

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

ATP 103: LEGAL WRITING AND DRAFTING

TUESDAY 29TH NOVEMBER, 2016

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

Read the following facts and then answer the questions that follow:

Prior to her second marriage to Ramesh, Lisona obtained maintenance orders which among others were that she should be paid a total of USD16,000 per month for 7 years (starting 18th March, 2005). She also got to retain 100% shares from the company that she had started with her former husband, Mr. Roja in 1992.

This company is called Roja and Coolers Co. Ltd. It is a limited liability company which specializes in the manufacture of fridges, coldrooms and portable cooling boxes for soft drinks. The company is incorporated under the Laws of Kenya.

The absence of Roja in her life and the trauma of divorce left her with no time to devote to Roja & Coolers Co. Ltd.

Limo Singh Co. Ltd, a competitor company which also specializes in the cooling business and whose owner had always felt that Roja had stolen Lisona from his arms, decided that it was time to take what was his. Ramesh was no competition for Limo Singh at least according to himself. Limo Singh also set out to buy Roja & Coolers from Lisona and she had no objection. She however felt that it was safer to capture the deal in an appropriate legal document. Limo would pay Lisona an agreed amount for the company and he would retain all the assets and the business of Roja & Coolers as a going concern. Lisona was however categorical that she could retain the cash assets of the company which were held in a certain bank account in the name of the company.

As both companies were incorporated under the Laws of Kenya, there was no challenge of choice of law. It was however agreed that in case of any other complex matters that may touch on regional and international agreements the parties to the contract would revert to the general principles of international law.

In a meeting held between them in the presence of a lawyer, the following issues were agreed upon:

- (i) The price to be paid was Kes 16 million;
 - (ii) The payment would be made through an electronic bank transfer to an account to be specified by Lisona;
 - (iii) Being a shrewd businessman, Limo asked Lisona to ensure that she had the requisite authority to make the deal.
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- (a) What is the most appropriate title for a contract that you would draft as an Advocate acting for either of the parties? (1 mark)
 - (b) Identify and explain at least five (5) contents of a contract. (10 marks)
 - (c) From the facts provided, draft three (3) clauses from among the ones that you have identified in (b). (9 marks)

Note to give the appropriate name to each of the clauses discussed.

QUESTION TWO

- (a) *'While there is no error in the use of plain English, lawyers are encouraged to use plain English while communicating.'* Anonymous

Critically analyse the above statement.

(4 marks)

- (b) Using examples, identify any three (3) ways of using plain English to avoid language that is verbose, complex and difficult to understand.

(6 marks)

QUESTION THREE

- (a) Applying the rules of writing in English including: paragraphs, paragraph blocks, sentence and paragraph structure, topic and concluding sentences and paraphrasing, compose an appellate brief in light of the facts below. You are instructed to only keep within the facts.

In the appeal, Musa's advocate will consider the fact that the trial court committed an error of fact and an error of law. The basis of conviction in the trial court was not murder but manslaughter. This was the first problem that ought to have been identified. Musa only killed his wife because he found out that she had planning to kill his mother. The prosecution therefore should have brought out those facts. On the aspect of error of law, the trial court made a mistake in considering only the state of mind of the accused as sober and thinking and omitted the fact that Section 132 of the Pens State Crime Code mentions provocation as a defense. At the end of the day, the court at the appellate level should consider the above facts and give directions that the case be tried afresh, or that the appellate court pronounces an acquittal.

(5 marks)

- (b) Legal drafting, legal writing and legislative drafting all demand that one has a mastery of the English language.

Identify the grammatical errors in the passage below and re-write the paragraph. Maintain the paragraphs as is where no error is identified.

The firm of Morrison & Co. Advocates is located at Capital Hill. The mgt team consist of 3 advocates; tunola, Phogisia & Angelica. They are employed on a permanent of pensional pay. The rest of the stuff are employed on contractual basis.

Every year, majority of the people at the firm go for trainings on property management. This is particularly of importance to the firm since they are currently managing the Mutharika real estate, Tunani Real estate and Sikala real estate. Out of all those real estates, Sikala is the larger one.

Imagining her life 10 years later, she said if I was a pilot in 2006 I would have been very happy today. Angelica who is the only female partner at the firm does not like Law practice any more

She identifies a number of challenges of for law practice in the property industry:

- (i) Interaction with corrupt officials
- (ii) Incompetency in the surveying departments
- (iii) Inadequate compensation for **your** Lawyers.

(5 marks)

QUESTION FOUR

*"In a democracy every citizen must know his rights and duties and this is possible **only if you are aware of law and legal language.**"*

B.M Gandhi Legal Language, Legal Writing and General English. Lucknow: Eastern Book Company
Page 10

- i) Analyse the statement above in the context of the growing trend of preferring plain language over legalese in legal drafting.
- ii) Re-draft the provisions of the Evidence Act (Cap.80 Laws of Kenya) below using plain language.

(3 marks)

Section 26:

Confessions and admissions caused by inducement, threat or promise

A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

(4 marks)

Section 27:

If such a confession as is referred to in Section 26 of this Act is made after the impression caused by any such inducement, threat or promise has in the opinion of the court been fully removed, it is admissible.

(3 marks)

QUESTION FIVE

You work for Tollan & Co. Advocates, specifically in the litigation department which is headed by one of the partners, Mr. Gurak Isinya.

Your firm was contacted as soon as the video of one of your main clients in the commercial department, Mr. Ajim Karim, leaked into a local TV station. The video showed him strangling a young female student in one of the five (5) star hotels in Nairobi.

Mr. Ajim frantically contacted you three (3) hours after the video went viral on 'Youtube', Facebook, WhatsApp and many other social networks. He knew that the police were trailing him in order to arrest him. He also knew he needed to contact his lawyers. He found you at your desk, briefed you and indicated that he would be back the next day.

As a young advocate, you are uncertain as to the extent to which you should get involved, in light of the public uproar about the obvious criminality of the brutal murder. After a moment of thought you realize that your firm's commercial department is closing in on a 6 million worth of commercial contract, in which Mr. Ajim is your client. You also realize that as a lawyer, you have no right to make a determination of guilt against Mr. Ajim until he is proven as such in a competent court. You then set out to engage in the steps to prepare for his defense for the charge of murder. As a matter of practice you need to brief the head of the relevant department in Tollan & Co. Advocates.

Draft the appropriate document.

(10 marks)

QUESTION SIX

The Ministry of Transport and Infrastructure has organized an Annual Transport Conference dubbed "Uchukuzi Kwa Wote" that will be held at the KICC. The objective of this event is to review the progress and challenges in the transport and infrastructure sector in Kenya.

One of the challenges facing the sector is conflicting laws and regulations between the national government and the county government.

In one of the recent conflicts, the County Government and the Kenya National Highways Authority (KENHA) had to settle a conflict on outdoor advertising through the Court process. The High Court ordered KENHA to desist from collecting revenue from outdoor advertisers along highways as this was a county function.

The Cabinet Secretary and the Governor of Nairobi have invited you to a preparatory meeting. During the meeting, the County Governor and Cabinet Secretary were emphatic that these conflicts could be reduced through an effective Transport and Advertising Policy and Law.

The Cabinet Secretary and Governor have identified the laws and policies that had been adopted before 2010 as the main cause of the conflict. However, they believe that with mutual commitment they can resolve these complexities and have harmonious relations like other successful cities have done around the world.

They have approached you to design and implement a policy and legislative development process that you will present at the Annual Sector Conference.

Prepare notes outlining the policy and legislative development process and the critical steps towards harmonizing the laws and policies in the transport sector.

(10 marks)

END