

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

NOVEMBER, 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**
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1. On 10th January 2009, Inspector Cheche of Huduma Police Station received information from an informer, Mshindi that a gang of robbers was planning to rob Bidii Bank in 2 days time. The gang leader Rasta and 7 other men including Mshindi met every evening at Chakula Bora Restaurant to finalise plans.

Inspector Cheche informed the O.C.S of Huduma Police Station and a contingent of police officers was assembled to foil the intended robbery.

On 12th January 2009, at 2 p.m. police officers in plain clothes were stationed along Uhuru Highway. They pretended to sell wares and newspapers. Police patrol vehicles were parked at the Museum Building.

At 2 p.m. a motorcade of 3 vehicles came along Uhuru Highway towards Bidii Bank and the police cars came in hot pursuit. Two of the vehicles drove off while one was intercepted at the scene. The police arrested the driver (Kikwete) of the vehicle Registration Number KAR 2009W – Toyota saloon blue in colour at the scene. The boot of the vehicle contained assorted number plates and black cello tape, handcuffs, metal bars and 2 pistols.

Meanwhile some of the other officers ran into the bank and found 4 men with the heads covered with masks brandishing guns and ordering the security guards to lie down. One was at the counter demanding money from the teller. A shootout ensued between the police officers and the 4 robbers. One of the robbers was shot dead and a member of the security staff injured. The 3 suspects (Mkali, Mrefu and Chatu) were arrested and 2 guns and a sack stuffed with money recovered.

The 2 vehicles that sped off were given a chase by police with one of them being intercepted at City Park/Forest Road. Inside were 2 men Tamaa and Haraka. The motor vehicle registration Number KAW9996W, Subaru Legacy was found with assorted wallets, identity cards, jewellery and watches.

The other vehicle was intercepted at Ruaraka, a shoot out ensued and the driver of the vehicle was shot dead and the passenger Makoli arrested. He had a gun in his possession. The motor vehicle Toyota Collora KBB4444X was also detained.

Mkali, Tamaa, Haraka, Mkoli, Mrefu and Chatu were detained at Huduma Police Station. Investigations revealed that the 3 vehicles used in the robbery were stolen vehicles with false number plates. The Manager of Bidii Bank (Mr. Hesabu) confirmed that Kshs.2,000,000/- in assorted currency was stolen during the said robbery. Inspector Cheche was in charge of the police teams interviewed and recorded statements from Mshindi and the bank manager staff of the bank. He also collected exhibits.

(a) Advise IP Cheche on the appropriate charges and draft the charge sheet.

(7 marks)

(b) Assuming you are the defence counsel, describe to your client the trial process they should expect in the court.

(8 marks)

2. Mr. Mamboleo is a prosperous and prominent businessman trading under the name and style of Imara Holdings.

On 3/6/09 when in the boardroom chairing a meeting of branch managers, he received a telephone call informing him that his son Machachari Mamboleo had been arrested together with other boys and that they were at Upesi Police Station.

He called his wife and they drove to Msingi Bora High School. On arrival, there was a huge crowd of onlookers and parents in a sombre mood. The School's dormitory had been burnt down and property worth millions of shillings destroyed. Mamboleo went to the headmaster's office where he was informed that students had gone on the rampage the previous night and set the dormitory on fire. Some students who were asleep had been woken up by screams and choking smoke and during the ensuing stampede, some were injured and those who did not get out in time sustained burns. About 10 students were admitted to Matibabu Hospital.

Upesi police officers came to the School and after interviewing students and staff it emerged that the ring leaders of the strike were about 10 boys, among them Mamboleo's son. They were arrested and taken to Upesi Police Station. Mrs. Mamboleo was sobbing uncontrollably and saying that she was going to lose her baby. Their son Machachari Mamboleo was born on 12th December 1993. Mr. Mamboleo calls the Company Secretary of his Company Imara Holdings for advice. Mr. Mrembo Mkezi advises the engagement of a criminal litigation advocate from the firm of Ukweli & Shujaa Advocates. You are an advocate in the law firm, and the matter is referred to you.

(a) What are your client's rights at the pre-trial stage?

(5 marks)

(b) What are your client's rights during trial?

(5 marks)

(c) What is your advice to the Mamboleos?

(5 marks)

3. Mr. Wesley Kumita was admitted as an Advocate of the High Court in November, 2008. He joined the law firm of Ukita, Marua & Pilita Advocates. During the interview he had expressed preference to deal with criminal cases. He joined the litigation department. The first case assigned to him was an old file of criminal case no. 1006/2007 Republic vs Ngoma & 3 others. Mr. Kumita read through the file and, in a nutshell, gathered that the 4 accused persons were charged with robbery with violence contrary to section 296(2) of the Penal Code. As he read through the file he realized that he needed to have an interview with the 1st accused person Mr. Ngoma. He visited him at Kamiti Prison and the officer on duty led him to a room where he met Mr. Ngoma. During the interview Mr. Ngoma reiterated that he was innocent of the crime. He told him that on the fateful day he was walking towards the bus stop with a cousin, Tendo. People emerged

running and police officers in hot pursuit behind them. Everyone ran in different directions. As he ran he fell down and a police officer arrested him. He was later charged with 3 other suspects. He had participated in an identification parade and was not identified. He gave the cousin's address and contact.

Mr. Ngoma told Mr. Kumita that he was innocent of the crime but the matter has taken too long as his co-accused were reluctant to proceed and keep on making applications for adjournments. He fears that he will never be set free. Mr. Kumita assures him that he will take over the case and pursue it as soon as practically possible. Mr. Ngoma asks Mr. Kumita the following questions:

- (a) What are Mr. Ngoma's rights in the criminal justice system in the circumstances? **(8 marks)**
- (b) What application(s) would Mr. Kumita make to enforce those rights and what reliefs can the court grant? **(7 marks)**

4. In what was billed by the Commissioner of Police of the Republic of Kenya Major General Tumbo Ngumu as a major operation against terrorism and terror suspects, several young men residing and working in the Eastleigh District of Nairobi were arrested. Among those arrested on 28th January 2009 was Mr. El Baradei Osameldin and Mr. Adil Abdilghani. The two were arrested and detained at Central Police Station, Nairobi up to 10th February 2009 then flown to Malindi town where they were held up to 28th February 2009. On 1st March 2009 the two terror suspects were flown to Addis Ababa by the Anti Terrorism Police Unit on the orders of the Minister for Internal Security where they were interrogated by Cobra Squad, the Ethiopian Anti Terror Police Unit up to 14th March 2009. On 14th March 2009, the head of Cobra Squad Master Haileule Bekele in liaison with the United States of America's Central Intelligence Agency (CIA) attaché flew the two suspects to Guantanamo Bay in Cuba where further interrogation of the suspects was conducted by the CIA. On 25th March 2009 the Guantanamo Bay CIA Commander ruled that the two suspects were 'low value' suspects and ordered their return to Kenya.

In the early hours of 30th March 2009, under the cover of darkness, Mr. Osameldin and Mr. Adil touched down at the Jomo Kenyatta International Airport aboard an American military transport plane a C-130. They were immediately taken into the custody of the Officer Commanding Station at the Jomo Kenyatta International Airport police station. Thereafter on 5th of April 2009 they were taken to Kileleshwa Police Station where they were held.

In the meantime, since 28th January 2009 Mrs. Osameldin and Mrs. Adil have not seen their loved ones. They have moved from police station to police station looking for their respective husbands in vain. They have paid several visits to the City Mortuary in Nairobi and the Municipal Council's mortuary in Mombasa after hearing that their respective husbands were killed during waterboarding, a new technique of interrogating suspects. Mrs. Osameldin and Mrs. Adil are very frustrated by their unfruitful search for their loved ones. On 4th of April 2009, Mrs Osameldin and Mrs. Adil approach you in your Chambers.

- (a) What remedies are available for the two suspects? **(5 marks)**
- (b) How would you approach the appropriate and competent courts of law for the remedies available in law?

(10 marks)

5. Mr. Mharibifu Matata was arrested on 10th of June 2009 for handling stolen property. The report filed at Kamukunji Police Station in Nairobi was that on 7th June 2009 Mr. Matata was found in possession of three crates of Alvaro and one crate of Tusker beer stolen during a burglary committed on Penzi Bar at about 2.00 a.m. on 5th June 2009.

At the hearing before the Principal Magistrate's Court at Makandara, PW1 Mr. Josiah Mulevi, the proprietor of Penzi Bar testified that what was stolen from his bar were three crates of White Cap and one crate of fanta soda. PW2 Mr. Mumburi Mwepesi, a waiter at the Bar, testified that before he signed off duty at 1.00 a.m. on 5th June 2009, there was no drink in their stores as students from Kamukunji School of Technical Studies had celebrated a colleague's birthday and consumed all the drinks that had been in their stores. PW3 Police Constable Afande Bondia testified that on 10th of June 2009 at about 9.00 a.m. while patrolling Gikomba area of Nairobi he received information that Mr. Matata was in possession of a dangerous consignment. That he, in the company of Police Constable Kulecho Korja, went to Mr. Matata's house and recovered three crates of Alvaro and one crate of Tusker beer which were exhibits 1a, b, c and d. During cross-examination, it turned out that the exhibits already admitted in court were crates of empty bottles although PW3 insisted that what was recovered from Mr. Matata's house were bottle fulls of Alvaro drink and Tusker beer.

The defence chose not to call any witness and Mr. Matata gave an unsworn statement. The court record reveals the following:

- (a) PW1 and PW2 were not sworn in before they testified;
- (b) The trial magistrate did not sign and date all proceedings;
- (c) The charge sheet was unsigned;
- (d) During the testimony of PW2, the trial magistrate expelled the accused person from the court and kept him out of the court room for allegedly winking at the court clerk;
- (e) The charge sheet read as follows:-

"statement of offence: handling stolen property contrary to section 322(10) of the Penal Code

Particulars: on 10th June 2009 you jointly and severally at different locations in Nairobi and its environs handled three crates of Alvaro drink and one crate of Tusker Beer that had been stolen from Penzi Bar."

- (f) Constable Kulecho Korja was not called to testify despite his availability;
- (g) PW2 sat through in court while PW1 testified.

The trial magistrate convicted Mr. Matata and said as follows: "...I hold that PW3 Police Constable Afande Bodia is a truthful witness and credible. I trust his testimony in its entirety. I also find, as a matter of fact that Mr. Matata was found in possession of an alcoholic beverage. As a member of the "Free the World from Alcohol Association" I must convict Mr. Matata as I hereby do and give him the maximum sentence allowed by law. I am called to do this by my fidelity to the Association's cause..."

Mr. Matata has been convicted and sentenced to serve 33 years in prison. He has retained your service to advise him on the appeal process and represent him at the Appeal.

- (a) Through what instrument do you institute an appeal from the Subordinate Court to the High Court? **(1 mark)**
- (b) Within what statutory duration should the appeal be instituted? **(1 mark)**
- (c) Draft the grounds upon which the conviction of Mr. Matata can be challenged in the High Court. **(8 marks)**
- (d) What legal principles govern first appellate courts in hearing and determining appeals? **(5 marks)**

6. Mr. Tatu Nyamamoto and Mr. Okinawa Akudo are Japanese tourists who visited Kenya on 14th October 2009 with intention to visit various tourist destinations. On landing at the airport in Nairobi, they engaged the services of Mr. Mkalimani Staarabu, a certified Japanese-English interpreter. The two tourists could not communicate in any other language other than Japanese. On 15th October, 2009 the trio drove to Maasai Mara game reserve where they spent their day tracking down the big five.

At about 4.00 p.m. on 15th October 2009, Mkalimani was informed that a rhino christened 'Kofi Annan' had been seen along the Mara River drinking water from the River. Sighting of the rhino is a traditionally rare happening in the Maasai Mara game reserve. Mkalimani, Nyamamoto and Akudo rushed to the riverside as described by informants and to their joy they came across two rhinos. The cow is christened 'Mama Mkubwa and the calf is christened 'Kofi Annan'. On seeing the two rhinos Okinawa told Nyamamoto and Mkalimani that his grandmother was suffering from an ailment that is known in Japanese language as 'rhinosios'. He explained that his grandmother was obsessed with rhinos and that whenever she slept she would dream engaging rhinos in fights. He further explained that according to the advice of a witchdoctor in the Japanese city of Hiroshima, her grandmother's ailment would be cured by sniffing tobacco everyday from a rhino's horn.

Okinawa explained that he badly needed a rhino horn as that was the only chance to bring happiness to his ailing grandmother and possibly draw blessings from her before she died. Okinawa indicated to Nyamamoto and Mkalimani that in the event they wanted to join the cause of assisting his grandmother, he would be willing to share with them all the blessings that would come his way from his grandmother. In addition he offered each of them \$1,000 and in return, they would help him kill 'Mama Kubwa' and cut off the horn. After much persuasion Nyamamoto and Mkalimani agreed to Okinawa's proposal.

To their surprise Okinawa pulled out a gun from his camera bag and shot dead 'Mama Kubwa'. Nyamamoto and Mkalimani quickly removed the horn from the dead animal and then retreated to their hotel room. To celebrate acquisition of the rhino horn, Okinawa hosted an evening party at the hotel where alcoholic beverages were plenty. After about two hours of partying a fight broke out between Mr. Mbugua, one of the hotel's patrons and Nyamamoto and Mkalimani. To disperse the trio and stop the fight Okinawa drew his gun and fired in the air. The party abruptly ended as the small crowd was dispersed.

Police were called in and while searching for the gun they came across the rhino horn in Okinawa's room. A ceska pistol was also recovered from Okinawa's room. Interrogation of Okinawa reveals the entire plot and leads to the arrest of Akudo and Mkalimani. The trio are charged charged in a court of law in Narok.

- (a) Assuming you are the prosecutor, describe the contents of your file. **(5 marks)**
- (b) As the trial Magistrate what steps will you take before and during plea taking to comply with the law? **(3 marks)**
- (c) How many offences are disclosed in the narrative? **(3 marks)**
- (d) If the offence(s) are bailable, on what terms and consideration will you as a Magistrate grant bail? **(4 marks)**
