

THE KENYA SCHOOL OF LAW



EXAMINATION FOR ADMISSION TO  
THE ROLL OF ADVOCATES

**CRIMINAL LITIGATION – ATP 101**

19<sup>TH</sup> NOVEMBER, 2014

DURATION: 3 HOURS

**Instructions to Candidates**

- (a) Answer Question **ONE** and **THREE OTHER** Questions.
- (b) All questions carry fifteen (15) marks each.
- (c) Marks may be lost for illegibility.

PLEASE TURN OVER

1. On 24 October 2014 at about 8.00 p.m. Ms Irene Anyonje, Officer Commanding Police Division Kamukunji was conducting a special police swoop within her area of jurisdiction in the Eastleigh District of Nairobi within Nairobi County. In her company was Corporal Tina Awuonda and Corporal Wilberforce Kikanu. Ms Anyonje is known to be a very tough no nonsense Officer.

On this particular evening, the swoop that was underway was triggered by a terror alert issued by the Federal Republic of Somalia. Indeed the Federal Republic of Somalia had issued a travel advisory to its citizens visiting Kenya or intending to visit Kenya. The advisory was to the effect that there was an imminent terror threat in Kenya against Somali interests larger Horn of Africa interests. Specifically, citizens of the Federal Republic of Somalia were warned against visiting the Eastleigh District of Nairobi County and to avoid large gatherings. In addition the advisory warned Somali citizens to restrict their visits to Kenya on purely essential travel.

Intelligence shared between the two countries indicated that a terror planning plot was at an advanced stage in Eastleigh and that execution of the plot was nigh. Of keen interest to Ms Irene Anyonje and her team was a Bar and lodging on 12<sup>th</sup> Street within Eastleigh district called Pink Cube. It was believed that the plot was being conceived in one of the rooms in Pink Cube Bar and Lodging.

Ms Irene Anyonje and her team was backed by over three hundred regular and anti-terror police officers. The first point of call for the team was the reception of the Pink Cube Bar and Lodging. The shaken receptionists at the Bar, Ms Dorothy Nabolindo quickly availed a comprehensive list of guests. One particular name on the list aroused Ms Anyonje's curiosity. A booking under the name Prof. Mrs. Tito Hadoto and Partner. The two had been booked in room number 320. A closer examination of copies of their passports left at the Bar's reception revealed that the two were South African Nationals but their passports appear to have been issued in Angola. In addition, they had been allowed into Kenya for one month but had sought from the immigration department and were granted numerous extensions of their stay then aggregating 6 months. The purpose of stay was described as "Consultant expatriates in Laparoscopic Procedures." No further details were available.

Ms Anyonje decided to visit the said room 320. On knocking at the door a woman opened the door and introduced herself as Prof. Mrs. Hadoto. A man leisurely smoking cigarettes while watching news on television introduced himself as Kukundawire Hadoto. The man before Ms Anyonje looked very familiar to her. She could not immediately recall the point of interaction. However Corporal Awuonda recognized the man as one Joseph Kony a rebel Commander of a band of thugs terrorizing civilians in Northern Uganda under the name the Lord's Resistance Army. The two were immediately taken into custody and kept at an undisclosed location pending further directions.

As soon as the Director of Public Prosecutions received information of the two being in custody the local Interpol office notified him that there has been a long standing and unexecuted warrant of arrest issued by the International Criminal Court sitting at the Hague in the Netherlands against Mr. Joseph Kony for crimes against humanity and rape committed against civilians. As for Prof. Mrs. Hadoto, her real name is Mrs. Namirimu Tumusiime. Mrs. Tumusiime is a Ugandan citizen wanted by Zambian authorities for offences that include harbouring fugitives (Joseph Kony) and theft of relief food in the Zambia Copper Belt Province.

The Director of Public Prosecutions is hard pressed with time and requires a well thought out legal opinion on how to deal with the two individuals in custody. The file for the two is passed over to you. You note, from the file, that Zambia is a designated Commonwealth Country pursuant to Legal Notice Number 208/1972 and Legal Notice Number 47/1987. The director of Public Prosecutions requires you to do the following:

- a) Give him a concise legal opinion, with the aid of case law on the procedure of Surrendering:
  - (i) Mr. Joseph Kony; and (4 Marks)
  - (ii) Mrs. Tumusiime Namirimu; (4 Marks)

To the respective authorities seeking them.

- b) Assuming the request for Mrs. Tumusiime Namirimu was being made by Kenya to Zambia. Prepare the necessary documentation to facilitate the request. (7 Marks)

2. Ms Ewang Nambo and her boyfriend Mr. Colleta Gesicho are employees of Karina Korir and Company Advocates a Nairobi based law firm, in the Accounts Department. Ms Ewang is in charge of the key to the safe. The firm of Karina Korir and Company Advocates keep cheque books in the safe. Mr. Colleta, on the other hand, is the authorized bank agent with access to both office and client Accounts maintained at Mali Nyingi Commercial Bank.

On 4 October, 2014, Ms Nambo suggested to Mr. Colleta to consider 'borrowing', on a very short term money that had been lying on their office's client account being Kshs. 900,000/-. This sum was deposited on the firm's client account by one Ongechi Okadia for the purchase of a property in the Kitengela District of Kajiado County in the year 2010. A dispute as to the ownership of the property arose in the vendor's family frustrating the sale. Mr. Okadia instructed the firm to retain the money until an alternative parcel was identified. It is now four years since the deposit was made. No one has heard from Mr. Okadia.



It is believed that in June 2011, Mr. Okadia travelled to Mbarara in Western Uganda, on an evangelization mission. On reaching Uganda, he found life more interesting than it was in Nairobi. In addition, it is believed that the relocation to Uganda was deliberate as competition for resources and harassment by his creditors in Kenya abruptly stopped. Manguro Kembero, a talkative young man, had confided in the firm's managing partner that Mr. Okadia did not plan to return to Kenya. He had gotten married to a refugee from Eastern Democratic Republic of Congo one Miss Elizabeth. Ms Elizabeth bore Mr. Okadia quadruplets sometime in 2013.

He had also won several tenders to supply medical equipment to Uganda's Ministry of Health. Ms Nambo had heard the firm's managing partner remarking that Mr. Okadia had no incentive of ever returning to Kenya leave alone visiting.

Ms Nambo's proposal was that she would avail a cheque leaf from the client's account's cheque book. Mr. Colleta would then fill in the cheque and describe himself as the payee. He would then imitate the Managing Partner's signature, bank the cheque on his account and draw funds for purposes of financing their forthcoming wedding.

Initially, Mr. Colleta was hesitant to sign onto the proposal. However, after Ms Nambo expressed doubts as to whether Mr. Colleta was 'man enough' to take some risks and decisions, Mr. Colleta gave in and on 24 January, 2014 a cheque was handed over to him by Ms Nambo. Colleta quickly drew the cheque in this name banked it and started making payments to their wedding service providers in readiness for their wedding scheduled for 29<sup>th</sup> February, 2014.

Unknown to Ms Nambo and Mr. Colleta on 30 January, 2014 a purge on corruption started at Uganda's Ministry of Health and Mr. Okadia was identified as having been at the centre of the supply chain malpractice. Fearing for his life and liberty, Mr. Okadia abandoned everything in Uganda and fled back to Kenya.

On 10<sup>th</sup> February, 2014 Mr. Okadia turns up at the firm for a meeting with the firm's Managing Partner, one Mr. Karina Arunda. Mr. Okadia's mission is to get back his money to enable him 'begin life' anew. To Mr. Arunda's shock, he noticed that the money had left the Office client's account on 25 January, 2014. He quickly made a report at the local police station.

In the meantime, on 12<sup>th</sup> February, 2014, Mr. Colleta was waylaid by one Bruno Royford along Mupe Road in Ongata Rongai and assaulted. A medical report prepared by Dr. Ali Kikanu opines that Mr. Colleta suffered soft tissue injuries to his neck and back as a result of the attack. The genesis of the assault has since been linked to the fact that Mr. Bruno Royford had a previous romantic relationship with Ms Nambo. However, their relationship broke down sometime in October 2012 due to Mr. Bruno's incessant drunken stupors. Investigations have revealed that Mr. Bruno learnt of the intended nuptials between Ms Nambo and Mr. Colleta in a church announcement on 8<sup>th</sup> February 2014 and vowed to stop the wedding by all means.

On 28<sup>th</sup> October, 2014, Ms Ewang Nambo, Mr. Colleta Gesicho and Mr. Bruno Royford are all taken into custody at Rongai Police station. The Officer Commanding Station (OCS) has asked you to polish up the investigation file shortly before charging the three.

- a) Prepare a memorandum to the OCS in which you should do the following:-
  - (i) Identify offences (s) committed. (3 Marks)
  - (ii) Explain the concept of joinder of persons and joinder of courts. (3 marks)
- b) Prepare the relevant charges. (9 Marks)

3. On 25 September, 2014 the Cabinet Secretary for Interior and Coordination of Government the Hon. Ida Mutabuza, concerned by the security situation in the country gave the following order to the Inspector General of Police one Ms Muthoni Njeri. The order was also forwarded to the press in form of a press statement. It read as follows:-

**“Following recent security challenges in the country I have reviewed the security infrastructure in the entire country and now direct every person from the Bahoyi tribe to do the following:-**

- (a) Get special passes from my Ministry;**
- (b) Undergo screening to determine their loyalty and allegiance to Baba’s government;**
- (c) Members of the Bahoyi tribe will not be allowed entry into Nairobi and Mombasa counties without prior written consent being sought and obtained from my office.**

**This order takes effect today this 25 day of September 2014.**

**Xxxx  
Signed”**

On 26 September, 2014 a member of the County Assembly from Bahoyi County one Mr. Osino Oyange was barred from entering Nairobi County by the Afande Shaba Muyanzi, Officer Commanding Station, Kabete Police Station on grounds that she was executing the Cabinet Secretary’s orders.

Worried that he will miss his political party’s launch of a Strategic Plan, Mr. Oyange abandoned his motor vehicle at the police station and rode on a motorcycle to Bomas of Kenya, within Nairobi County, the venue of the three day event.

During the 7 p.m. News, on 26 September, 2014, Afande Buyanzi saw Mr. Oyange, on television smiling broadly as he sat next to his Party Leader. She immediately instructed officers under her to have Mr. Oyange arrested and charged with the offence of disobedience of lawful authority contrary to Section 96 (c) of the Penal Code Cap.63 of the Laws of Kenya.

On 27 September, 2014 at about 6.30 a.m. officers from the dreaded flying squad police Unit arrived at Bomas of Kenya and arrested Mr. Oyange. He was thereafter taken to Kibera before the Kibera Principal, Magistrate Hon. Betty Gathara, where he was charged with the offence of disobedience of lawful authority contrary to section 96 (c) of the penal code Cap. 63 of the Laws of Kenya. He has since been admitted to cash bail of Kshs.20,000.

Mr. Oyange calls on you, in your chambers, where you practice in the name and style of Double X and Company Advocates. Your managing partner, Ms Ivy Kawira, advises that the most appropriate remedy in the circumstances is Judicial Review.

- a) Identify the prerogative writs that you will apply for. (2 Marks)
  - b) Prepare the following document:
    - i) Statement of facts; (7 Marks)
    - ii) Notice of Motion (assume that leave was granted) (6 Marks)
4. a) Name three procedural mechanisms through which the process of termination or discontinuation of criminal proceedings may be initiated. (3 Marks)
- b) What are the respective outcomes of discontinuation of criminal proceedings before or after the close of the prosecution's case and what are the implications of such outcomes as to whether the accused may or may not again face charges against him/her on account of the same facts? (3 Marks)
- c) Mr. Abunuasi Kichwangumu, a cashier in Dololo livestock Co-operative Society Limited, was on 13<sup>th</sup> March, 2013 arraigned in Bura Chief Magistrates Court Criminal Case No. 111 of 2013 on a charge of stealing by servant, contrary to section 281 of the Penal Code Cap 63. The particulars of offence alleged that he, Abunuasi Kichwangumu on diverse dates between 2<sup>nd</sup> – 23<sup>rd</sup> January, 2013 at Dololo Livestock Co-operative Society Limited office in Moyale Count within the Republic of Kenya stole various sums of money totaling Kshs.555,550 the property of Dololo Livestock Co-operative Society Limited.

For the next over 1 year there was inactivity in presentation of prosecution witnesses in court ascribed mainly to instability in the area occasioned by frequent incursions by Al-Shabaab militia into the region. The last time the prosecution presented a witness, one Mr. Abdi Makengeza, an auditor, was on 14<sup>th</sup> May, 2014. Mr. Makengeza, a key witness, gave evidence-in-chief but could not be cross-examined owing to shortage of time. Next hearing was fixed for 28 May, 2014 but Mr. Makengeza's cross-examination could not proceed as the trial magistrate was taken ill.



The case was fixed for mention on 11 June, 2014 but on that date the court was informed that Mr. Makengeza had mysteriously disappeared. Another mention was fixed for 11<sup>th</sup> July, 2014 but on that date the court was informed that Mr. Makengeza's body had been found early that morning lying about 100 metres in the bushes behind the aforesaid co-operative Society offices. Information reaching the prosecution cast suspicion around the accused one Kichwangumu as having had a hand in Makengeza's disappearance and death. It was the prosecution's view that the Proceedings against Kichwangumu ought to be halted temporarily while the police explored the possibility of obtaining a replacement for Makengeza as a witness, concurrently with their investigation into Kichwangumu's possible complicity in Makengeza's death.

You are an Assistant Director of Public Prosecutions in the office of the Director of Public Prosecutions. Draft a suitable and duly supported application for filing in the trial court informing the court that the Republic does not intend that proceedings against Abunuasi Kichwangumu continue.

(9 Marks)

- 5 a) Define duplicity and explain why it is considered prejudicial to an accused person's right to a fair trial.

(5 Marks)

- b) The offence of trafficking in obscene publications is triable by any subordinate court. The following proceedings appear in the record of Karumaindo resident Magistrates Court Criminal Case No. 144 of 2014 at the Court's sitting of Friday 10<sup>th</sup> October, 2014.

**"10/10/2014 Coram Ibrahim Kazamoyo – Resident magistrate.**

**Phillip Kachachawa – State Counsel/Prosecutor**

**Dalmas Mkosi – Accused/unrepresented**

**Ms Salma Kazibure – Court Clerk**

**Court**

**The charge against you, Dalmas Mkosi is: Trafficking in obscene publications, contrary to section 181 (1)(a) of the Penal Code, Cap. 63.**

**The particulars of offence are: that you, Dalmas Mkosi on 9<sup>th</sup> September, 2014 at Karumaindo village in Maskini Halali County within the Republic of Kenya, for the purpose of, or by way of trade, or for the purpose of distribution or public exhibition had in your possession seventy-seven photographs of an obscene nature which would tend to corrupt the morals of any person into whose hands these publication are likely to fall.**

**How do you plead?**

**Accused (responds in English)**

**I know no law and do not understand the charge.**

**Court**

**Ignorance of the law is no defence: Ref. Section 7 of the Penal Code Cap 63 of the Laws of Kenya. In any case the charge and particulars were read in English which you the accused seem to understand and speak well. English is one of the languages of the court in subordinate courts: Ref. Section 198(4) of the Criminal**

Procedure Code, Cap.75. I do not accept that you the accused do not understand the charge and you are warned against wasting the court's time by claiming not to understand the charge. If you persist in not pleading to the charge and force the court into undertaking a full trial of the case, you risk dire consequences in the event of the trial ending in your conviction. I ask you again:

How do you plead?

Accused

In view of the court's warning, I plead guilty.

Prosecutor

Facts as per charge sheet.

Accused

I reiterate that I do not understand the charge or what I am required to plead to.

Court

Accused found guilty on his own voluntary plea of guilty and convicted accordingly.

Prosecutor

Treat the accused as a first offender.

Accused

Since I have heeded the court's advice and warning not to waste its time and pleaded guilty, although I do not understand the charge, I hope the court will exercise leniency.

Court

The offence is serious and deserves deterrent punishment. Accused is sentenced to 5 years imprisonment plus 6 strokes of the cane.

Signed:

I. Kazamoyo

Resident Magistrate

10/10/2014

### Instructions

The accused is upset about the conduct of the case and decision by the court. Upon arrival at Maskini Halali County Prison on the same day ie. 10/10/2014 he got advice from fellow inmates that you are the best criminal litigation Counsel around. He immediately communicated with and requested his wife Roseline Mkosi to instruct your firm, Wakili Shupavu and Company Advocates of Nairobi to appeal against the decision of the court and how it was reached. Roseline visited your firm on Monday 13/10/2014 and instructed the firm to appeal accordingly. Assume you applied for certified proceedings and the decision of the court the same day and obtained them by Wednesday 15/10/2014. There is urgency in the matter, especially in view of the corporal punishment aspect of the sentence.

Draft the necessary appeal documents for filing.

(10 Marks)



6. Mr. Mwenda Pole is a member of Majimazuri County Assembly in the Republic of Kenya. On Tuesday 9<sup>th</sup> September, 2014 at 5.00 p.m he checked in at Zimamoto Hotel on the outskirts of Mbalamwezi City within the County for a three-day Seminar for members of his County Assembly which was scheduled to start the following day, Wednesday 10<sup>th</sup> September, 2014 and end on Friday 12<sup>th</sup> September, 2014. He duly registered for the seminar upon arrival at the Hotel. Chatted jovially with other seminar participants for about half an hour, collected his seminar papers and retired to his room.

The seminar was scheduled to start at 8.30 a.m. on 10<sup>th</sup> September, 2014 but he got to the seminar Hall at 9.30 a.m. looking restless. Within about 15 minutes of his arrival at the seminar Hall, his mobile phone vibrated and he stepped out to answer the incoming call. He returned after 5 minutes but had hardly settled down when his phone vibrated once more. This second call seemed to disturb him. As he stepped out to answer the call he was heard to enquire from the caller: "what is it again, Inspector?" He (Mwenda Pole) got out and stayed on phone for a further 5 minutes before returning to the Hall. At that juncture he confided in his table mate, Julius Kaisari that the persistent caller had described himself as Inspector Karanga from Mbalamwezi Divisional Police Headquarters; that he had information that his (Mwenda Pole's) life was in danger on account of his association with a group that was instrumental in the impeachment of the Governor of Majimazuri County; and that he (inspector Karanga) was on his way to Zimamoto Hotel to pick and take him to a place of safety and for him to assist the police in their investigations. Mwenda Pole then picked his papers, stepped out of the Hotel and entered a grey Peugeot 504 station wagon car Reg. No KSG 333.

Some of whose occupants wore what looked like police uniform and the car drove away in the direction of Mbalamwezi divisional Police headquarters. Mwenda Pole never returned to the seminar until it ended on Friday 12<sup>th</sup> September, 2014.

On the day Mwenda Pole disappeared from the seminar venue (Tuesday 10<sup>th</sup> September, 2014), Julius Kaisari informed his (Mwenda Pole's) wife Zainabu about Mwenda Pole's disappearance. Zainabu visited Mbalamwezi Divisional Police Headquarters to check if her husband was there but she was told he was not there. Zainabu next enquired from all police stations in the county whether they were holding her husband but all the answers were negative. By Monday 15<sup>th</sup> September, 2014 Mwenda Pole was still at large and had not been taken to court. On the same day Mrs. Zainabu Mwenda Pole visited the firm of Halahala & Company Advocates, Nairobi and instructed them to seek judicial intervention to find the whereabouts and condition of Mr. Mwenda Pole and secure his liberty. Mrs. Zainabu has credible information that Mr. Mwenda Pole is being held by the Police at Ngware Police Station

You are a partner in the firm of Halahala & Company Advocates and have been directed by the firm to seek the judicial remedy of *Habeas Corpus* for Mwenda Pole. Draft the necessary documents for filing.

(15 Marks)