

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION  
TO THE ROLL OF ADVOCATES

**ATP 101: CRIMINAL LITIGATION**

TUESDAY 2<sup>ND</sup> 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 20<sup>th</sup> 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 30<sup>th</sup> September, 2009. On 15<sup>th</sup> 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 20<sup>th</sup> September, 2010 Gul in the Company of his legal counsel were

served with the deportation order. However, the same could not be effected immediately as airlines were unwilling to take Gul on board. The earliest flight to Jamaica through Johannesburg was available on 2<sup>nd</sup> 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 18<sup>th</sup> April, 2010 at about 10.30 p.m. Mr. Modo Sonko, 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 unfitnes, 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 19<sup>th</sup> 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 18<sup>th</sup> 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 30<sup>th</sup> 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

aggrieved by the conduct of the two security men and he has come to you for legal advice on the best cause 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 (3<sup>rd</sup> August 2009) really drunk and carrying a 4 litre jerrycan 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 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 14<sup>th</sup> 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 3<sup>rd</sup> 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)**