

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 forty 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 dockets 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, dockets 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 Zimbabwi 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)**
