

# COUNCIL OF LEGAL EDUCATION.



## EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES.

### **ATP 104: TRIAL ADVOCACY.**

**THURSDAY 23<sup>RD</sup> NOVEMBER, 2017.**

**DURATION: 3 HOURS.**

#### **Instructions to Candidates:**

- (a) This paper contains **Five printed pages** including the cover page, with a total of **Six questions**.
- (b) Candidates **MUST** answer **FIVE** questions.
- (c) **Question ONE** is compulsory and carries **20 marks**.
- (d) **All other questions** carry **10 marks each**.
- (e) Answers **MUST** be supported by relevant case law and statutory provisions where required.

**PLEASE TURN OVER**

### QUESTION ONE

Your good friend Augusta was approached by his client Stephanie an accountant at the firm of Stakes & Co. Ltd. Stephanie has been charged with the offence of theft by servant. The theft in question took place at the Stakes & Co. Ltd office complex where Kshs.2 million was stolen from Stephanie's office. A few days later while watching the investigative series "Special Features" on MTN News, Augusta came across an investigative report on CCTV footage of the afternoon the theft that took place at Stakes & Co. Ltd. In the footage, Stephanie is seen transporting a big brown sack from his office into his car.

Augusta is perplexed by this footage and immediately calls Stephanie who without prodding, confirms that it is indeed him in the footage. He further confirms that he took the Kshs.2 million from the office counter in order to finance a tender he had recently been awarded by the County Government. He insists that he intended to return the money as soon as he received his payment for the tender.

They agree to meet for the initial client interview. During the meeting Stephanie suggests the questions Augusta could ask him in the examination in chief and they further agreed on the possible appropriate answers to those questions. Stephanie further informs Augusta that he had a talk with Francis, his friend and colleague at the IT Department of Stakes & Co. Ltd who has agreed to digitally modify the CCTV footage so as to hide Stephanie's face and identity before submitting the same to the Prosecution.

Stephanie also informs Augusta that he is aware that Hon. Cornelius, the trial magistrate has been experiencing "financial difficulties", and as a matter of strategy, Augusta should connect him to Hon. Cornelius so that he can offer the magistrate a "soft loan" to assist him. Stephanie is confident that Augusta will assist him in fixing this matter.

Augusta has an uneasy feeling about this arrangement with his client Stephanie and has approached you, his friend, for advice.

Highlight the duties of an advocate to the court and to the client and advise Augusta accordingly. (20 marks)

### QUESTION TWO

The Union of Coal Workers entered into a Collective Bargaining Agreement (CBA) with their employer, the Ministry of Energy and Natural Resources in the year 2013. Three years later, the CBA is yet to be registered as is required by the law. Consequently, the terms of the CBA have not been implemented by the Ministry. The Union officials therefore called for a nationwide strike of all its registered members on 20<sup>th</sup> December 2016. On 7<sup>th</sup> January 2017, the Ministry made an application to the Labour Relations Court, seeking various orders, *inter alia* an order that the strike be declared unprotected.

The Ministry's application was successful and the court declared the strike unprotected and therefore unlawful. The union officials who were present in court were ordered to call off the strike with immediate effect. The court further ordered the parties to resume negotiations, failure to which the court would appoint a mediator to bring to an end the deadlock. The parties were further directed to report back to the court after 7 days.

Immediately after stepping out of the courtroom, the Secretary-General posted the following statement on a popular social media networking site "Phrasebook" -

"These court orders are impossible to comply with. I know the Judge has received a bribe. The strike will continue as earlier planned. I have no intention to negotiate with anyone, especially not a mediator. CBA or nothing. I will not comply with such a ridiculous order."

(a) Explain the extent to which the Secretary-General's post on "Phrasebook" may be regarded a contempt of court. (5 marks)

(b) While highlighting the salient features of (i) Negotiation and (ii) Mediation as forms of Alternative Dispute Resolution, advise the Union officials (the Chairperson and Treasurer) who are willing to settle the dispute as soon as possible. (5 marks)

### QUESTION THREE

The Anti-Corruption and Integrity Committee of the Judicial Service Commission has, in its report, implicated various Judicial Officers for malpractice and lack of ethics. The Committee has recommended to the Commission, the dismissal of those implicated. Among those dismissed by the Commission is Kachao, a court assistant. She was dismissed on the ground of lack of ethics/unethical conduct and has consequently lost all her benefits amounting to Kshs.20 million.

She has discussed the dismissal with her husband, a Judge of the High Court, Judge Nyangwale. Her husband advised her that legally, her dismissal was unlawful and she should file a petition in court for a declaration to that effect. Kachao dutifully files a petition at the High Court as advised.

As the matter is one of substantial constitutional weight, the Chief Justice has constituted a Bench of three judges to hear and determine the petition. Coincidentally, Judge Nyangwale is appointed to that Bench together with two of his colleagues.

Kachao has instructed Ngugi, the bestman during her wedding to Nyangwale, to represent her in the proceedings. The hearing is scheduled to take place in a few days.

You have been instructed by the Judicial Service Commission to represent it in the petition. Advise the Commission on how you intend to proceed to safeguard its interests and the reasons for your decision. (10 marks)

### QUESTION FOUR

Charles is an advocate of the High Court practicing in Nairobi. He is also a businessman with vast business interests in real estate. He owns five (5) rental apartment blocks in the up-market Karen estate and a fleet of high-end cars for hire. The business consumes a good part of his time. As such he has decided that he would only be attending to court matters on Mondays, Wednesdays and Thursdays.

On a particular Thursday, Charles had a matter at the Chief Magistrate's court at Milimani Law Courts and it happened that another matter came up urgently at the High Court to which he had to attend. He sent his friend, Alfred, another advocate, to hold his brief for the purpose of taking another date.

The Magistrate allowed the adjournment and set the matter for hearing on a Tuesday two weeks later, a date which Charles had set apart to attend to a compensation meeting for people in his home area who had been affected by the proposed Standard Gauge Railway line.

On the date for the hearing, while driving home, he was called by his clerk to be notified of his matter. He had to quickly turn back and head to court. Fortunately, he always carried a coat and tie in his car which he put on. He arrived in the courtroom to find the court in session and could not tell whether his matter had been called out or not. To make matters worse, the court was unusually packed on that day. There were a number of advocates seated on the front bench but a few vacant positions were still available. In fact, he could see some of his former associates including Ben, a brilliant advocate who had since made a name for himself as a litigant.

Charles squeezed himself to sit next to Ben so that he could ask about the cause list but Ben had struck a lively conversation with Henry, a more senior and prominent advocate and could not notice Charles. When he turned and saw Charles, the sight of him with a shirt that did not match with the jacket and shoes made him burst out laughing as he retorted that he did not know that Charles was also a farmer. The laughter drew the Magistrates attention to them as the court was called to order.

The next case to be called was Charles's. In his confused state, Charles nearly knocked off the files of Susan, the opposing counsel who incidentally was two years ahead of him at the School of Law, and was seated next to him.

Charles immediately asked the court for an adjournment since he could not locate his client. Susan, who felt slighted, vehemently opposed the application noting that the same matter had been adjourned two weeks earlier. With a stern warning, the Magistrate permitted the parties to appear for the hearing on the next Thursday to Charles's relief.

In light of these circumstances, examine the issues of court etiquette that arose and explain what would have been expected of the various advocates. (10 marks)

#### QUESTION FIVE

Akinyi is a student at the Kenya Institute of Global studies, Nairobi. Recently, she bought an alarm clock from Biashara Chap Chap Stores, Nairobi. It cost her Kshs.500/- but was not supplied with batteries. She used the alarm clock for two (2) weeks without any problem.

Akinyi booked a holiday to Dubai and set the alarm for 3.00 a.m. on the day of departure. The alarm failed to work and she overslept by 2 hours. She ended up missing the flight and had to pay for another flight at the cost of Kshs.99,000/-.

You have already filed a suit against Biashara Chap Chap Stores on behalf of Akinyi for the loss and damage suffered. The case is scheduled for hearing when Akinyi is set to testify.

(a) Arrange the various steps and rationale in planning your questions for Akinyi. (6 marks)

(b) Prepare four core questions that you intend to ask Akinyi. (4 marks)

### QUESTION SIX

Sandra, a lifestyle blogger downloaded a popular transportation network service application, Nuber Inc. on her smartphone for the first time. She then immediately used the application to request for a taxi-cab to transport her to her friend's house. Her request was matched to Bryson, a taxi-cab driver employed by Nuber Inc. As soon as she entered Bryson's car, she jumped into the backseat and sat behind Bryson.

On the back seat, Sandra was busy updating her blog on her smartphone and barely looked up from her phone. Bryson offered Sandra a soda which she gladly took. According to Sandra, that is the last thing she remembers before waking up in a ditch with no personal belongings. Her smart phone and purse containing Kshs.3,000/- had been stolen.

She immediately reported the matter to the police. In her complaint, she stated that she has used the Nuber Inc. services numerous times before. She thereafter called the Nuber Inc. helpline and informed it of her predicament. The representative from Nuber Inc. informed her that they had received several complaints about that particular Bryson and had conducted an independent background check on the driver. In its estimation, the fact that Bryson had a previous criminal record was immaterial. The matter has proceeded to a criminal trial against Bryson.

(a) You are the advocate for the accused, Bryson. Draft three (3) questions you would ask Sandra in cross examination in the criminal proceedings. (4 marks)

(b) Sandra has sued Nuber Inc. for negligence. Draft a suitable opening statement for Sandra's (plaintiff) Advocate. (6 marks)

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