

COUNCIL OF LEGAL EDUCATION



**EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES**

ATP 101: CRIMINAL LITIGATION

TUESDAY 19TH JULY, 2011

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. Anthony Keane and his wife Colin Keane whom he had recently wedded elected to travel to Barbados and Bermuda to celebrate their honeymoon. Accordingly, Anthony who is a career hotelier and Colin who is an aerobatics instructor at Lani Hotel, took some time off from work. Prior to their marriage which was solemnized at the Kiperu Pentecostal Church in the Landi Mawe Estate, Nairobi County, Colin used to live with her parents in Kamiti Estate while Anthony lived in Landi Mawe estate where he had rented an apartment (a three bedroomed flat)

Their scheduled flight out of the country was on the 24th January, 2011 (KLM). Since the newly wedded couple were to remain out of the country for two weeks, Anthony approached his next door neighbour Nigel and sought the services of her son Jayden as a caretaker, to take care and watch over his apartment for the two week period that he would be away.

Nigel, who is a divorcee and a single mother, did not immediately accede to the request but as such told Anthony that he was to consult Jayden prior to making any undertaking or commitment. She referred Anthony to Jayden and upon consultations, Jayden humbly agreed to take care of the apartment while the occupier was away. The keys to the house were handed over to him.

Jayden, who just turned 18 years and was awaiting his Kenya Certificate of Secondary Education results was elated to be the custodian of the house for the two week period. Anthony and Colin left the country on the 24th January 2011 as scheduled.

Jayden spent the first two nights in the apartment. On the 28th January 2011, Jayden who is an ardent basketball fan went to the local stadium to support his local team (Landi Mawe Club) which was playing its archrival (Rundstarian Area Club). The basketball match ended in disarray as hooligans who were aggrieved by a decision of the referee not to award penalty invaded the pitch and chaos ensued. Jayden lost the keys to the house in the melee

He returned home and informed this mother that he had misplaced the keys to the house. He did not have the cell phone number for Anthony and thus he was unable to communicate with him. He stayed at his mother's home for the rest of the day. Meanwhile, the two week honeymoon period lapsed and the couple returned home. Upon returning home and while on their way to the apartment, Anthony was shocked to find the padlock of the grill door vandalized. He only needed to push the wooden door and the door was open. Upon entering the house, he was further shocked to realize that assorted equipment in his living room were all gone, to wit hometheatre, DVD, VCD, Laptop and in his bedroom his safe which contained Kshs.250,000 had disappeared as well.

He immediately rushed to Jayden's house and reported the matter to the mother. Jayden's mother who was equally alarmed raised Jayden on his cell phone. Jayden also sounded shocked by the development. Anthony was dissatisfied with the explanation proffered by Jayden and the mother and immediately reported to the nearby police station.

The police who visited the crime scene conducted investigations and formed the view that Jayden was responsible for the offence. He was subsequently arrested.

- (a) Discuss the offences disclosed by the narrative above and draft appropriate charges. (8 marks)
- (b) Jayden has appointed you as defence counsel and has informed you of the date when he is supposed to take plea at Kibera District Magistrates Courts.

Advise Jayden on the vital applications that you would make in court on that day.

2. Andrew Chichanto, a renowned music teacher and thespian works at Jada International School, and besides teaching he runs his music and art school called "Musicart Entertainment". Since the music and art school is a start up business and is still experiencing teething problems in terms of finances and clients, Andrew has elected to convert his garage at his Kileleshwa residence and has redesigned it for purposes of running his music and art school. Andrew's specialized niche in music and film business has endeared him to young teens and adolescents who have a dream of pursuing a career in the music and film industry. Among his first clients were Nini, Perpetua and Agneta who are young girls aged 12, 13 and 14 respectively. They all live in the Kileleshwa neighbourhood and they attend the nearby Kileleshwa Preparatory School. They are all music and film enthusiasts but because of school during the day, they usually attend music lessons at Musicart Entertainment from 5.00 – 7.00 p.m. on weekdays and from 2.00 – 5.00 p.m. on weekends. Andrew made it a routine to offer the girls dinner or tea after every music lesson. Naturally, he established a rapport with them and they all became fond of one another. Andrew started developing affection for the girls and separately intimated his interest and desire to get intimate with them. To execute his mission, Andrew arranged private lessons for each of them. A new schedule was prepared and Nini was to attend on Mondays, Perpetua on Wednesdays and Agneta on Fridays. After the private lessons Andrew through trickery and deceit managed to lure the girls and as a consequence had sexual relations with them discreetly. When they all realized Andrew's scheme, all hell broke loose and they reported incidents to their parents and Andrew was arrested.

- (a) Andrew has been arraigned before your court on charges of defilement contrary to section 8(1) of the Sexual Offences Act, and he has pleaded guilty to the charges.

Outline the procedure and requisite steps that you will follow until conclusion of the matter. (8 marks)

- (b) Assuming Andrew has pleaded not guilty to the charges, and you are faced with rival submissions both from the prosecution and the defence counsel on the issue of bail pending trial, what are the relevant considerations that you would bear in mind in deciding whether or not to grant bail.

3. Kavina Mali ya Mungu was a private askari guarding Kilimambogo Enterprises, a micro finance firm situated in the Kadima area on the outskirts of Kawangware on the border of Kawangware and Lavington area. On the night of 24th February 2011 while on duty at Kilimambogo Enterprises, unknown people armed with machetes and rungus/clubs invaded the said Kilimambogo Enterprises, and sought to gain entry into the offices by force. Kavina in his diligent manner tried to resist the forcible entry and whereupon the assailants attacked him and rained blows and clubs on his body, causing grievous bodily harm that left him unconscious. The foregoing notwithstanding, Kavina managed to sound the alarm which went off. By then, the thugs had already broken the door and had carted away valuable equipment and goods and specifically made away with the safe which contained Kshs.1,000,000. Kavina was arrested and subsequently charged with two counts of conspiracy to stealing and burglary.

Kavina is really worried about what would transpire once he is arraigned in court because, being a layman and a man of straw, he does not understand how the criminal justice system works in Kenya.

He has been advised to visit the Kenya School of Law Legal Aid Clinic and where he has been assured he will get free legal advice.

Advise Kavina on the salient features of a criminal trial process.

(15 marks)

4. (a) Distinguish between revision and appeal in the criminal justice system.

(5 marks)

(b) Briefly discuss the principles that would guide the high court when it is called upon to invoke its revisionary jurisdiction on the one hand and the exercise of its appellate jurisdiction.

(5 marks)

(c) Describe the procedure process to be followed when seeking revision and appeal.

(5 marks)

5. Aisha Mwateta had met her fiancé Job Wamalwa in 2006 while they were both pursuing their undergraduate studies at the prestigious London School of Economics. They successfully completed their Bachelors degrees in Business in 2009 when they elected to return home, and pursue their respective careers in the business world.

Aisha secured a job at a multinational telecommunications company and Job went into private business. They solemnized their union in August 2009 and have been living as man and wife since then. They were blessed with a child at the start of 2010. Their marriage started experiencing problems and eventually became acrimonious and they parted ways. Job left the matrimonial home and went to live with his longtime girlfriend Bella whom was apparently instrumental in the breakdown of his marriage with Aisha. Aisha in the meantime filed for divorce and during the pendency of the divorce proceedings she met Polycap with who she started cohabiting. The principle reasons why Aisha elected to part ways with Job were because of his adulterous adventures and extremely violent behavior. The divorce was eventually allowed and Aisha was at liberty to marry Polycap legally.

On the 28th April 2011 while having a drink at his local public house with his acquaintances, Job spotted Aisha strolling into the same public house accompanied by Polycap who was by then unknown to Job. Job became angry and furious. Overwhelmed with rage, he confronted Aisha and demanded to know who the gentleman was and what business had brought her to the public house. In a fit of rage, he punched Aisha on the face causing her to fall down unconscious. Polycap quickly picked her up and rushed her to hospital.

On the 30th of April 2011, Job decided to show up at Aisha's place of abode ostensibly to find out how their son was doing. Upon reaching the house, it became apparent to him that Aisha was unwilling to open the door. Clearly alarmed by the unfolding events, Job banged the door and threatened to shoot Aisha if she did not let him in.

Aisha reluctantly opened the door and Job stepped in. In a fit of rage, he drew a gun and shot directly at Aisha. Luckily, she ducked and the bullet hit the wall unit. Job was relentless and proceeded towards where Aisha had hidden herself and he started hitting her. He took a piece of cloth and unsuccessfully tried to strangle her. The house help who was aged 14 had already raised an alarm outside by screaming and had attracted the attention of neighbours. The police were alerted and upon their arrival arrested Job and took him to the nearby police station. Job was charged with attempted murder, and assault causing grievous bodily harm. He pleaded not guilty to the charges and the prosecution presented witnesses who testified as follows:

PW1 - Aisha who gave a narrative on how Job stormed into the house and without justification shot at her. Aisha also reiterated the fact that it was not the first time Job had pointed a gun at

her threatening to shoot her. She also recounted to the court what had transpired at the public house.

PW2 – Mary (the house help); reiterated what Aisha had stated.

PW3 – John – (next door neighbour)

PW4 – Paul – the Investigating Officer who visited the scene of crime and recounted what he saw and explained to the court the investigations he carried out.

PW5 – Polycap who narrated to the court his story based on information received from Aisha.

PW6 – Dr. Kamau the medical doctor who examined Aisha and testified that she suffered bruises on the neck and hand.

You are the presiding magistrate and you are faced with two rival submissions at the close of prosecution case.

Prepare your draft ruling.

(15 marks)

6. (a) With the aid of decided cases, critically discuss the constitutionality or otherwise of section 203 as read with section 204 of the Penal Code (Cap. 63, Laws of Kenya) and the impact of that case law on the mandate of courts to mete out appropriate punishment in the sentencing phase of a criminal trial process.

(10 marks)

- (c) In light of (a) above, suggest reforms that you deem necessary in the sentencing procedure in Kenya's criminal justice system.

(5 marks)