

# COUNCIL OF LEGAL EDUCATION



## EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

### **ATP 101: CRIMINAL LITIGATION**

**TUESDAY 30<sup>TH</sup> JULY, 2013**

**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. Johnson Tumusiime a national of the Republic of Somalia visited Kenya on what he described as his 'Spring Vacation.' He landed at Jomo Kenyatta International Airport in Nairobi on 12<sup>th</sup> March, 2013. Mr. Tumusiime booked himself in the Presidential Suite of a hotel called Ola Sarara in Eastleigh. At about 2030hrs Mr. Tumusiime walked to a bar, a block away, for purposes of entertaining himself. He entered Tupendane Bar and Discotheque and then ordered for a bottle of Tusker beer. Ms Penzi the waitress, who considers herself beautiful and is at times addressed as Ms Eastleigh, was at hand to serve Mr. Tumusiime.

After taking several drinks, Mr. Tumusime got attracted to Ms Penzi and invited her for a drink. Since Ms Penzi was on duty, she declined to join Mr. Tumusiime but suggested that she could join him at a different venue as soon as her shift ends at 2200hrs. The duo agreed to meet at Nyenye Nyenye Bar and Discotheque within Eastleigh off Wahome Road. At about 2215hrs Mr. Tumusiime had already pitched tent at Nyenye Nyenye Bar waiting for Ms Penzi. Ms Penzi considered the sharing of a drink with Mr. Tumusiime a major event (date) for which she dashed home to dress up for the occasion. She entered into Nyenye Nyenye Bar and Restaurant at around 2330hrs and joined Mr. Tumusiime at a table.

After being together at the table for about 45 minutes with Mr. Tumusiime a huge stocky man known as Buda walked in and went straight for Mr. Tumusiime's table. While shouting at Mr. Tumusiime, he grabbed Mr. Tumusiime by the collar and smashed his face into the wall. A fight ensued between the two men. While attempting to scare away Mr. Buda, Ms Penzi threw at him a bottle of Tusker beer. The bottle smashed a Sony television set valued at Shs.5,000/=, the property of Nyenye Nyenye Bar & Restaurant. Police arrived at the scene at about 0010hrs, attracted by the commotion. They arrested Mr. Tumusiime, Ms Penzi and Mr. Buda.

On taking the three to Kamukunji Police Station, it was discovered that Mr. Buda is believed to have assaulted Mr. Maji Sukari on 20<sup>th</sup> February, 2013 for allegedly stealing 2 kilograms of Sugar from Mr. Buda's house in Karen View Estate. Mr. Buda has since been on the run. While at the Police Station it is also discovered that Mr. Tumusiime was in possession of a firearm with one round of ammunition, without a licence.

Draft appropriate charges.

(15 marks)

2. The following proceedings appear in the record of Kithimanu Resident Magistrates Court in Taita Taveta County:

"Charges as read to the accused person statement of offence: Theft by servant contrary to Section 275 of the Penal Code Cap. 63 Laws of Kenya

Particulars: Makanga Jeuri on 12<sup>th</sup> March 2013 within Machakos County being a domestic servant of Shinda Mali stole from the said Shinda Mali an Ipad VI serial number 09876 valued at Kshs.120,000/=

Accused: Probably

Court: Plea of Guilty Entered

Sentence: 2 years imprisonment.

Mitigation by Accused: I have 30 children and 6 wives who depend on me entirely.

Court: Accused person convicted."

You are instructed by Mrs. Makanga Jeuri to file an appeal.

a) Prepare the requisite instrument of appeal.

**(10 marks)**

b) Outline the procedure of taking pleas.

**(5 marks)**

3. The following judgement was read by Justice Masaa Masaa sitting in Kerugoya Kutus High Court:

#### JUDGEMENT

"The accused person, Mr. Haramu Kali was charged before me with the offence of Treason contrary to Section 40 of the Penal Code.

Particulars of the offence are that on 04 March 2013 following the hotly contested presidential election held in the Republic of Kenya Mr. Haramu Kali stuffed presidential ballot boxes with pre marked votes in his favour. As a presidential candidate of the Placenta Party, Mr. Kali stuffed the said boxes across the country. According to the vote tally released by the Independent Electoral and Boundaries Commission Mr. Kali garnered 10,000 votes countrywide but according to his (Mr. Kali's) tally he garnered 7,000,000 votes. After 'garnering' 7,000,000 votes, Mr. Kali on 06 March, 2013 called a political rally at Nairobi's Uhuru Park at which rally he installed himself as the duly elected President of the Republic of Kenya and proceeded to the gates of State House to evict the then President. He and his supporters were armed with sticks and machetes.

It is at that point that he was arrested and brought to court. The prosecution called six witnesses. PW1, PW4 and PW6 testified as to how they attended the 'inauguration' rally at Uhuru Park at which the accused proclaimed himself the President and Commander in Chief of the Armed Forces of the Republic of Kenya. At the trial, I was persuaded that PW2, PW3 and PW5 looked and indeed appear like outright liars and I therefore rejected their attempts to testify.

Having personally been at home on 06 March 2013 while watching television, I am convinced beyond reasonable doubt that I saw the accused person at Uhuru Park purportedly 'assuming power.'

The question that I am called upon to address is whether the conduct of the accused person amounted to treason. Having listened to rival submissions by learned counsels for the state and defence I am persuaded that the accused person was incapable of committing treason.

I accordingly acquit the accused person"

Dated and delivered this 14 May 2013

XXXXXX

Signed"

- a) Give essentials of a judgement. (5 marks)
- b) The Director of Public Prosecutions instructs you to prepare relevant instruments of appeal for his consideration. Deal appropriately. (10 marks)

4. Joab Arthur a most wanted robber in Kajiado Country is currently in custody. He was arrested at his Kitisuru residence while relaxing with this family. Reports gathered from interviews with Mr. King Maru, the investigating officer, indicates that on 20 August 2011 while in the company of two other persons robbed Quality Bank Ltd in Athi River Kshs.20,000,000/=. The said robbery was executed without a gun. In the underworld lingua, such an operation is called 'Bare Hand Clean Sweep.' On 06 September 2013 Mr. Joab Arthur is believed to have robbed Ngett Bank Ltd Ongata Branch Kshs.5,000,000/=. During the said robbery Mr. Arthur robbed the Custodian of the Strong Room of the said Ngett Bank Ltd Mr. Mbalamwezi Mzalendo the said amount of money at about 10.00a.m. The robbery was witnessed by Valerie Msumbu.

While leaving the scene of crime in a hurry Mr. Arthur dropped his gun, his wallet and a document titled a Strategic Plan. The document sets out various banks to be robbed within a 3 year period and suggests possible accomplices.

- a) King Maru learns that you are a lawyer and approaches you for advice on how to compile his police investigation file with respect to Ngett Bank robbery. Advise him on the contents of each sub file. (8 marks)
- b) Assuming you are instructed by the defence, discuss the contents of the defence file. (7marks)

- 5.
- a) Name **THREE** methods through which the prosecution may initiate the process of termination of criminal proceedings. (3 marks)
- b) If the prosecution succeeds in getting the criminal proceedings terminated through any of the three methods, what would be the outcome under each method? (4 marks)
- c) On Saturday 13/04/2013 at around 6.p.m. Mbalamwezi Football club fans were streaming out of Nyayo National Stadium, Nairobi after a football match between the two clubs which had ended in a Nil:Nil draw. A Mbalamwezi fan, Mr. Alfayo Mchokozi remarked to an Alfajiri fan, Mr. Juma Mwendapole that the Alfajiri team was no match to the Mbalamwezi team and that the Alfajiri team only managed to hold the Mbalamwezi team to a draw through witchcraft. Mwendapole took great exception to Mchokozi's insinuation and instantly slapped him once on his left hand side cheek without causing him any actual bodily injury. Mchokozi, who was wearing a neck tie, started removing his tie in preparation to fight Mwendapole but other fans intervened and restrained Mchokozi from fighting Mwendapole.

In the same evening Mchokozi lodged a complaint against Mwendapole at Langata Police Station resulting in the arrest of Mwendapole next day and his arraignment before Kibera Chief Magistrates Court on Monday 15/04/2013 on a charge of common assault under the Penal Code Cap.63. Mchokozi denied the charge and was released on bail pending trial, which was fixed for Monday 29/04/2013. In between, mutual friends promoted reconciliation between Mchokozi and Mwendapole and Mchokozi decided not to proceed with the criminal case against Mwendapole.

You are an Assistant Director of Public Prosecutions DPP's office and have been instructed to initiate the process of having the criminal proceedings in Kibera Chief Magistrates Court Criminal Case No.43 of 2013 against Juma Mwendapole terminated. Proceed.

**(8 marks)**

6. Mr. John Komesha and his wife Sarah run a successful hardware business at Sura Mbaya Market in Maji Mazuri County within the Republic of Kenya. The business has been the envy of many over the last year or so.

On Friday 07/06/2013 at 6.00a.m. some three men visited the Komesha's residence within the Sura Mbaya Market area, introduced themselves as policemen who had gone there to arrest Mr. Komesha in connection with his alleged involvement in drug trafficking. The three men hurriedly took Mr. Komesha away despite protests by himself and his wife, claiming that they were taking him to CID Headquarters for interrogation. It took about an hour before Mrs. Komesha could follow the three men and Mr. Komesha to CID Headquarters but when she got there she was told that her husband was not there. Further enquiries by Mrs. Komesha led to information by anonymous sources that her husband's disappearance was the work of his business rivals who had connections with some senior officers in the police service and that the rivals had vowed to teach Mr. Komesha a lesson he would not forget for a long time. Mrs. Komesha looked for her husband in several police stations in Maji Mazuri County for the entire weekend without success.

On Monday 10/06/2013 Mrs. Komesha instructed Wakili Shupavu & Co. Advocates Nairobi to seek judicial intervention to find the whereabouts and condition of her husband and secure his liberty. You are a senior partner in Wakili Shupavu & Co. Advocates and have been instructed to seek appropriate judicial remedy to secure Mr. John Komesha's liberty. Proceed.

**(15 marks)**