

6. Ali Baba, a renowned saxophonist and guitarist had recently established a musical school for training children aged 14 to 17 on how to play a piano, guitar, a saxophone and other musical instruments. Ali Baba is aged 44 and is not married. He set up the musical school within his residence in Kyuma, and merely converted one of his guest houses to be the training centre.

Occasionally after the music lessons, he would invite his trainees to a swimming lesson and towards the end he would invite them to a sumptuous dinner where they would engage in lively discussions on what it takes to become a musician. It transpired that in the course of the training he developed an emotional attachment to Liz and Bella who were his favourite students. They were both aged 15 and 16 respectively. Liz and Bella attended Kianda School and would attend the music lessons every evening. It was agreed between Ali Baba and their parents that he would always drop them in their respective homes. It turned out that in the course of the private lessons, Ali Baba took advantage of the ignorance, naivety and innocence of the young girls and lured them into having sexual intercourse with them in the car. He apparently infected them with herpes, a sexually transmitted infection. This came to light when the young girls complained to their parents about their medical condition. The doctor's report revealed the nature of the infections which prompted the parents of Bella and Liz to lodge a complaint at Milimani Police Station.

Ali Baba was arrested and charged with the offence of defilement contrary to Sections 8(1) and 2 of the Sexual Offences Act of 2006. During the trial, evidence was led that Ali Baba had lured the minors to have sexual intercourse with him against their wish and the parents testified to the effect that they were informed by their daughters on what had transpired, in effect corroborating the testimony of the complainants. The medical doctor gave evidence as to the source and nature of the sexually transmitted disease. There was no evidence that was led as to the age of the complainants and during cross-examination of an officer from the children's department he was at pains to tell the age of the complainants. During cross-examination of the complainants it turned out that Bella was 14 and Liz was 17 contrary to what had been indicated in the charge sheet. The charge sheet reflected ages 15 and 16 respectively. At that juncture no attempt was made to amend the charge sheet.

At the close of the prosecution case, the Hon. Magistrate (Delila Omondi) found that the accused person had a case to answer, and put him on his defence. He elected to remain silent and the court eventually found him guilty of the offence of defilement. When delivering the judgement, Hon. Omondi unilaterally amended the charge sheet to reflect defilement contrary to Section 3 of the Sexual Offences Act which prescribes a punishment of not more than fifteen years imprisonment; and having heard the mitigation, namely that Ali Baba suffers from prostate cancer and attends chemotherapy on a weekly basis at MP Shah Hospital, proceeded to sentence him to serve twenty years imprisonment.

- (a) Ali Baba is naturally aggrieved by the unfolding events and has instructed the firm of Cliff and Allan Advocates; a renowned criminal litigation firm to which you have been recently recruited as a junior associate. The head of litigation has assigned you Ali Baba's brief and seeks your legal opinion on the way forward.

(5 marks)

- (b) Prepare the relevant documents to be lodged in court.

(10 marks)

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EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 101: CRIMINAL LITIGATION

TUESDAY 19TH JULY, 2011

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. Anthony Keane and his wife Colin Keane whom he had recently wedded elected to travel to Barbados and Bermuda to celebrate their honeymoon. Accordingly, Anthony who is a career hotelier and Colin who is an aerobatics instructor at Lani Hotel, took some time off from work. Prior to their marriage which was solemnized at the Kiperu Pentecostal Church in the Landi Mawe Estate, Nairobi County, Colin used to live with her parents in Kamiti Estate while Anthony lived in Landi Mawe estate where he had rented an apartment (a three bedroomed flat)

Their scheduled flight out of the country was on the 24th January, 2011 (KLM). Since the newly wedded couple were to remain out of the country for two weeks, Anthony approached his next door neighbour Nigel and sought the services of her son Jayden as a caretaker, to take care and watch over his apartment for the two week period that he would be away.

Nigel, who is a divorcee and a single mother, did not immediately accede to the request but as such told Anthony that he was to consult Jayden prior to making any undertaking or commitment. She referred Anthony to Jayden and upon consultations, Jayden humbly agreed to take care of the apartment while the occupier was away. The keys to the house were handed over to him.

Jayden, who just turned 18 years and was awaiting his Kenya Certificate of Secondary Education results was elated to be the custodian of the house for the two week period. Anthony and Colin left the country on the 24th January 2011 as scheduled.

Jayden spent the first two nights in the apartment. On the 28th January 2011, Jayden who is an ardent basketball fan went to the local stadium to support his local team (Landi Mawe Club) which was playing its archrival (Rundstarian Area Club). The basketball match ended in disarray as hooligans who were aggrieved by a decision of the referee not to award penalty invaded the pitch and chaos ensued. Jayden lost the keys to the house in the melee

He returned home and informed this mother that he had misplaced the keys to the house. He did not have the cell phone number for Anthony and thus he was unable to communicate with him. He stayed at his mother's home for the rest of the day. Meanwhile, the two week honeymoon period lapsed and the couple returned home. Upon returning home and while on their way to the apartment, Anthony was shocked to find the padlock of the grill door vandalized. He only needed to push the wooden door and the door was open. Upon entering the house, he was further shocked to realize that assorted equipment in his living room were all gone, to wit hometheatre, DVD, VCD, Laptop and in his bedroom his safe which contained Kshs.250,000 had disappeared as well.

He immediately rushed to Jayden's house and reported the matter to the mother. Jayden's mother who was equally alarmed raised Jayden on his cell phone. Jayden also sounded shocked by the development. Anthony was dissatisfied with the explanation proffered by Jayden and the mother and immediately reported to the nearby police station.

The police who visited the crime scene conducted investigations and formed the view that Jayden was responsible for the offence. He was subsequently arrested.

- (a) Discuss the offences disclosed by the narrative above and draft appropriate charges.

(8 marks)

- (b) Jayden has appointed you as defence counsel and has informed you of the date when he is supposed to take plea at Kibera District Magistrates Courts.

Advise Jayden on the vital applications that you would make in court on that day.

2. Andrew Chichanto, a renowned music teacher and thespian works at Jada International School. and besides teaching he runs his music and art school called "Musicart Entertainment". Since the music and art school is a start up business and is still experiencing teething problems in terms of finances and clients, Andrew has elected to convert his garage at his Kileleshwa residence and has redesigned it for purposes of running his music and art school. Andrew's specialized niche in music and film business has endeared him to young teens and adolescents who have a dream of pursuing a career in the music and film industry. Among his first clients were Nini, Perpetua and Agneta who are young girls aged 12, 13 and 14 respectively. They all live in the Kileleshwa neighbourhood and they attend the nearby Kileleshwa Preparatory School. They are all music and film enthusiasts but because of school during the day, they usually attend music lessons at Musicart Entertainment from 5.00 – 7.00 p.m. on weekdays and from 2.00 – 5.00 p.m. on weekends. Andrew made it a routine to offer the girls dinner or tea after every music lesson. Naturally, he established a rapport with them and they all became fond of one another. Andrew started developing affection for the girls and separately intimated his interest and desire to get intimate with them. To execute his mission, Andrew arranged private lessons for each of them. A new schedule was prepared and Nini was to attend on Mondays, Perpetua on Wednesdays and Agneta on Fridays. After the private lessons Andrew through trickery and deceit managed to lure the girls and as a consequence had sexual relations with them discreetly. When they all realized Andrew's scheme, all hell broke loose and they reported incidents to their parents and Andrew was arrested.

- (a) Andrew has been arraigned before your court on charges of defilement contrary to section 8(1) of the Sexual Offences Act, and he has pleaded guilty to the charges.

Outline the procedure and requisite steps that you will follow until conclusion of the matter.

(8 marks)

- (b) Assuming Andrew has pleaded not guilty to the charges, and you are faced with rival submissions both from the prosecution and the defence counsel on the issue of bail pending trial, what are the relevant considerations that you would bear in mind in deciding whether or not to grant bail.

3. Kavina Mali ya Mungu was a private askari guarding Kilimambogo Enterprises, a micro finance firm situated in the Kadima area on the outskirts of Kawangware on the border of Kawangware and Lavington area. On the night of 24th February 2011 while on duty at Kilimambogo Enterprises, unknown people armed with machetes and rungas/clubs invaded the said Kilimambogo Enterprises, and sought to gain entry into the offices by force. Kavina in his diligent manner tried to resist the forcible entry and whereupon the assailants attacked him and rained blows and clubs on his body, causing grievous bodily harm that left him unconscious. The foregoing notwithstanding, Kavina managed to sound the alarm which went off. By then, the thugs had already broken the door and had carted away valuable equipment and goods and specifically made away with the safe which contained Kshs.1,000,000. Kavina was arrested and subsequently charged with two counts of conspiracy to stealing and burglary.

Kavina is really worried about what would transpire once he is arraigned in court because, being a layman and a man of straw, he does not understand how the criminal justice system works in Kenya.

He has been advised to visit the Kenya School of Law Legal Aid Clinic and where he has been assured he will get free legal advice.

Advise Kavina on the salient features of a criminal trial process.

(15 marks)

4. (a) Distinguish between revision and appeal in the criminal justice system. **(5 marks)**
- (b) Briefly discuss the principles that would guide the high court when it is called upon to invoke its revisionary jurisdiction on the one hand and the exercise of its appellate jurisdiction. **(5 marks)**
- (c) Describe the procedure process to be followed when seeking revision and appeal. **(5 marks)**
5. Aisha Mwateta had met her fiancé Job Wamalwa in 2006 while they were both pursuing their undergraduate studies at the prestigious London School of Economics. They successfully completed their Bachelors degrees in Business in 2009 when they elected to return home, and pursue their respective careers in the business world.

Aisha secured a job at a multinational telecommunications company and Job went into private business. They solemnized their union in August 2009 and have been living as man and wife since then. They were blessed with a child at the start of 2010. Their marriage started experiencing problems and eventually became acrimonious and they parted ways. Job left the matrimonial home and went to live with his longtime girlfriend Bella whom was apparently instrumental in the breakdown of his marriage with Aisha. Aisha in the meantime filed for divorce and during the pendency of the divorce proceedings she met Polycap with who she started cohabiting. The principle reasons why Aisha elected to part ways with Job were because of his adulterous adventures and extremely violent behavior. The divorce was eventually allowed and Aisha was at liberty to marry Polycap legally.

On the 28th April 2011 while having a drink at his local public house with his acquaintances, Job spotted Aisha strolling into the same public house accompanied by Polycap who was by then unknown to Job. Job became angry and furious. Overwhelmed with rage, he confronted Aisha and demanded to know who the gentleman was and what business had brought her to the public house. In a fit of rage, he punched Aisha on the face causing her to fall down unconscious. Polycap quickly picked her up and rushed her to hospital.

On the 30th of April 2011, Job decided to show up at Aisha's place of abode ostensibly to find out how their son was doing. Upon reaching the house, it became apparent to him that Aisha was unwilling to open the door. Clearly alarmed by the unfolding events, Job banged the door and threatened to shoot Aisha if she did not let him in.

Aisha reluctantly opened the door and Job stepped in. In a fit of rage, he drew a gun and shot directly at Aisha. Luckily, she ducked and the bullet hit the wall unit. Job was relentless and proceeded towards where Aisha had hidden herself and he started hitting her. He took a piece of cloth and unsuccessfully tried to strangle her. The house help who was aged 14 had already raised an alarm outside by screaming and had attracted the attention of neighbours. The police were alerted and upon their arrival arrested Job and took him to the nearby police station. Job was charged with attempted murder, and assault causing grievous bodily harm. He pleaded not guilty to the charges and the prosecution presented witnesses who testified as follows:

PW1 - Aisha who gave a narrative on how Job stormed into the house and without justification shot at her. Aisha also reiterated the fact that it was not the first time Job had pointed a gun at

her threatening to shoot her. She also recounted to the court what had transpired at the public house.

PW2 – Mary (the house help); reiterated what Aisha had stated.

PW3 – John – (next door neighbour)

PW4 – Paul – the Investigating Officer who visited the scene of crime and recounted what he saw and explained to the court the investigations he carried out.

PW5 – Polycap who narrated to the court his story based on information received from Aisha.

PW6 – Dr. Kamau the medical doctor who examined Aisha and testified that she suffered bruises on the neck and hand.

You are the presiding magistrate and you are faced with two rival submissions at the close of prosecution case.

Prepare your draft ruling.

(15 marks)

6. (a) With the aid of decided cases, critically discuss the constitutionality or otherwise of section 203 as read with section 204 of the Penal Code (Cap. 63, Laws of Kenya) and the impact of that case law on the mandate of courts to mete out appropriate punishment in the sentencing phase of a criminal trial process.

(10 marks)

- (c) In light of (a) above, suggest reforms that you deem necessary in the sentencing procedure in Kenya's criminal justice system.

(5 marks)

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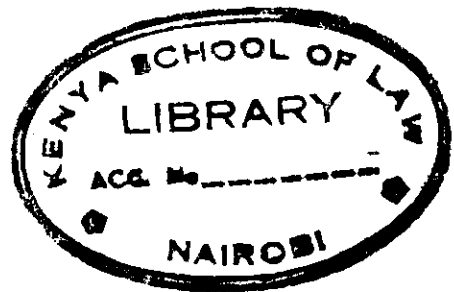


EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 101: CRIMINAL LITIGATION

TUESDAY 2ND NOVEMBER, 2010

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. Mr. Gul Adodo was born on 20th December 1970 in the Kenyan County of Machakos to Kenyan parents, Mr. and Mrs. Bul Adodo. In 1993, Gul's father was posted to Japan as a diplomat by the Ministry of Foreign Affairs. Gul travelled with his father to Japan, stayed in Tokyo, for one year then returned to Kenya. He did not like life in Tokyo describing it as boring. In the year 2006, Bul was transferred to Jamaica. Gul was very excited by the new posting of his father and whispered to his friends that his life time dream of visiting the burial place of the late Bob Marley, a renown reggae musician was at hand. As soon as Bul reported to Kingston, Jamaica, Gul resigned from his job at Tamu Tamu enterprises Ltd and joined his father in Jamaica. He stayed with his father in Jamaica for 3 years during which period he developed a habit of smoking *cannabis sativa* otherwise known as bhang.

In September 2009, Gul was arrested in the upmarket Radon Estate in Kingston while leading a militia gang of twenty men (Rudd Boys) on a revenge mission against a rival gang. The clash between the two rival gangs left three gang members from both sides dead. He was immediately deported, after it was realized that he had a diplomatic passport and enjoyed diplomatic immunity before Jamaican Courts. He arrived in Nairobi on 30th September, 2009. On 15th April 2010 there was a terrorist attack in Jamaica in a country called Miami Dade. During the attack seventy five people were killed.

The Jamaican National Security Intelligence Service launched a massive manhunt for the attackers. With the assistance of the American Federal Bureau of Investigations (FBI) the investigations zeroed in on Rudd Boys. A review of gathered intelligence indicated that Rudd Boys planned the attack with a view to decimating the rival gang. Intercepted emails, facebook communication and related blogs indicated that Gul was the brains behind the attack. The investigations report compiled indicated that after Gul's deportation from Jamaica in September, 2009, he sent an email to his former gang members urging them to deal their enemies what he described as a 'mortal blow'. In response to the email, Rudd Boys' operations chief Mr. Walter Walls addressed an email to Gul seeking directions on how to conduct the attack. In a document titled "Reclaiming our Honour", Gul advised Mr. Walls to buy a van and pack it with explosive materials. In addition Mr. Walls was directed to get a volunteer "Martyr" who would drive the van into Miami Dade's Bob House, the perceived headquarters of the rival militia gang. Gul's instructions were executed to the letter leading to the seventy five deaths.

In Jamaica, Mr. Walls and three gang members are in custody pending trial for terror related charges under Jamaica's Suppression of Terrorism Act, Number 20 of 2003. Interpol was requested by Jamaican authorities to assist in apprehending Gul and sending him to Jamaica to stand trial. A report from the Ministry of Foreign Affairs confirms that there is an Extradition Treaty between Jamaica and Kenya. As soon as this information was relayed to the Commissioner of Police of the Republic of Kenya, he ordered the immediate arrest of Gul. The Police Headquarters Chief Legal Officer in an opinion to the Commissioner advised that it would be appropriate to commence extradition proceedings. The Commissioner of Police declined to implement the opinion claiming that the Kenyan Judiciary is too slow and easy to compromise. He proposed to the Chief Legal Officer to copy what Americans refer to as "extraordinary rendition" (meaning transferring of suspects from one jurisdiction to another without following due process). After lengthy strategy sessions, it was agreed that as a middle ground, the Minister for Immigration be requested to sign a deportation order, deporting Gul to Jamaica whereupon he would stand trial. The Minister for Immigration is approached and he agrees to sign the order pursuant to Section 8 of the Immigration Act (Cap.172) (See annexed excerpt of Section 8 Cap.172).

In the meantime, Gul has been under house arrest where his legal counsel Mr. Janja Jeuri has had unhindered access to him. On 20th September, 2010 Gul in the Company of his legal counsel were

airlines were unwilling to take Gul on board. The earliest flight to Jamaica through Johannesburg was available on 2nd November 2010.

Mr. Jeuri, your partner is angry at the intended police action and recommends to you a court challenge by way of Judicial Review.

- (a) Which order/writs will you seek? **(3 marks)**
- (b) Draft the relevant documents for grant of the orders referred to in (a) above (restrict yourself to the application for leave and the substantive application). **(12 marks)**

2. On 18th April, 2010 at about 10.30 p.m. Mr. Modo Sunko, an employee of the security company G4SE was on duty along Kenyatta Avenue, Samkey House, Ground Floor guarding an electronics shop which stocks music system DVD players and mobile telephones. While keeping watch, Mr. Sonko heard movements from within the shop but did not bother much, concluding that the noise was probably coming from rats that occasionally find their way into the shop from the neighbouring restaurant called Calistos Palace. At about 10.45 p.m. in the full glare of security lights, Mr. Sonko was shocked to see the shop's main door swing open as three unknown men dashed out carrying a box. Due to Mr. Sonko's unfitness, the three men outpaced him and disappeared into a side alley off Kenyatta Avenue.

Fearing for his life, Mr. Sonko abandoned the chase and called a G4SE backup van to his rescue. By the time back up personnel arrived the three men were nowhere to be seen. Leaving one of his colleagues to watch over the shop, Mr. Sonko was escorted to Central Police Station to file a report. He narrated to the duty officer what had happened and his complaint/incident was entered in the occurrence book as OB No.230/18/04/2010.

Meanwhile, Chief Inspector Gidi Kabosh was leading a motorized patrol squad along Muranga Road at about 11.15 p.m. on the same day when he came across three men carrying a box. He stopped the patrol Van to interrogate the three men. As soon as the van stopped the three men ran in different directions leaving behind a box full of 20 pieces of DVD players and ten mobile phones.

Chief Inspector Gidi and his colleagues gave chase and managed to arrest two of the men. The third man jumped into Nairobi river and could not be traced. The two men in custody, Mr. Hodari Rui and Mr. Chizi Mzembe were booked in at Central Police Station at 4.00 a.m. on 19th April, 2010. On questioning the two men, they revealed that the recovered items were stolen from Samkey House. They explained that an employee of the electronics shop Ms Mrembo Supu had given them keys to the electronic shop. When leaving the shop at 6.00 p.m. on 18th April, 2010, Ms Mrembo had locked the door while knowing that the two men were hiding in the toilets inside the shop. Ms Mrembo was arrested the following day at the shop.

The Officer Commanding Station (OCS) has instructed Police Constable Muruga Hunter to investigate the incident. You are the officer-in-charge of the legal desk at Central Police Station, Nairobi. The Investigating Officer consults you on the way forward.

- (a) Advise him on the charge(s) disclosed by the narrative and draw the requisite charge(s) **(6 marks)**
- (b) Advise Police Constable Hunter if there is any need to conduct identification parade and why. **(2 marks)**
- (c) What rules must the police observe in conducting an identification parade? **(7 marks)**

3. On 30th September, 2010 Mr. Sina Makosa, a resident of Nairobi, left his house in the morning to pursue his business activities in the city. He never returned in the evening. At about 9 p.m. his wife Angela embarked on a round of enquiries with various police stations in Nairobi city to ascertain whether the police were holding him but failed to trace him for two days.

On the third day Angela was informed by neighbours that they had heard that her husband and 12 others had been arrested by the Kenya police and that secret arrangements were being made to hand them over to the Uganda police, ostensibly to stand trial for the Kampala bombings reported to have taken place in July, 2010 in which 75 people were reportedly killed. Meanwhile Sina Makosa and colleagues continued to be held in police custody without being taken to court. While Angela was still figuring out what to do about her husband's disappearance, a news item appeared in the media to the effect that Sina Makosa and 12 others were in the process of being handed over secretly to the Ugandan authorities pursuant to a security agreement under the East African Community to reduce and stop cross-border crimes.

In the above connection, Angela's attention was drawn to Article 124 of the Treaty for the Establishment of the East African Community which, *inter alia*, provides:

"124(5) The Partner States agree to enhance co-operation in the handling of cross-border crime, provision of mutual assistance in criminal matters including the arrest and repatriation of fugitive offenders and the exchange of information on national mechanisms for combating criminal activities. To this end, the Partner States undertake to adopt the following measures for maintaining and promoting security in their territories to:

- (a) enhance joint operations such as hot pursuit of criminals and joint patrols to promote border security;
- (b) adopt the United Nations model law on mutual assistance on criminal matters".

The reported plan to deliver Sina Makosa and 12 other Kenyans to Uganda has since generated persistent and heated public debate through the media to the effect that the intended delivery would violate established Kenyan law(s) and practice regarding rendition of alleged fugitive offenders and that the rendition is actionable at the instance of the families of Sina Makosa and his 12 colleagues.

Assuming the events alluded to in the above narrative to have taken place:

- (a) Would those occurrences have amounted to criminal offence(s) if they took place in Kenya? If so, what offences? **(3 marks)**
- (b) If there were complaints from Uganda alleging involvement of Sina Makosa and his 12 colleagues in the Kampala bombings, what would be the correct procedure for securing lawful rendition of Sina Makosa and his 12 colleagues to stand trial in Kampala, Uganda?

Describe that procedure. **(12 marks)**

4. Stanely Gareth, a foreign journalist with Cable News Network (African Correspondent), while covering the victory speech by the President of the Republic of Kenya after announcement of the referendum results was assaulted by the security men surrounding the President. His expensive video camera was damaged in the melee. He blames two security men whom he positively identified as Sergeant Amolo and Colonel Wanyonyi. Stanley Gareth claims he was manhandled by the two security men and was whisked away in an embarrassing manner. Naturally, he is

best course of action in seeking legal redress. He reiterates the fact that he is apprehensive that the police would not take action, the suspects being presidential aides. In those premises:

- (a) Advise Stanley Gareth on the complaint/charge available options in seeking legal redress and the necessary steps. **(2 marks)**
 - (b) As legal counsel prepare the relevant documentation to commence the remedy proposed. **(7 marks)**
 - (c) With the aid of decided cases discuss the legal principles that would guide the court in granting or refusing the necessary preliminary orders. **(6 marks)**
5. Zebedayo Kiplanga a stonemason who resides and works in Kinoo area within Kabete Constituency went home on the eve of the referendum (3rd August 2009) really drunk and carrying a 4 litre jerrican of "changaa illicit drink". Naturally Zebedayo was given a warm reception by his wife (Trufosa). While Zebedayo was eating supper his wife informed him that she was pregnant, a revelation which Zebedayo did not take lightly. The revelation confirmed Zebedayo's worst fears and dismay that his wife has been having extra marital affairs with the area chief. All of a sudden, arguments ensued and Zebedayo reached for a panga and attempted to cut his wife in a fit of rage. Trufosa managed to free herself and run away to a neighbour with Zebedayo in hot pursuit. The neighbour (Wanyonyi) came out and unsuccessfully tried to restrain Zebedayo who rushed back to the house and unleashed his anger on her daughter (Millicent). He cut Millicent on the neck and she died on her way to hospital. A report and complaint was made to the nearest police post. Zebedayo later presented himself to the police telling them that he was remorseful. He has been arrested and charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. During the prosecution case, evidence was given by the wife, the neighbour and the investigation officer who received the complaint. Trufosa testified as to the accused's previous assaults on her and threats to eliminate the family. The presiding judge was persuaded that the accused had a case to answer. He eventually dismissed the accused's defence and accordingly found him guilty and sentenced him to death.

Zebedayo is clearly aggrieved and has instructed you to appeal.

- (a) Prepare the pertinent as documents for purposes of appeal. **(10 marks)**
 - (b) Discuss the guiding principle that would aid the court in determining the appeal and the orders that may be made. **(5 marks)**
6. In criminal case No. 40 of 2010 (R V Chanzo and 3 Others), the accused persons have been charged with the offences of being in possession of Government Stores contrary to Section 324 (3) of the Penal Code,(Cap. 63) and being in possession of ammunitions contrary to Section 4(2) of the Firearms Act (Cap. 114 of the Laws of Kenya). The particulars of the first count are that on 14th October 2010 at Mofaru Slums, they were found, without lawful justification, in possession of 500 pairs of boots and assorted jungle jackets being the property of the Government of Kenya. They are due for arraignment in court on 3rd November 2010 and have appointed you as defence counsel. You have accordingly taken proper and sufficient instructions from your clients.
- (a) Advise your clients the applications you will make in court after they have taken their plea. **(5 marks)**
 - (b) On what legal grounds would you base your applications, and what legal oppositions to your applications would you anticipate? **(5 marks)**
 - (c) As the presiding magistrate faced with the aforesaid rival submissions in respect of the applications made by the defence counsel, what principles would aid you in arriving at a decision on whether or not to allow such applications? **(5 marks)**

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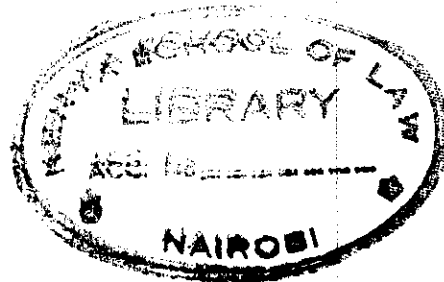
COUNCIL OF LEGAL EDUCATION



**EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES**

AUGUST/SEPTEMBER 2010

CRIMINAL LITIGATION



Instructions

- (a) Answer question ONE and any other three (3) questions
- (b) All questions carry 15 marks.
- (c) Marks shall be lost for illegibility
- (d) Time allowed is 3 hours

1. Mr. Jimmy Kimani is a prominent businessman operating a hardware shop in Karatina. On 20th March, 2010 at about 6.30 p.m. he closed his hardware shop as is customary then drove to Ushindi Primary School where Mrs. Mrembo Kimani is a teacher. He picked her up and drove to Karatina's upmarket neighbourhood where the couple has a palatial home. The neighbourhood is called Kwaren. At about 10.30 p.m. Mr. Kimani noted some strange commotion outside his house. His four dogs were barking loudly and appeared to have been chasing something outside the house. Mr. Kimani decided to step outside the house to investigate what was happening. After exiting through the garage door he was shocked to see three men inside his compound fighting off the dogs. Before he could step back into the house and lock the door behind him one of the intruders dashed past the dogs and forced his way into the house.

The intruder whipped out a Ceska pistol and directed Mr. Kimani to calm the dogs immediately and grant unhindered access to his accomplices who were outside battling the dogs. Mr. Kimani unconditionally complied, calmed the dogs and the 2nd and 3rd intruder were granted access to the house. They immediately started ransacking the house while beating up Mr. and Mrs. Kimani asking them to give up the day's hardware sales. After about 10 minutes from the time the intruders entered the house, Mr. Kimani's cook Mr. Makmende managed to trigger an alarm. In the ensuing panic, the gang leader referred to as Major shot at Makmende but the bullet missed Makmende and instead hit one of the gang members called Captain, in the arm. Captain let out a loud scream and by a strange twist of fate darkness engulfed the whole house as a result of an electrical fault caused by the ricocheting bullet. Pandemonium broke out and the three gang members dashed outside the house. While running outside the house, the third gang member referred to as Corporal was set upon by the dogs which bit and severely injured his left foot. The gang made off with Kshs.250,000/- and three mobile phone handsets all valued at Kshs.80,000/-

Mr. and Mrs. Kimani together with Mr. Makmende went to Karatina Police Station later in the night and reported the incident. The report was made at 12.52 a.m. as the fourth report at the police station. The description of the assailants as given by Mr. and Mrs. Kimani and Mr. Makmende are as follows:

Major:

Tall African male, pot bellied, red eyed and scarred left cheek. Heavily built body.

Captain:

Short slender Caucasian male. Has a shrill voice.

Corporal:

Tall Arab male, pot bellied. Walks with a limp to the left-hand side.

Mr. Kimani's daughter (Dr. Nina Kimani), a medical doctor practicing medicine at Nanyuki District hospital, received information that her parents had been attacked. She talked to her father who narrated the incident and described the assailants. Since none of her parents was injured, she consoled them on telephone and continued working. At about 11.48 a.m. on 21st March, 2010 two patients walked into Dr. Nina's waiting room for purposes of consulting her. The first patient to be seen was a Mr. Nick Hathaway of Caucasian origin. Mr. Hathaway gave a history of having sustained a bullet injury in the right arm while training at the nearby Archer's Post, a military ranch used by the Royal British Army Forces stationed in Kenya. He produced his British Army identification card. Dr. Nina did not understand why Mr. Hathaway did not seek treatment within the ranch. She treated him and directed him to the pharmacy to collect an assortment of drugs.

A second patient walked into Dr. Nina's consulting room. He was of Arab origin and identified himself as Mr. Ali Akbar Rafsanjani. Mr. Rafsanjani gave a history of a dog bite. He claimed that he is a Syrian national sent to Kenya as a dog trainer attached to the Nanyuki Dog Unit of the police. He explained that early in the morning he opened a dog's kennel at Nanyuki Dog Unit and one of the dogs that had apparently contracted rabies bit him. He was similarly treated by Dr. Nina and then directed to the pharmacy to collect an assortment of drugs.

As soon as Mr. Rafsanjani left the consulting room, Dr. Nina was struck by the strange coincidence of the two patients' medical history as given. It had an eerie similarity to what her father had described to her that morning. She looked through her office window and saw a tall male African man seated in a car at the parking lot that had apparently brought in the two patients. She immediately became suspicious of the patients and their driver. She called the pharmacist and requested him to delay dispensing drugs to the two patients until her further directions. She did not explain to the pharmacist why the delay was necessary. In the meantime, she instructed the Hospital's Chief Security Officer to ensure that the driver of the motor vehicle parked outside the hospital did not drive out.

- (a) What arrest options are available to Dr. Nina? (2 marks)
- (b) What offences, if any, are disclosed by the narrative? (2 marks)
- (c) Assuming you are instructed by Mr. Kimani to watch brief in the matter after the accused persons were arrested and charged, what is the occurrence book number that you will look out for to help you understand the history of the initial report. What preparations would you make and what document would you look at in preparing for the watching brief assignment? (2 marks)
- (d) Discuss the rules and procedures you will adhere to in conducting an identification parade, assuming that the three men are now in custody. (9 marks)

2. The Honourable Mr. Matendechere is a newly appointed magistrate sitting in Lodwar town of Turkana District. He is the only Judicial officer in the entire district. The Judicial Officers nearest to him are stationed in Kitale Town, about 358 kilometers away. He reported on duty for the first time on 28th April, 2010. On 29th April 2010 a murder suspect is arraigned before him for plea taking. The facts as presented by the prosecution are that on 20th of February, 2010 at about 11.45 p.m. at a village south of Lake Turkana called Lolrwak the accused person, Mr. Naila Natibu, in the company of several other men raided Lalrwak village and made away with 1,000 heads of cattle. During the said raid Mr. Naila and his men encountered armed resistance from the villagers and several police reservists. In the ensuing exchange of fire, Mr. Naila shot and fatally injured Mr. Epolot, a police reservist. The police reservist and villagers were overpowered by Mr. Naila and his gang. Reinforcements were called in and two Kenya Army Apache helicopters came in to help track down the assailants on 21st February, 2010. The assailants were traced to a valley commonly referred to as the Valley of Death. One hundred paratroopers aboard the two helicopters were dropped in the Valley of Death to pursue the assailants. Forty assailants were shot dead in the ensuing battle while fourty assailants escaped and Mr. Naila was captured alive. His firearm, an AK-47, was also recovered. Mr. Naila has been in the custody of the military since 21st February 2010.

When the murder charges were read out to him, Mr. Naila replied as follows: "Nyinathani Chayo Mimanenyo nyalitendeka." Hon. Matendechere did not understand what Mr. Naila had said. The prosecutor Mr. Aukot explained to the Hon. Matendechere that in the Turkana language Mr. Naila's response meant that he had committed the offence. On the strength of the prosecutor's interpretation, Hon. Matendechere called upon the prosecutor to give facts of the case. In reply, the prosecutor said "your honour, facts as per charge sheet." Hon. Matendechere proceeded and convicted the accused person on his own plea of guilty and sentenced him to death. In Hon. Matendechere's view there was no reason to entertain any form of mitigation from Mr. Naila since a murder charge, on conviction, attracts a mandatory death penalty.

You are an associate in the firm of Konvict and Sempala Advocates. The Senior Partner in charge of litigation informs you that Mrs. Naila has approached him for what she calls assistance. You are invited to attend a briefing session with Mrs. Naila and the Senior Partner when you receive the foregoing brief.

- (a) With the aid of relevant case law, prepare a detailed legal opinion for consideration by the Senior Partner in charge of litigation.

(7 marks)

- (b) Having made a decision to appeal, on the basis of your legal opinion, draw up the requisite instrument that institutes an appeal.

(8 marks)

3. Mr. Honourable Nyakwenda Tumbo is the Honourable Member of Parliament for Baraingo Ya Kati Constituency, a constituency in the expansive and cosmopolitan Rift Valley Province. During the recent referendum campaigns, Hon. Nyakwenda told a rally at Socho grounds that "Rift Valley has its owners. As soon as the proposed constitution sails through all those groups that we have been hosting in the Rift Valley must move out. If they do not move out we will forcefully ship them out. To avoid this eventuality all migrant tribes must vote No. I say this knowing that members of Koni tribe inhabit our fertile lands in Koni District west of our Province. Unless the Koni tribe votes with us, we shall teach them an unforgettable lesson. I urge all my people (Ngicho tribe), to prepare for this operation".

Mr. Nyakiangana, Mr. Tumbo's political side kick cheered his master wildly for the memorable speech given at the rally. To underscore the importance of Mr. Tumbo's speech, Mr. Nyakiangana printed out a verbatim excerpt of the speech as captured above and started distributing leaflets containing those words in the Rift Valley Province. To ensure that the 'memorable speech' reached the highest number of voters Hon. Tumbo hired a helicopter from Captain Hellon Timberlake for aerial distribution. Captain Timberlake accepted the assignment and started dropping the leaflets at major shopping centres within the vast province.

Alarmed by Mr. Tumbo's speech, the Managing Trustee of the National Social Security Fund (NSSF) who is a member of Koni tribe orders his Enforcement Officers to conduct a special audit on Mr. Tumbo's flower farm in Nakuru. The Managing Trustee has information that Mr. Tumbo has failed to pay to the NSSF contributions for his flower farm workers. Mr. Tumbo is reported to have also failed to return to the NSSF contribution records for the last three years and docket for other documents necessary for the proper maintenance of his employees' accounts at the NSSF. The Special Audit confirms the foregoing information with respect to Mr. Tumbo's flower farm workers.

The National Social Security Fund Act (Cap.258) provides as follow:-

"s.36 Any person who –

- (a) fails without lawful excuse to pay to the fund within the period prescribed by this Act any contribution which he is liable as a contributing employer to pay under this Act; or
- (b) knowingly makes any deduction from the wages of his employee in respect of any contribution which he is liable as a contributing employer to pay under this Act, other than a deduction which he is authorized to make by this Act; or
- (c) for the purpose of obtaining any benefit for himself or for any other person, knowingly makes any false statement or representation, or produces or furnishes, or causes to be produced or furnished, any document or information which he knows to be false in any material particular; or
- (d) fails to return to the fund at the end of each calendar year contributions records, docket or other documents which are required for the proper maintenance of members accounts,

shall be guilty of an offence and liable to a fine not exceeding fifteen thousand shillings."

The National Cohesion and Integration Act, No.12 of 2008 provides as follows:

(1) "Section 13(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) Presents or directs the public 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 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."

(a) Draw appropriate charge(s).

(7 marks)

(b) What considerations will you take into account, while representing the accused, in making your submissions for bail pending trial?

(8 marks)

4. On 11th July 2009 there was a terrorist attack in a Ugandan city called Mbaruru in which several persons were killed. A total of 14 Ugandans, 3 Kenyans and 3 Britons died. A terror gang operating in the lawless Somalia christened Waru-Shabe claimed responsibility for the attacks and promised to launch more attacks against what they described as infidels.

Meeting under the auspices of East African Police Chiefs Association, the East African Community Police Chiefs agreed to share intelligence on the terror attack and aid Uganda in arresting and bringing to justice the perpetrators of the attack. It was highly suspected that some suspects were hiding in Kenya.

Intercepted telephone communication indicated that the planning of the terror attacks was coordinated in Nairobi's Eastleigh Estate. Intelligence reports received at Police Headquarters in Nairobi indicate that in the run-up to the attacks there were numerous mobile telephone calls between the identified suicide bombers and a string of residents of Estleigh. Following up on the leads, police officers from the Kenya Anti Terrorism Unit visited Al Akuru Complex on 10th Avenue Eastleigh with the intent of arresting Al Marikini, Al Somali and Al Rwandi. On reaching the premises, there appeared to have been people inside the premises but no one heeded orders to open the outer door. Police Team Leader Chief Inspector Wario decided to break into the complex. As the attempt to break into the premises got underway, a shot was fired from within the premises. Police returned fire and after about 15 minutes of intense exchange of fire the shots from within the premises abated. Police officers broke the outer doors to the complex and dashed in, taking vantage positions. A door in an inner room was locked tightly. When police managed to break it they were shocked by what they saw. There were three people alive and five dead. Two of the dead Al Tanzani and Al Zimbwabi appeared to have died as a result of injuries inflicted by a blunt object while the other three appeared to have died of bullet wounds.

The three captives, Al Marikini, Al Somali and Al Rwandi were taken into police custody and detained at various undisclosed locations. It was during their interrogation that they alleged that the anti terrorism police unit under the command of Chief Inspector Wario executed their

deceased colleagues after they surrendered. Chief Inspector Wario on the other hand argued that the surviving suspects, now in custody, had told him that the deceased persons committed suicide so as not to be arrested by what they considered to be infidel forces; that it was a 'death of honour' otherwise referred to as martyrdom.

In the meantime the Ugandan High Commissioner has started applying pressure on the Kenyan authorities to handover the three persons in custody. On the other hand civil rights activists are strongly opposed to the handover arguing that Kenyan authorities are planning to sacrifice innocent citizens. The tug of war has been ongoing for the last three months now. The whereabouts of the three suspects is still unknown.

You are an employee of Human Rights Defender, a Non-Governmental Organization. You are requested by your organization's Executive Director to give a considered opinion on:

(a) The remedies available to the deceased persons' respective families in establishing the cause of death of their loved ones;

(8 marks)

(b) The procedure the Kenyan authorities would use to lawfully hand-over the suspects to Ugandan authorities.

(7 marks)

5. On 12th May, 2010 at about 7 p.m. Mr. Msema Kweli was driving his Toyota Saloon Car Reg. No. KBX 333 YZ from Muthaiga Police Station round-about, Nairobi towards Kiambu accompanied by his wife, Mary who was on the front passenger seat. The car lights were on.

After travelling for about a kilometer, he was flagged down by three men dressed in what looked like police uniform. Mr. Msema Kweli stopped to ascertain what the three men wanted. No sooner had Mr. Msema Kweli stopped than the three men surrounded his car: one in front, one on the passenger side and one on the driver's side of the car. The three men drew pistols and ordered Mr. Msema Kweli out of the car and he did so, leaving the car engine on. Shortly before the car was flagged down, Mary had switched on the car's internal light to find something in her hand bag and the light was still on.

The man standing outside the driver's side got into the car and took control of the car. The other two men dragged Mr. Msema Kweli to the left side of the road in front of the car, wrestled him to the ground, kicked him with their boots and broke his left side ribs and left him groaning in pain. They then returned to the car and jumped into the rear seat and their colleague at the wheel drove off. The two men in the rear seat kept threatening to shoot Mary if she shouted or made any false move.

After approximately five minutes drive, it dawned on the two men in the rear seat that the car's internal light was on and one of them switched it off. The driver then turned the car dragged her into a side road and stopped at a coffee plantation. The three men pulled Mary out of the car into the coffee plantation and there forced her to have sex with them in turns. Thereafter they abandoned Mary in the plantation and drove away in the car.

Mr. Msema Kweli was rescued by another motorist approximately a quarter an hour later and taken to Kiambu Police Station. The police took him to Kiambu District Hospital where he was admitted for treatment.

After her ordeal in the coffee plantation, Mary walked back to the spot where her husband had been left but she did not find him. She took a matatu to Kiambu Police Station to report what had befallen her husband and herself and learnt that he had already reported the incident and was taken to Kiambu District Hospital. She proceeded to the hospital for her own examination and also to see her husband. Mr. Msema Kweli was discharged a week later.

Both Mr. Msema Kweli and his wife Mary subsequently positively identified their assailants as Penda Mali, Mchovya Asali and Mpenda Maovu.

- (a) What criminal offence(s) did Penda Mali, Mchovya Asali and Mpenda Maovu commit? (5 marks)
- (a) Draft the requisite charge(s). (10 marks)

6. On 6th August, 2009, Kipindi Linda and Fadhili Mwenelo, security guards from Ulinzi Security Services were deployed to Wakulima Kahawa factory for overnight duty.

At 10 p.m. two men, Fukara and Matendo approached the guards at the gate and engaged them in discussion on the guard's working schedule, terms of employment and payment. Kipindi ordered the two men to leave but Matendo pleaded that he had a big project to make a lot of money but he needed help and they would share the money.

Matendo explained that coffee prices in the International market had greatly improved and it was a lucrative venture. He claimed that the factory officials were siphoning funds after selling coffee from the farmers by paying them at the old price while the officials kept the difference. He then asked the guards to assist in removing bags of coffee from the factory which they would sell to middlemen and obtain good prices.

Fukara proposed that on the night of 10th August, 2009 the guards were to ensure they were on duty, and leave the rear gate open. He would come with a loading team and lorries to load coffee bags from the embankment point. At 11 p.m. the first lorry would arrive and be pushed into the factory with its headlights turned off and the engine switched off. The loading team knew their way around the factory and would break the door and proceed to load coffee sacks out of the factory. The four men negotiated the price for the planned project and agreed that after successful delivery of coffee sacks from the factory, each of the guards would be paid Kshs.50,000/-. They agreed and exchanged mobile telephone numbers.

Immediately the two men left, the guards argued on whether to be part of the plan and get the money or to report the incident to the management of the factory. Fadhili prevailed upon Kipindi that they ought to report the matter because if they did not and were found out later, they would be sacked and never obtain employment in the same sector.

They reported the matter to the security manager of the factory Granio Msimamizi, who in turn informed management of the factory. The matter was then reported to the police for further investigations.

On 7th August, 2009, the OCS of Maendeleo Police Station, Kassim Ushindi, came to the factory with a team of 5 officers. After they had lengthy discussions with Msimamizi, Kipindi and Fadhili, the police obtained written statements. It was agreed that the police would lay an

ambush at the factory on the night of 10th August, 2009. The guards were to continue acting as part of the group that would execute the plan.

On the evening of 10th August, 2009, 4 unmarked police vehicles with armed plain clothes officers drove into the factory. They mingled with the factory personnel and at 9 p.m. they got back into their vehicles and sat quietly waiting.

At 11 p.m. a lorry Isuzu Reg. KBR 3394X turned off the main road into the lane next to the factory and as it went towards the rear gate the headlights were put off and engine turned off and the vehicle seemed to glide slowly towards the factory gate. The rear gate was opened and the lorry came and stopped at the loading zone.

All was quiet but after a few minutes there was commotion. The factory store door was yanked open and about 6 men emerged carrying sacks of coffee from the factory to the lorry.

After about 45 minutes or so, the police vehicles headlights were put on and police officers came out brandishing guns ordering the suspects to surrender and lie down. The suspects ran in all directions within the factory but eventually they were all apprehended. A total of 12 men were arrested and taken to Maendeleo Police Station, booked and remanded in custody.

The following morning the factory was a beehive of activity with the management of the factory assisting the police with their investigations.

The lorry was stationary at the loading zone with 100 sacks of coffee on the lorry and 6 others on the ground. A pair of pliers, a hammer and huge stone were recovered from the scene.

The management congratulated the two guards, Kipindi and Fadhili for their sterling performance in reporting the matter and they were promised a reward. The Police Officers were commended for foiling the theft.

At the police station, OCS Kassim Ushindi booked in the 12 suspects in the OB as Shuki, Mateso, Majali, Alfayo, Asif, Otabo, Kitele, Tifano, Chwele, Kumita, Charo, Kazungu.

Assuming the OCS assigned the case to you as the Investigation Officer:-

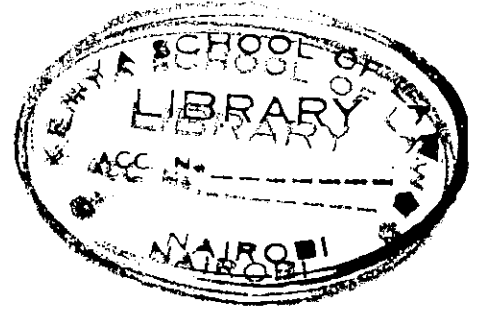
- (a) Is there a case for determination in the Criminal Justice System? (3 marks)
- (b) If so, what preparations will you make before arraigning the suspects in court? (6 marks)
- (c) What is/are the charge(s) to be preferred? (Draw the charge(s)) (6 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

DECEMBER, 2009

CRIMINAL LITIGATION



Instructions

- (a) Answer question ONE and any other three (3) questions
- (b) All questions carry 15 marks.
- (c) Marks shall be lost for illegibility
- (d) Time allowed is 3 hours

On 12th April 2008 at about 9.00 p.m., Mr. Chomba Mbulu was strolling along Tom Mboya Street in Nairobi when he noticed a very attractive mobile Nokia E92 phone handset on display at Simu Enterprises Ltd. He stood at the display window for about ten minutes while admiring the said telephone handset. He could not access it (the phone) as the shop was closed and he could only see it through the glass window.

While still admiring the phone Mr. Pevu Noma a local expert on door and window locks and who was Chomba's primary school deskmate, unexpectedly showed up with his tools of trade. He informed Chomba that he had just alighted from a Route 46 matatu (Kawangware) where he had gone to help his client access his house after he had lost his house keys in a robbery incident on 11.04.2008. Chomba told him that he was taking an evening walk in town and had been so captivated by the mobile phone on display.

After a 10 minute discussion the duo decided to break into Simu Enterprises Ltd Shop. Using his tools of trade, Noma forced open the doors and the two gained access. As soon as the two entered the shop an alarm went off attracting security guards from VSG4 Group of Companies. Two security guards responded quickly and arrived at Simu Enterprises within five minutes of the break in. The security guards from VSG4 were Mr. Matendechere and Mr. Vurugu. As soon as the two security guards arrived, they blew the whistle which drew the attention of a huge crowd of onlookers. In the meantime Chomba and Noma are stuck in the shop of Simu Enterprises Ltd as they have no escape route. The only exit route has been sealed by Matendechere and Vurugu and the crowd of curious onlookers. Mbulu and Noma decided to surrender to Matendechere and Vurugu. However upon complete surrender Matendechere and Vurugu tied Chomba and Noma's hands at the back then decide to 'teach them a lesson'. They beat up the two suspects using clubs in what they called 'people's justice' and by the time police officers on patrol arrived the suspects were unconscious. They (suspects) were rushed to Guru Nanak Hospital and upon arrival Chomba was pronounced dead. Noma was hospitalized for one week and discharged.

- 306 PCA Breaking ^{into} building
 - s. 307 PCA Breaking into ^{with} intent to commit a felony Penalty is 5 yrs
 - s. 202 Manslaughter & Penalty is in Sec. 205 imprisonment for life.
 - s. 234 Grievous harm, Penalty is life imprisonment.
- (a) Is there a case for determination in the criminal justice system? (5 marks)

- (b) What is/are the charge(s) to be preferred? (draw the proposed charge(s)) (10 marks)
- Def a charge -
 Requirements of a charge

P. 2.
 Anne

Ahmed Aslam a Kenyan national was arrested by the Anti Terrorism Police Unit (ATPU) on 26th March 2009 on suspicion that he was engaged in the coordination of terrorism activities for and on behalf of the East African Cell of Al Kwada terror network operating on Shela Island near Lamu. According to information passed to the police by unidentified informers, Aslam received training as a Mujahedeen in Afghanistan's Hemland Province in 2005-2008. He is reported to have specialized in arming suicide bombers and generally overseeing suicide missions in Kabul, the capital city of Afghanistan. An intelligence brief by the Ministry of Internal Security opined that Aslam was ordered by Sheik Osman bin Ledged the head of Al Kwada to return to Kenya and set up local terror cells with the objective of attacking western installations and troops in the East African Region. The brief goes on to state that on 20th March 2009, Aslam was trailed by police to the Kilindini Port in Mombasa and was seen filming a British warship that was replenishing its supplies at the port.

On 25th March 2009 ATPU raided Aslam's Kwale home and recovered Rocket Propelled Grenades shoulder missile launchers and an assortment of grenades. His gardner Mr. Wazir was arrested and on interrogation he led the ATPU to Shela Island where Aslam was arrested. Mr. Wazir was soon after released without charge. Mr. Aslam has remained in police custody since 26th March 2009. His wife Mrs. Supu Aslam after futile search for her husband for 3 weeks at various police stations calls on Chapa Kazi and Company Advocates.

You are a Senior Associate in the said Firm of Chapa Kazi and Company Advocates.

- (a) What are the remedies available to your client? (5 marks)
- (b) How would you approach the appropriate and competent courts of law for the remedies available? (10 marks)

3.
 N. Lisa

On 15th June 2009 at about 7.30 p.m., Mr. Ndoli Ndua was walking along Langata South Road outside the Kenya School of Law when a gang of three men attacked him. The three men were armed with a piece of wood carving that look like a pistol and a crow bar. They robbed him of a wallet valued at Kshs.140, and Kshs.50. During the incident one of the men threatened to shoot Ndua dead if he raised the alarm. Ndua cooperated and handed over the wallet and the Kshs.50. After the incident the three men walked away. While walking away Ndua noted that the apparent gang leader was tall, about six feet five inches and had a limp on the right hand side. The other gang member was pot bellied and had a husky voice. The third gang member had a scar on his forehead. The gang members were unknown to him. Mr. Ndua walked to Hardy Police Station in Karen, Nairobi and reported the matter to Chief Inspector Afande, the police officer manning the Report Desk. In the meantime, a patrol troupe of police officers in Dagoretti arrested three men at about 9.00 p.m. of 15th June 2009 for 'failing to give a good account of themselves'. You are the investigating officer in this case, as instructed by the OCS. You are required to process the three accused persons who have been handed over to Hardy Police Station and are suspected to be linked to the robbery.

- (a) What legal procedure will you implement to ensure fair and objective outcome? (2 marks)
- (b) Describe the process of implementing the above-mentioned procedure. (7 marks)
- (c) Assuming you are the investigation officer of the case describe the contents of your file before handing it over to the prosecutor. (6 marks)

4.

Answer

On 16th July 2009 Major Muniu and Captain Kweyu were arrested allegedly for unlawfully planning to depose the sitting President of the Republic of Kenya. Information gleaned from military intelligence officials and the National Security Intelligence Service was that on 20th March 2009 Major Muniu and Captain Kweyu joined an outfit calling itself Garbatula Liberation Front whose aim was to change the composition of the government of the Republic of Kenya by use of arms. It was also reported that a raid conducted on a godown jointly owned by Major Muniu and Captain Kweyu in Marsabit netted a cache of arms. Among the recovered arms were 8,000 AK-47 rifles, 600 stinger missile launchers and a container full of grenades.

Arrested during the raid was the godown caretaker Mr. Nadhiwal Amir a national of Ethiopia and Mr. De Belwaar, a military tactician of South Africa nationality and Mr. Eliud Barili a Kenyan national who was the guard on duty at the premises. The intelligence brief was to the effect that Mr. Amir and Mr. De Bewaar were part and parcel of the coup plotters calling themselves the 'High Command Council'. The High Command Council (HCC) was composed of Major Muniu (President designate), Captain Kweyu (Prime Minister designate) and Mr. De Bewaar (Chief of General Staff designate). All members of the HCC had planned to execute the coup on 20.07.2009. They had a manual to guide them in their mission called 'How to Take Power'. At their last planning meeting held at the godown on 10.07.2009 Mr. Amir accidentally dropped his copy of 'How to Take Power'. This document was picked up by the security guard Mr. Barili who read it and understood what the HCC and its membership were planning. Since Mr. Barili's salary was raised in May 2009, he opted to keep the manual to himself in his house and decided not to report to the police.

However Marsabit Police Officers on a routine swoop in Gede slums where Barili stays came across the manual whose contents led them to the godown and the eventual arrest of Captain Kweyu, Major Muniu, Mr. Amir, Mr. De Bewaar and Mr. Barili.

You are a State Counsel in the Attorney-General's Chambers and the investigation file with this information is passed to you for appropriate action.

- (a) Identify the offence(s) committed by each individual. (10 marks)
- (b) Assuming you were appointed by the suspects as their defence counsel, advise them on their individual rights to bail and bond. (5 marks)

5.

Home Rehab

Tom Chamurei owns an expansive ranch in Laikipia. On 26th June 2009, while hunting for antelopes on his ranch in the company of his friend, Carlos Tanduri, bumped into a gang of three poachers who had killed a buffalo on the ranch and were skinning it. The poachers had a hunting dog. Immediately the poachers noticed Tom and Carlos they set their dog upon the duo. Tom, who was armed with a Ceska pistol drew it and fired at the charging dog killing it instantly. As soon as the first shot rang through the air, the poachers abandoned their find and ran for cover. Tom took aim and shot dead one of them, Mr. Gurulu Bolbol.

The killing of Mr. Bolbol, a village wrestling champion in Laikipia raised a national political storm that caught the Attorney-General's attention. The Attorney-General instructed the Police Commissioner to conduct expeditious investigations into the matter and report to him within twenty four hours. The Police Commissioner moved fast and arrested Tom Chamurei and his friend Carlos Tanduri. Within fourty eight hours of arrest of the suspects the Police Commissioner forwarded his investigation file to the Attorney General. The Attorney General perused the file and directed the Director of Public Prosecutions to prosecute Tom Chamurei and release Carlos Tanduri immediately.

You are an associate at the firm of Kalari and Sarani Advocates who have a long working relationship with Tom Chamurei. Mrs. Chamurei approaches you for advice after hearing that her beloved husband will be charged in a court of law with murder. She wants to know the following:

- (a) Which court has jurisdiction to try Chamurei and why? (1 mark)
- (b) What procedure will the court adopt if Mr. Chamurei pleads guilty to the charge? (4 marks)
- (c) Outline the trial process if Chamurei pleads not guilty. (9 marks)

6.

WILLIE

On 24th April 2009 Mr. Jua Cali was driving along Uhuru Highway in Nairobi when he heard a loud bang from the rear of his Mercedes Benz registration number KAXX4444Z. He stopped the car, stepped out and went round it. He noticed that an apparently drunk driver of a VW Passat registration number KAYY 666Y had rammed into his car damaging its boot. The driver of the VW Passat a Mr. Geogio Arafat Junior is the son of a senior Minister in the Grand Coalition Government. Geogio stepped out of his Passat, walked up to Jua Cali and wrestled him to the ground. In the process of wrestling Jua Cali he hit him on the head. Jua Cali bled profusely but due to timely intervention by traffic police officers nearby, the two were separated and Jua Cali rushed to Kenyatta National Hospital where he was treated and discharged. Geogio was arrested and locked up at Central Police Station.

As soon as word reached Geogio Arafat Senior that Geogio Araft Junior was in police custody, he rang the Police Commissioner and asked him to release his son. The Police Commissioner ordered the Officer Commanding Central Police Station to unconditionally release Geogio Arafat Junior, which he did. On 25th April 2009 Jua Cali made a formal report to the police station which was recorded as OB No.1/25//04/2009. He also informed the Attorney-General of the incident in a letter of even date. Jua Cali has made numerous trips to the police station and the Attorney General but no action has been taken against Geogio Junior.

During the last visit to the police station Chief Inspector Koros told Jua Cali not to expect them to antagonize senior Government officials by arresting a Minister's son. The Director of Public

Prosecutions told Jua Cali that the case was 'hot' as it involved 'very big people' and that no action was going to be taken against Georgio Arafat Junior.

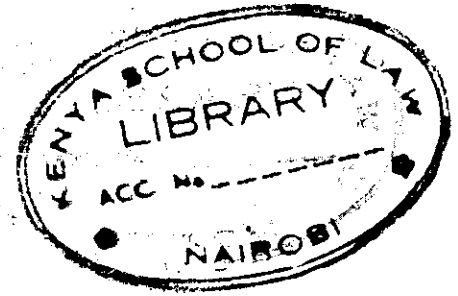
You are a senior partner in the firm of Ohangla, Ochudo and Kumbafu Advocates. Jua Cali approaches your firm for advice on how to make use of the criminal justice system in light of reluctance by Government officers to take action.

- (a) Advise Jua Cali on the remedy(ies) available **(1 mark)**
(b) Outline the procedure to be followed in accessing the remedy(ies) **(14 marks)**

COUNCIL OF LEGAL EDUCATION
EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

NOVEMBER, 2009

CRIMINAL PROCEDURE



Instructions

- (a) Answer question ONE and any other two (2) questions
- (b) Question 1 is compulsory and carries 20 marks
- (c) All other questions carry 15 marks each
- (d) Marks may be lost for illegibility
- (e) Time allowed is 2 hours

-
1. On 12th March 2009 at 9.00 p.m., Hatari and Hodari were strolling along Muindi Mbingu Street in Nairobi when they noticed that a shop stocking mobile telephone handsets, called Truika Enterprises Ltd was open. On close examination, they realized that the outer door of the shop was ajar while the inner door was shut. The security man on duty, Papa Shirandula was fast asleep and did not notice the duo's presence. Hatari and Hodari entered through the outer door and to their amazement the second door was not locked and there was nobody in the shop. They swung the door open, entered the shop and picked up three mobile phone handsets, make Nokia E70. They hurried out of the shop, dashed to a bus stage and boarded the first available bus to their house in Kaangumu Estate, Westlands, Nairobi.

As soon as they entered the house, Orwao, a neighbor paid them a courtesy call. Orwao deals in reconditioned mobile phone handsets and has a shop along Tom Mboya Street, Nairobi. Hatari and Hodari told him that they had three new handsets that they wanted Orwao to sell on their behalf. They handed over the three handsets to Orwao and asked him to dispose them off at whatever price he desired. When he asked for a receipt or any other document of title, the duo informed him that the three handsets were acquired through a 'deal' and therefore there was no accompanying paperwork. On Orwao's inquiry as to what a 'deal' meant, Hatari and Hodari replied in unison that the expression meant the three handsets were acquired through illegal means.

On 13th March, 2009, Truika, the Managing Director of Truika Enterprises notices that three handsets were missing from his stock. He is also shocked to find the doors to his shop wide open. He reports the loss to the Central Police Station and to mobile phone service providers Safaricom and Zain. He gives the mobile phone service providers what is called an EIR number for each of the missing phones.

On 14th March, 2009, the three handsets are traced by Safaricom to Rukia, Binti and Mrembo. When Rukia, Binti and Mrembo are arrested, they lead the arresting officer to Orwao who is said to have sold the three handsets to them at a price of KShs.1,500 each. Receipts are provided for the purchase transaction.

Orwao leads the arresting officer Inspector Gichingwa to Hatari and Hodari who are similarly arrested. You are the legal counsel attached to Central Police Station, Nairobi. Do the following

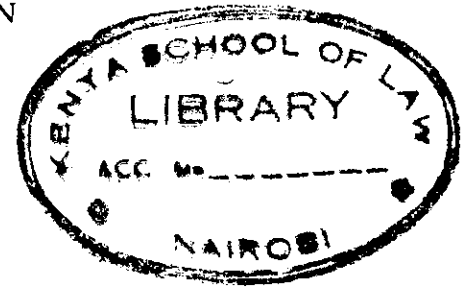
- (a) Identify the offence(s) disclosed by the narrative and the possible offender(s). (6marks)
 - (b) Draft the appropriate charge sheet. (6 marks)
 - (c) Explain the contents of the sub-files contained in the prosecution file. (8 marks)
2. What is the role of the Attorney General's Office with regard to prosecution of cases in Kenya. (15 marks)
3. Outline the process of plea taking where:-
 - (a) the accused person pleads guilty; (3 marks)
 - (b) the accused person pleads not guilty; (6 marks)
 - (c) the accused refuses to plead. (6 marks)
4. Describe the law and process relating to Bail/Bond in the criminal justice system in Kenya. (15 marks)
5. Write explanatory notes on the following as they relate to the criminal justice system in Kenya.
 - (a) Child witness. (5 marks)
 - (b) Expert witness. (5 marks)
 - (c) Exhibits. (5 marks)
6. Evaluate the elements and contents of a court judgment in a criminal case. (15 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

JULY, 2009

CRIMINAL LITIGATION



Instructions

- (a) Answer question ONE and any other three (3) questions
- (b) All questions carry 15 marks.
- (c) Marks shall be lost for illegibility
- (d) Time allowed is 3 hours

-
1. On 20th December 2008 Mr. Toledo Kapu, an employee of Tindiki Electronics Ltd, walked out of their shop along Luthuli Avenue in Nairobi wearing a very long jacket. In the jacket, he tucked two mobile phone handsets namely a Nokia E71 and Nokia N70. He picked the two phones from the shop's display window. He boarded a number 58 matatu and alighted at Makongeni Estate where he visited his old friend's house one Man Maish. Man Maish is a chicken vendor at Gikomba market of Nairobi. At Man Maish's house, Mr. Kapu found Madame Babes, Mr. Man Maish's daughter.

Mr. Kapu handed to Madam Babes the two mobile phone handsets with instructions to hand them over to her father. He (Kapu) promised to return the following day. On 21/12/2008 Mr. Kapu returned and was glad to have found Mr. Man Maish. After Man Maish confirmed receipt of the two mobile handsets, Mr. Kapu explained to him that he had picked the two mobile handsets from his employer's shop and wanted Mr. Man Maish to help him market them. Mr. Man Maish agreed to keep the two mobile handsets as they shopped for purchasers. On 23/12/2008 at about 11 a.m. Mr. Man Maish stole two chicken at Gikomba Market and handed them over to Mr. Kapu. He similarly explained to Mr. Kapu that due to the impending Christmas festivities, it was going to be easy to get a market for the two chicken. Mr. Kapu agreed to the arrangement and took with him the two chicken to his house in Kaloleni Estate.

On 23/12/2008 at about 8 p.m. the Buruburu OCPD launched what he called a cleanup operation to flush out petty thieves and hardcore criminals. The operation started in Makongeni in which Mr. Man Maish was arrested and the

two mobile phone handsets recovered. Further interrogation of Mr. Maish led the OCPD and his team to Kaloleni Estate where the two chickens were recovered and Mr. Kapu arrested.

You are the Chief Legal Counsel, BuruBuru Police Station, a position created after the institution of reforms in the police service. Take the following actions:

- (a) Prepare/draft appropriate charges; (10 marks)
- (b) What documents will constitute your file? (5 marks)
- (c) Assuming you are instructed to act for the defence, what documents must your file hold? (5 marks)

2. On 18th June 2008 Ms Mrembo and her fiancé Mr. Jua Cali agreed to go out to Florida 2000, a discotheque along Koinange Street Nairobi. Mr. Jua Cali left his parents house in Runda well after 11.00 p.m. instead of the agreed time, being 9.00 p.m. The reason for the delay was because Mr. Jua Cali's parents went to bed late. Mr. Jua Cali wanted to sneak out of his parents' compound while driving his mother's car, a Toyota Prado. Mr. Jua Cali knew from experience that his mother would not allow him to attend 'Lady's Nite' at Florida 2000 while driving her car.

Immediately his parents went to bed, he promptly concluded a deal with the watchman on duty, Mr. Papa Rugendo, to let him drive out in his mother's car on the understanding that Mr. Jua Cali would return the car by 19th June 2008 at 5.00 a.m. In addition Mr. Jua Cali gave Mr. Papa Rugendo Kshs.1,000/- as 'facilitation fees'. Mr. Jua Cali drove out of his parents' compound and headed to the University of Nairobi Halls of Residence to pick Ms Mrembo. While leaving the Halls of Residence along Mamlaka Road a sudden electricity blackout engulfed the entire University of Nairobi premises. While negotiating through the potholes and bumps along Mamlaka Road a rowdy group of students poured onto the road, blocked Mr. Jua Cali's path with huge boulders, forced him to open the car and robbed him of his wallet and mobile telephone. Ms Mrembo's handbag was also taken away. One of the assailants smashed the car's windscreen. Although the assailants were armed with sticks, Mr. Jua Cali and Ms Mrembo believed, wrongly, that the assailants were armed with guns. All the assailants, eight, were unknown to their victims.

Responding to a general distress call, the Officer Commanding Station (OCS) Central Police Station Nairobi arrived at the scene and arrested 20 students. The OCS has given you the following instructions, execute the said instructions immediately and precisely:

- (a) Identify all the offences committed in this narrative; (3 marks)

- (b) Advise him on the rules to be adhered to while seeking to identify Mr. Jua Cali/Ms Mrembo's assailants; (7 marks)
- (c) Draw appropriate charge sheets. (5 marks)

3. Mr. Kassim Aden is a member of the 'Somali Coast Guard' a rag tag army of pirates operating within the Gulf of Aden and generally along the Somali Coast. On 19th March 2009 while on the lookout for civilian ships in the Indian Ocean to hijack, Mr. Kassim, Mr. Morian and Mr. Wariahe's navigation equipment became faulty. They started drifting generally in the Indian Ocean. Unknown to them, they drifted into Yemen's territorial waters. While there, they encountered a ship MV Faida, a Tanzanian registered cargo ship carrying maize destined for Maputo in Mozambique.

With little assistance, they successfully boarded and took command of the ship. However before they could leave the Yemeni territorial waters an American frigate christened USS George H Bush, responding to distress calls from the MV Faida, appeared and the three pirates were taken into custody. The American frigate escorted the MV Faida up to the Kenyan coast. The frigate docked at the Port of Mombasa and the three pirates on board were handed over to the Kilindini Port Police boss Afande Yusuf Abdul.

You are the Attorney General of the Republic of Kenya. His Excellency the President of the Republic of Kenya has taken a personal interest in the presence of the three pirates on Kenyan soil due to the potential security implications to the country. He wants a detailed opinion on the following:

- (a) Jurisdiction of Kenyan Courts to try the pirates; (7 marks)
- (b) Possible charges to be brought against the three men; (3 marks)
- (c) Draft possible charges. (5 marks)
4. Mr. Mwenda Pole a resident of Mbotela Estate has been experiencing what counselors call a 'difficult marriage'. His wife Mrs. Asha Pole is known to have explosive feats of anger. She does not like her husband's relatives visiting their home and if they do, they must give a personal undertaking to leave the home within twenty four hours of arrival. On 26th May 2009 Mr. Pole's last born brother, Mr. Kambo, visited but stayed for more than 24 hours. Mrs. Pole was very angry and she demanded the immediate expulsion of Mr. Kambo and an argument ensued between Mr. and Mrs. Mwenda Pole. Mr. Pole picked up a chair and hurled it at Mrs. Aisha Pole. Luckily the chair missed Mrs. Pole but hit a wall unit made of glass. The wall unit broke into pieces and a huge piece of flying shrapnel pierced Mr. Mwenda Pole's neck killing him instantly.

As all this drama was unfolding Mr. Kambo and Mr. Punda Milia (the domestic servant) were watching from a distance.

(i) You are the Attorney General of the Republic of Kenya. What lawful steps will you take to deal with and resolve this matter?

(10 marks)

(ii) Outline the role of Mr. Wakili Kweli, an Advocate appointed by Mr. Mwenda Pole's father.

(5 marks)

5. Kudumu, Kesha, Himili and Baraka grew up together in Tamasha village. They completed 'O' levels but were not financially able to pursue further studies.

Kudumu decided to visit his uncle Hodari in Nairobi at Ushindi Estate. Whilst there, he interacted with friends and relatives and informed them that he was looking for a job.

On 6th June, 2008 he met his long lost friend Maendeleo in town and they caught up on the lost time. Maendeleo told him that he had been away working in Saudi Arabia, was back on holiday to bring some money to start construction of a home at their village.

Kudumu enquired how he could secure employment. Maendeleo asked him to meet with him the next day at Khoja Mosque area on Moi Avenue. The next day they met at 1 p.m. at the agreed spot. Maendeleo introduced Kudumu to a lady Binti Mrembo who explained to Kudumu that there were vacancies for various categories of employment. The Saudi Arabia Consulate was looking for drivers, clerks, construction workers, hotel workers and househelps. Binti gave Kudumu a form to fill in the details and category he preferred. He did so and was asked to pay Kshs.20,000/- for processing of travel documents and registration fee. He was to avail a valid passport, ID Card, medical fitness record and certificate of good conduct. Binti asked Kudumu to look for other interested persons. They were to meet in 2 weeks.

Kudumu went and informed Kesha, Himili and Baraka. They also told other villagemates. They began to prepare to come to Nairobi, got Kshs.20,000/- each and the relevant documents. On 1st July 2008, they met at Khoja Mosque, Kudumu, Kesha, Himili and Baraka, Maendeleo, Binti Mrembo who was now accompanied by a Saudi representative, Abdallah Tembo. They filled in the prescribed forms and produced the requisite documents. At the end of the meeting, they were eight applicants including Mkweli, Akili, Tisho and Tamaa Binti and Abdallah received a total of Kshs.160,000/-. They all agreed to meet again on 20th July, 2008 at the same venue to arrange for the trip to Saudi Arabia.

On 20th July 2008, they converged at the venue but Binti and Abdallah did not appear. Kudumu called their cellphones that went dead. He decided to look for Maendeleo. He went to Ushindi Estate and found him. Maendeleo asked for time to look for Binti and Abdallah. After 1 week, he came and informed Kudumu that he could not trace him. Kudumu and Maendeleo went to the Saudi Arabia Consulate to inquire and report the matter. They were informed that the Consulate was not aware or involved in the matter. They proceeded to Central Police Station and reported the incident.

Kudumu went back to the uncle's place a devastated man, he did not have a job, he lost Kshs.20,000/- and also made friends loose too. He kept going to the Khoja mosque area each day.

A month later, he went to the spot and found a man who was grumbling that he had been conned money to get a job in Saudi Arabia. The man, Bahati described what had happened and Kudumu realized it was a similar incident to what happened to him. They talked. Suddenly, they saw Abdallah alight from a matatu, Bahati followed Abdallah while Kudumu ran to seek help from the police. As they communicated on phone, the Police Officers pounced on Abdallah and arrested him.

At Central Police Station, Abdallah was interrogated. He led the Officer to Binti's house in Eastleigh where the police officers recovered numerous passports, ID cards, medical records and certificates. Binti was arrested and recovered items taken to the Police Station.

Advise on the:

- (a) Processes to compile a case; (5 marks)
- (b) Contents of the prosecution file (5 marks)
- (c) What are the charges to be preferred (draft them) (5 marks)

6. The residents of Funguo Estate have been complaining to the Police and the local administration of the growing incidents of insecurity in the area. There has been a spate of robberies, carjackings and attacks in the area and it is scary to be out after 7 p.m.

Hajali a new resident in the estate was driving home at 10 p.m. in a BMW 520i green in colour along Utumishi Road. Suddenly, a vehicle, Toyota Corolla came at high speed behind him switched off the headlights and banged his car from the rear. He stopped and came out. He was accosted by 4 men brandishing guns. They asked for his car keys, mobile phone and wallet. He was buddled into the boot. They left the vehicle they came in and drove in the BMW.

At this time, the police in plain clothes were on patrol strolling along the Utumishi round about. The 4 men drove in front of a motorist, Bahati Mbaya in a Pajero and stopped in front of his vehicle. The 4 men came out and brandishing guns took all the motorists belongings, money, cellphone and car keys and bundled him in the rear seat of the BMW. They all drove off.

The police officers on patrol received reports of the 2 robbery incidents and the registration number of the BMW vehicle on the police phone. One of the officers, saw the vehicle and staggered on the road like a pedestrian seeking help. The vehicle screeched to a halt. The other officers who were hiding nearby emerged and shot in the air and demanded the 4 occupants to surrender. They did and surrendered the guns and they were arrested.

At the Haraka Police station, the 4 men whose names were Chatu, Mabele, Tinka and Opash were remanded in cells, the motorists Hajali and Bahati Mbaya recorded statements and went to hospital for treatment.

In the course of investigation, it emerged that Chatu, the ringleader is a habitual offender, and he had escaped from custody pending another ongoing robbery case.

In the boot of the car, Toyota Corolla that was left at the scene of the first robbery, were found assorted ID Cards, credit cards, wallets, mobile phones, number plates, black cellotape, bundles of keys and assorted jewelry. The 4 suspects have been charged with 2 counts of robbery with violence contrary to section 296(2) of the Penal Code. Other victims have flooded the police station to identify their belongings and record statements.

You have been engaged by the 4 men as their Counsel to conduct their defence.

They have asked you to advise them on the conduct of proceedings when they are arraigned in court.

Advise them on:

- (a) Right to bail and bond and what the court will take into account in granting or denying them bond/bail; (5 marks)
- (b) The process of taking plea and pleading guilty; (5 marks)
- (c) The process of taking plea and pleading not guilty. (5 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

JUNE 2009

CRIMINAL PROCEDURE



Instructions

- (a) Answer QUESTION ONE and ANY OTHER TWO QUESTIONS
- (b) Question ONE is compulsory and carries 20 marks
- (c) All other questions carry 15 marks each
- (d) Marks may be lost for illegibility
- (e) Two (2) hours are allowed

1. Mr. Baraka is the proprietor of Maendeleo Travel Agency in Eastleigh, Nairobi. He made huge profits recently from several bookings for the Muslim Hajj pilgrimage to Mecca. From the profits he wanted to take a holiday and invest in real property. As he discussed investment prospects with his colleagues, 2 men came in and claimed they had diamonds for sale. This caught Mr. Baraka's attention and he walked towards the men, Khan and Asif. He asked to see the diamonds. Asif said they could only be seen on agreement to purchase and part payment.

Asif and Khan went with Baraka to Highridge, Diamond Plaza and introduced him to Abdallah. After exchanging pleasantries, Abdallah left and came back and from his mouth removed a shiny crystal that he claimed was a sample of the diamond for sale. Baraka asked for proof that it was real diamond. Abdallah called on his mobile phone and talked to someone. After the call, he said someone was on the way coming to demonstrate that this was real diamond. As they waited, they went to a nearby café for refreshments, which Baraka paid for.

Rukiya, a beautiful lady in her thirties appeared, greeted them and talked to Abdallah. She then sat down, produced a teaspoon and poured some liquid in it, then took the crystal Abdallah had shown Baraka earlier, put it in the teaspoon, and lit the contents with a cigarette lighter. After a short while, she blew the flame off and told Baraka to see for himself; the diamond crystal did no change.

Baraka was convinced it was real diamond and they negotiated the price at Ksh.500,000/= for 500g and Ksh.1,000,000/= for 1000g. Baraka considered this a good price since he would make a huge profit once he sold it to the jewelers.

Baraka asked them why they did not sell the diamonds directly to the jewelers and they claimed that they came from Congo, and as illegal immigrants they were under police surveillance. They wanted

to go back home but needed money. The jewelers would want details which they were not ready to provide for fear of arrest.

Baraka believed them and they agreed that Asif, Khan and Abdallah accompany Baraka to the bank and then Rukiya was to bring the 1000gms of diamond to the bank.

They took a taxi and went to Baraka's bank at the city centre. He walked to the manager's office, and after 30 minutes came out and went to the counter. Shortly thereafter he came out with money in his hands. They all walked out and entered a nearby hotel, to wait for Rukiya. Abdallah was impatient and kept calling frantically on his phone. Rukiya emerged after a while with a sealed box and told Baraka that in the box was 1000g grams of diamonds. Baraka paid Ksh.1,000,000 in cash to Abdallah as Asif and Khan looked on. Abdallah left first but as Asif and Khan rose to leave Baraka decided to open the box. Asif and Khan ran off but Baraka held onto Rukiya. On checking the box, there were only pieces of broken glass inside. He called the police who came and arrested Rukiya to help with investigations. The others were arrested and half the money recovered.

- (a) Advise the police on appropriate charge (s) to be preferred
 - (b) Draft the relevant charge(s) (20 marks)

2. Outline the plea-taking process where;
 - a) the accused pleads not guilty
 - b) the accused pleads guilty (15 marks)

3. Discuss the role of the prosecution in criminal trials. 15 marks)

4. Describe the criminal jurisdiction of the courts in Kenya. 15 marks)

5. What factors and/or principles govern sentencing policies in Kenya. (15 marks)

6. Outline the legal essentials in writing a judgement at the conclusion of a criminal trial.

COUNCIL OF LEGAL EDUCATION

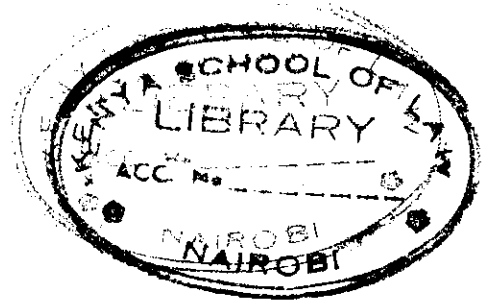
EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

DECEMBER, 2008

CRIMINAL LITIGATION

Instructions

- (a) Answer question ONE and any other three (3) questions
- (b) All questions carry 15 marks.
- (c) Marks shall be lost for illegibility
- (d) Time allowed is 3 hours



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1. On 23rd of April 2008, John Kano, the managing director of Twit To Ltd, a garment manufacturing plant in Athi River, was conducting what he calls an 'administrative morning round' in the factory premises at 10.am when he received a telephone call from the factory's Chief security officer a Mr. Kali Kauka. Mr. Kauka explained to Mr. Kano that he was at the main factory gate and that there were about four visitors who included Mr. Atoti Supa the Honourable Minister for Labour and Manpower Development of the Republic of Kenya. The Minister's personal assistant, a Mr. Kacheke, explained to Mr. Kauka that in fulfillment of their Political Party Leader's election pledge to supervise factories and in readiness for the up coming Labour Day celebrations, the Minister had decided to visit their premises to assess their workers' working condition and examine their payroll to satisfy himself that Twit To Ltd complied with all their statutory obligations.

Mr. Kano authorized the factory security to let the Minister and his entourage into the factory premises whereupon he would conduct them on a factory tour. As soon as the Minister and his entourage entered the factory premises, they went straight to Mr. Kano's offices and were ushered into the Boardroom for a discussion before the tour. Mr. Kano met the minister and expressed his pleasant surprise at the surprise visit. The minister explained that his mission was two fold:-

- i) to meet factory workers and assess their working condition;
- ii) to examine the payroll and confirm if the factory has been meeting/paying out the minimum wage as gazetted.

Mr. Kano confirmed to the minister that he would conduct him on a tour of the factory unconditionally but added that as for the second request, he required a board of Director's approval to avail to the Minister or any third party payroll details, in the absence of a court order. The minister demanded for the payroll, with or without the board's consent arguing that he was discharging his ministerial responsibilities. Mr. Kano stood his ground after which a scuffle ensued. The Minister slapped Mr. Kano across the face, picked Mr. Kano's official lap top that

was lying on the table and smashed it on the ground before his personal assistant and bodyguard intervened and restrained the Minister. The scuffle was witnessed by Ms Subira Mrembo (Mr. Kano's secretary), Mr. Kali Kauka, Mr. Kacheke and Mr. Matata (the Minister's bodyguard).

Mr. Kano bled profusely and was rushed to Athi River District Hospital whereat he was treated and discharged the same day. From hospital he drove to Athi River police station and made a report to the duty officer (Occurrence Book Number 13/23/04/2008) giving a detailed account of what happened. On mentioning the assailant's name, the duty officer said he had no authority to enter a minister's name in the occurrence book and claimed that he had to be specifically authorized by the Officer Commanding Station who at the time was not in office. Mr. Kano was asked to return to the police station the following day, 24th April 2008 at 10.am for further instructions. When he returned on 24th April 2008, he was asked to go away and return on 25th April 2008 to enable the OCS to 'consult further'. On 25th April 2008, the OCS informed Mr. Kano that he had received orders 'from above' to take Mr. Kano's complaint in full, which he did and commence investigations into the incident. Mr. Kano, Ms Subira and Mr. Kauka recorded statements and were thereafter advised that they would be contacted in due course. For the last eight months, Mr. Kano has not heard from the OCS despite making numerous telephone calls and visits to the Police station. Mr. Kano feels very frustrated by the conduct of the OCS and calls on you for advice. He affirms to you his desire to put the criminal justice system into motion and have the Minister punished for his misconduct. He inquires from you the steps necessary for the conduct of a private prosecution.

- a) With the aid of relevant case law and statutory provision advise him on what steps and considerations you will take into account in mounting a private prosecution; (7 marks)
- b) What purpose does the option to initiate private prosecution serve? (2 marks)
- c) Draft an appropriate charge sheet covering all the offences disclosed in the narrative above; (2 marks)
- d) As a private prosecutor, what must your file have before you commence the prosecution? (2 marks)
- e) Can the Attorney General intervene in any way in a private prosecution? Elaborate your answer. (2 marks)

2. On 15th October 2008, Mr. Diallo an employee of Lehman Brothers Bank headquartered along Kirinyaga road Nairobi left his house in Kayole at about 5.30 am so as to beat traffic jam along Jogoo Road arrive in office early enough, open the bank and clean it up. Mr. Diallo is employed as a Senior Cleaner at the Bank a position he has held for the last 35 years. On arriving at the bank at about 5.45 am, the bank was dark and it appeared to him that the electricity connection to the banking hall was not functional. Before opening the main grill, he approached the night guard one Mr. Papa who was in a cubicle next to the main door grill. To his shock and amazement, he realized that the uniformed man was not Papa but a total stranger who whipped out a gun and placed it on his forehead. Immediately thereafter, three other persons emerged from the shadows each armed with a gun, and ordered Mr. Diallo to open the bank immediately.

The sun was rising fast but it was not clear to Mr. Diallo who the four men were. He could only recognize Papa the security guard who had been stripped off his uniform and his hands bound from behind. He appeared to have been thoroughly beaten as he seemed unconscious of what

was happening around him. Mr. Diallo was forced to open the bank after which the four men made him to lie down on his face next to his desk as they ransacked the banking hall. Unknown to the robbers, Mr. Diallo reached out for the panic button under his desk and pressed it. As the four men were leaving, police from the Central Police Station arrived and a shootout ensued. One of the men was shot dead while the other three escaped with all they had collected from the bank. The bank estimated to have lost Kshs.2,000,000/-.

On 28th of October 2008 Mr. Kiriti, Mr. Kokiput and Mr. Mchafu were arrested in Komarock Estate and Kenya Shillings 1,800,000/- was recovered from them. In addition, two AK-47 assault rifles and a Cieska pistol was found in their house. Mr. Kiriti, at the time of arrest, had the following features, a scar on his left jaw and a slight limp while walking. Mr. Kokiput stammered in his speech and his left ear was deformed. Mr. Mchafu was short and pot bellied. All these features had been noted by Mr. Diallo. The arresting officer is called Chief Inspector Kendagor. The investigation officer is Inspector Kitur. You are the Legal Counsel attached to the Central Police Station. You have noted in your diary that there is need to conduct an identification parade of the three men in custody.

- a) With the aid of case law advise the OCS on how to conduct a legally acceptable identification parade. (6 marks)
 - b) Draft an appropriate charge sheet for all the offences disclosed in the narrative; (3 marks)
 - c) Assuming that you act for the three men in police custody and that they are charged in court on 20th of November 2008 with the offence of robbery with violence, outline the measures you will take in readiness for the trial set to commence on 30th November 2007. (3 marks)
 - d) Given that the three men were held in custody from the 28th October 2008 to 20th November 2008 what would be your advice to your clients regarding the pre arraignment detention (3 marks)
3. On 18th of February 2008 your client, Mr. Wakisa Tom was charged in court with the offence of theft contrary to section 275 of the Penal Code Cap 63. He also faced an alternative charge of handling stolen property contrary to section 322(2) of the penal code cap 63 of the Laws of Kenya. The charge sheet read as follows:-

'Statement of offence: stealing contrary to section 275 of the penal code

Particulars of the offence:- on 12th of February 2008 at Westlands along Museum Hill Road in Nairobi jointly with others not before court stole and or handled a Sony Television set the Property of Mali Mangi.

ALTERNATIVE CHARGE

Statement of offence:-handling stolen property contrary to section 322(2) of the Penal Code

Particulars of the offence:-on 12th of February 2008 at Westlands along Museum Hill Road in Nairobi jointly with others not before court you handled a Sony Television set knowing or having reason to believe that the same were stolen'

The prosecution has called 6 witnesses and closed its case. All the prosecution witnesses have led credible evidence that your client knowingly handled the stolen property. You are now preparing to make submissions under section 210 of the Criminal Procedure Code Cap. 75. Your client, who studied law at the University of Kiev in Ukraine about 35 years ago remembers vaguely his professor of Criminal Litigation discussing the concept of duplicity of charges. Your client tells you that he thinks the charges as drawn are duplex and that you should strongly submit on that point.

With the aid of case law and statutory provisions, prepare your client's submissions to address the following points:-

- (a) What do criminal litigation lawyers mean by saying the charge is duplex? (2 marks)
 - (b) What is the rationale behind the rule against duplicity? (2 marks)
 - (c) Under what circumstances does the prosecution draw alternative charges? (2 marks)
 - (d) The propriety of the charges facing your client. (9 marks)
4. You are an advocate of the High Court of Kenya of 5 years standing. Mr. Kokoto Mbovu was briefly arrested on 12th of March 2008 and released on 13th of March 2008. It was alleged that in the aftermath of the 27th December 2007 General election in the Republic of Kenya, Mr. Kokoto organized a private militia in Wendoni village. He instructed the militia to torch property of people whom he believed did not vote for his preferred presidential candidate at the said General Election. Following Mr. Kokoto's instructions, many people in Wendoni village including Mr. Chemka had their homes razed down by the militia and women of all ages were selected and assaulted.
- (a) What offences are disclosed by the narrative above, if any? (2 marks)
 - (b) Assuming that you are engaged by Mr. Chemka to advise him, what steps MUST he have take to put the criminal justice system into motion? (4 marks)
 - (c) Assuming that you are engaged by Mr. Kokoto, outline to him the trial process in the subordinate court from arraignment to sentencing. (7 marks)
 - (d) Is there any difference in substance between the trial process in the High Court and the subordinate courts? Explain. (2 marks)
5. Mr. and Mrs Mkalimali were married for 20 years, Mr. Mkalimali is a prominent business man, running Maendeleo Holdings, a multinational Company. Mrs Mrembo Mkalimali was a housewife and homemaker. They have 3 children; Binti, Kinga and Hodari aged 19yrs, 16yrs and 12yrs respectively. They live in the up market area of Maridadi Grove.

On 10th October, 2008, the family held a party for Kinga on his 16th birthday at their residence. Classmates and friends of Kinga came, uncles, aunties and family friends attended the party too.

Hadija, Shehe and Hodari who worked in the said residence were busy ensuring everything was in order.

Mrembo Mkalimali was entertaining guests, Mkalimali was not at the party, he left early that Saturday morning claiming he was going to work at the office. The party begun at 2pm and went on into the night. Kinga was not that happy as his father was not there yet. He quietly went and asked his mother when his father would come in. His mother smiled and asked him to wait he was on the way.

After an hour, Mrembo went upstairs to the bedroom and called her husband but could not reach him. She was persistent until he picked the phone. After a heated exchange he said he was coming to the party. Another hour later, Mkalimali came home greeted the children and briefly mingled with guests.

Shortly thereafter, he went to the bedroom. Mrembo went after him and asked him why he retired from the party early after he was away all day. Mkalimali shouted at her and a scuffle ensued between them. Finally, he asked her to leave the matrimonial home. She was adamant. He pushed her and she screamed for help. Hadija, came to see what was happening. At this time Bintiye had left the party and she was listening and watching the scuffle from a hidden distance. Mkalimali, chased Hadija away. He turned and grabbed Mrembo shook her and banged her on the wall. She fell and groaned pain. As she tried to wake up, Mkalimali took the walking stick and hit her on the head. She was still. He called his brother, Msaidizi and explained what happened. Msaidizi rushed Mrembo to hospital, unfortunately the doctor pronounced her dead on arrival.

Meanwhile, Mkalimali called Hadija in and ordered her to wipe the blood on the floor. He threatened her not to say anything about what happened and if asked to say Mrembo fell down the stairs. He took the blood stained walking stick and hid it in the bedroom. Unknown to him, Binti watched everything as it happened. She was in shock. She ran to her room and cried. Her aunt Mama Mkweli came to her room and she told her what she saw. The matter was reported to Upesi Police Station. The deceased's family led by Mama Mkweli are concerned with the death of Mrembo especially from the report that alleged she died as a result of falling down the stairs. They have sought their advocate's advice on the following;

- a) What role will Upesi Police Station play to ensure that the matter is conclusively determined? (5 marks)
- b) What proceedings and process may be carried out in court? (5 Marks)
- c) What role if any will the Attorney General play? (2½ marks)
- d) What role may their advocate engage in during the proceedings? (2½ marks)

6. Ushindi and Hodari are directors of Yote Yawezekana Holdings, a steel manufacturing company, on Enterprise Road. They have just passed a resolution to expand and distribute steel pipes of a new brand called chuma ngumu in East Africa beginning December, 2008.

On 2nd December, 2008, they flagged off the first consignment of assorted steel bars to Uganda. The trailer Isuzu lorry reg. ZA2351 was driven by Shupavu and the turn boy was Juhudi. They drove from Nairobi towards the border at Malaba.

On reaching near Eldoret on the Nairobi-Kisumu highway, at about 5.30pm, Shupavu saw a stationary vehicle, parked partly on the road and 2 men who waved them to stop. Juhudi told Shupavu to drive on, but Shupavu thought the 2 men were in danger and needed help. He stopped.

Immediately, the 2 men came one on each side of the vehicle and shoved them out of the vehicle and demanded keys to open the consignment. 3 other men appeared on the scene. Shupavu adamantly refused to release the keys. The 5 men pounced on him and beat him, one of them pointed a gun at him. Juhudi shouted to Shupavu to give the keys. He gave the keys.

Juhudi and Shupavu were tied on the hands and legs and thrown in the boot of the stationary vehicle. They heard commotion of the steel bars being offloaded from the lorry. After a while all was quiet. They banged the boot and shouted for help. After 20 minutes, a Good Samaritan came to their aid. Jirani Mkweli, broke the boot, he untied Shupavu and Juhudi, helped them out of the boot. He took them to hospital, they were treated and discharged. They reported the matter to Eldoret Police station. They called Hodari and Ushindi and informed them what happened.

The investigations revealed the following;

- The trailer Isuzu lorry reg. ZA2351 was towed to the Eldoret Police Station. Scenes of Crime took photos of the said trailer.
- Hodari and Ushindi brought the consignment note for the 20,000 steel bars valued at Ksh.2,000,000/= of chuma ngumu brand, a new brand in the market that was destined for Uganda.
- On 4th December, 2008, Police officers recovered 5,000 new steel bars of chuma ngumu brand at Haraka Enterprises being offered for sale. Mjanja, the proprietor of the business led the police to the person who sold him the steel bars.
- Mjanja led Police to Hatari, a wheeler-dealer around town. Upon interrogation by Police, he led them to a godown at Mbotela estate.
- At the godown, were 2 men, Mkali and Mukora.
- The police conducted a search and retrieved assorted new steel bars of chuma ngumu brand about 10, 000 of them
- At an identification parade, Shupavu and Juhudi positively identified Mkali and Mukora as the 2 men who stopped them on the road and accosted them.

Answer the following questions;

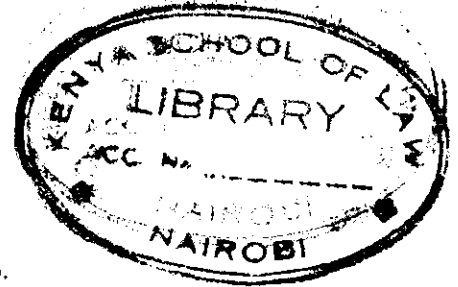
- (a) Is there a case for determination in the criminal justice system? (5 marks)
- (b) If so what preparation will you make for trial? (5 marks)
- (c) What is/are the charge(s) to be preferred? (Draw the proposed charges) (5 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

NOVEMBER, 2008

CRIMINAL PROCEDURE



Instructions

- (a) Answer QUESTION ONE and ANY OTHER TWO QUESTIONS.
- (b) Question ONE is compulsory and carries 20 marks
- (c) All other questions carry 15 marks each
- (d) Marks may be lost for illegibility
- (e) Two (2) hours are allowed

1. Mr. Hodari Tajiri is a prominent businessman and proprietor of Jitegemee Holdings Limited. The last 12 months he had been ailing, he had visited doctors and was admitted in hospital. As a result, his family was concerned and his business affected by his absence. Hodari Tajiri was desperate, he spent lots of money as medical expenses, yet he was not able to work due to ill health.

2 months ago, 2 men visited Hodari, in his office. They introduced themselves to him as Mjanja and Maliza. They told him, they were from his home area and learnt from relatives of his problem. As traditional medicine-men, they could cure him and make his business flourish. Mjanja said they had to go to Tanzania to collect special herbs to treat him and needed Ksh.100,000/= Hodari gave the money. They told him that to divulge the information to anyone would affect their success. The matter was to remain a secret.

After, 1 week, Mjanja and Maliza, called Hodari and asked to meet at Karibu hotel. They met, gave him some concoction to drink every evening and he would improve. However, they said they had talked to the gods at the sea and they were annoyed with him and he needed to make a sacrifice and cleanse himself for the medicine to work. They asked for Ksh. 200,000/= to travel, obtain the special items required for the cleansing ceremony; a special white cock, a rhino's horn, special multicolored woven cloth and fly whisks. The ceremony was to be done in 2 weeks. They would come to take him by the sea and carry out the ceremony and he would heal and prosper. Hodari gave the money and waited for 2 weeks.

After 2 weeks, Hodari did not hear from Mjanja and Maliza. He tried the mobile numbers they gave him, but did not get them. At this time, the more he took the concoction, his health deteriorated fast, his family intervened and rushed him to the hospital. The doctor, Mwepesi inquired what Hodari took and the liquid was produced. Upon examination, it was found to be poisonous.

Mwepesi called the Police. The police interrogated Hodari who told them the whole episode.

The police launched investigations and later the 2 men, Mjanja and Maliza were traced and arrested at Karibu hotel.

- (a) Advise the police on appropriate charge (s) to be preferred
 - (b) Draft the relevant charge(s)
2. Discuss the statutory provisions, practice and procedure of plea taking.
 3. Discuss the fundamental principles of a fair trial in Criminal justice system.
 4. Outline the legal requirements of bail and bond in the Criminal justice system.
 5. Write notes on the following;
 - (a) The hierarchy of the court system in Kenya.
 - (b) The criminal trial process.