

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 2008. **(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 sexually 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 began 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)**
