

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION  
TO THE ROLL OF ADVOCATES

**ATP 101: CRIMINAL LITIGATION**

TUESDAY 17<sup>TH</sup> JULY, 2012

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. Mutigs Polina is the Chief Accountant of Wodu Wakiri Enterprises Ltd. His deputy is Selina Malik. There are three other persons who work under him (Polina). They are Ms Mudekere Matata, Mr. Tamaa Mbaya and Mr. Ian Kwenda. Lately the company has been experiencing an upsurge in business following the implementation of its new business strategy of 'Looking East'. The strategy entails engaging in business with countries described generally as Orient Eastern Countries which include China, South Korea and India. Mr. Polina is aware that the company is awash with money and believes there are no sufficient audit and general financial controls were he to decide to steal some of it.

His idea, however, faces a few hurdles. He is not a signatory to the company account at Karafu Bank Ltd. Secondly, he is not the custodian of the cheque books. The cheque books are kept in a safe by Mr. Mbaya, the only person who has the secret code to the safe. The signatory to Karafu Bank Ltd is Ms Mwenda Haraka. Ms Haraka is known to vacation almost the entire year and rarely attends to office matters. On 28.06.2012 Mr. Polina summoned Mr. Mbaya to his office and after intense, and at times heated, discussions it was agreed as follows between the two:-

Mr. Mbaya was to make a report to the safe maintenance department that the lock of the safe was faulty. As soon as the report was made, he would tamper with the lock. Since the maintenance department ordinarily takes long to attend to maintenance requests, Mr. Mbaya would take three cheque leaves and hand them over to Mr. Polina who would try as much as he could to forge Ms Haraka's signature on the cheques. The same would be payable to Matrix Limited a company owned by Mr. Polina and Mr. Mbaya. Once the cheques cleared the two were to share the money equally.

On 30.06.2012, an argument ensued in the office between Ms Matata and Mr. Kwenda on the one hand and Mr. Mbaya on the other hand regarding what Ms Matata and Mr. Kwenda perceived as laziness on the part of Mr. Mbaya. Mr. Mbaya had allegedly not been reconciling the books of account. In a fit of anger, Mr. Mbaya hit Ms Matata and Mr. Kwenda on their respective face, with Ms Matata's sustaining a broken nose while Mr. Kwenda suffered a concussion. The two made a report to the police.

On 01/07/2012 Mr. Mbaya took three cheque leaves from the damaged safe and handed them over to Mr. Polina. On each cheque leaf, Mr. Polina wrote that a sum of Kshs.900,000/= be paid to M/S Matrix Limited. Mr. Tamaa was given the cheques. He rushed and banked the three cheques at M/s Matrix Ltd's Karafu Bank Ltd account and the cheques cleared the same day.

Ms Matata, while doing her daily bank reconciliation discovers the unexplained payment and reports the matter to Mr. Polina, Ms Haraka and the police. After brief investigations Mr. Polina and Mr. Mbaya are arrested.

- a) How many offences are disclosed by the narrative? (3 marks)
- b) Draft the requisite charges. (12 marks)

2. Mr. Mali Yamungu a resident of Muthaiga Estate in Nairobi, is believed to be aged 50 years. Most of his neighbours saw him grow up as a young man but on attaining the age of about 15 years, he simply vanished. He reappeared two years ago and nobody knows where he had been for about 33 years. It is rumoured that at 15 years, he travelled to North Western Pakistan where he underwent military training on how to make improvised explosive devices (IEDS). He is believed to have crossed over to Afghanistan where he fought alongside Osama bin Laden in the Mujahideen that drove the Soviet Army out of Afghanistan. He is also believed to have been the Chief Explosives Instructor at a military academy set up by the Taliban in Afghanistan in the year 2000. After the United States Army invaded Afghanistan in November 2001, Mr. Yamungu is believed to have crossed back to Pakistan where he lived for two years.

In 2005 he moved to Iraq where he is believed to have fought the American forces. He is then believed to have relocated to Yemen before ending up in Somalia in the year 2011. Mr. Yamungu is newly married to Ms Hamadi. Recent events in the country involving explosions have caused the intelligence community to be interested in his life. The Police Commissioner, acting on instructions of the National Security Council, had him arrested on 22.03.2012. The police have employed the latest interrogation techniques on Mr. Yamungu but he has adamantly refused to divulge anything. He has been in police custody for the last three months without any court appearance. You are approached by Ms Hamadi who explains to you what befell her beloved husband.

- a) What remedy will you recommend to Ms Hamadi? (1 mark)  
b) Draft the necessary documents for the realization of the recommended remedy. (14 marks)

3. Mr. Lema Ayanu a national of Ethiopia crossed into Kenya with his herd of cattle in search of grass and water. While at the border crossing point called Kanyarkwat, two kilometres into Kenyan territory, he encounters Mzee Lemaiko with his herd (Mzee Lemaiko's). Mzee Lemaiko is annoyed by the presence of Mr. Ayanu. Within Mr. Ayanu's earshot, Mzee Lemaiko declares that Mr. Ayanu has crossed into Kenya to steal Kenyan pasture. He brands him an international thief who should be deported to his country of origin.

In a fit of rage Mr. Ayanu picks up his gun an AK-47, and fires a barrage of rounds at Mzee Lemaiko killing him instantly. Before he could be arrested by Kenyan authorities, he hurriedly crosses back to Ethiopia. The family of Mzee Lemaiko petitions the office of the Director of Public Prosecutions (DPP) to take action and bring Mr. Ayanu to justice. You are a Principal State Counsel in the DPP's office. The DPP has instructed you to think through the petition and offer advice to him as to how to bring Mr. Ayanu to justice.

- a) What remedy will you propose? (1 mark)  
b) Describe the procedure that you will follow to realize the recommended remedy. (14 marks)

4. (a) What is bail and what is its legal basis in Kenya? What types of bail are available and what principles guide the grant or denial of the various types of bail?

(8 marks)

- (b) On Thursday 31<sup>st</sup> May, 2012 at 3.00p.m., Kenya Airways Flight KQ999 landed at Jomo Kenyatta International Airport, Nairobi from Bombay, India.

Disembarking passengers included one Mr. Maskini Halali, a Nigerian national who described himself as an international business executive on his way back to Nigeria via Nairobi, with a three-day stop-over in Nairobi. Following a trip-off, customs officials searched his baggage and found its contents to include 27.8kgs of a powdery substance. Upon analysis the substance was confirmed to be heroin of an estimated market (street) value of Kshs.27.8 million. Maskini Halali was arrested by the Kenya Police and detained in police custody pending arraignment before court in Nairobi on Monday 4<sup>th</sup> June, 2012

On 4<sup>th</sup> June, 2012 Maskini Halali was taken to Makadara Chief Magistrate's Court, Nairobi and charged with the offence of trafficking in a narcotic drug and psychotropic substance, contrary to section 4(a) of the Narcotic Drugs & Psychotropic Substances (Control) Act No.4 of 1994. The section provides as follows:

*"4. Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic or psychotropic substance shall be guilty of an offence and liable ----*

*(a) In respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life".*

Mr. Maskini Halali has engaged M/S Halahala & Co. Advocates of Nairobi where you work. He vehemently denies the charge, enters a plea of not guilty and instructs you to defend him to the end. The earliest the case can be heard is in a month's time. Maskini Halali points out that if he is detained in custody pending the hearing of the case, his international business will be adversely affected. Accordingly, he has instructed you to explore all possible legal ways of getting him out of custody during the pendency of the case. Mr. Maskini Halali has lots of money but knows no one of substance in Nairobi.

What steps would you take towards securing the release of Mr. Maskini Halali pending the hearing and determination of the case against him? What grounds would you advance in support of those steps and what obstacles would you expect to stand in the way?

(7 marks)

5. On 31<sup>st</sup> December, 2011 at about 8.30p.m. at Panyakoo village in Sulisuli District of Usumbufo County, Ms Supu Sinachuki was about to go to bed in her house when she heard loud noises outside. She rushed to the window, peeped outside and saw a group of men who had just brought down the perimeter wall surrounding her compound. The men, numbering six, were armed with assorted weapons – pangas, clubs, metal rods, stones, etc. The invaders were threatening to teach a lesson to whoever obstructed their march into the compound. She double-checked her locked door, praying that the invaders would not do her any harm. She was mistaken.

Within a short time Ms Sinachuki heard loud knocks on her door and several voices demanding that she opens the door. Scared and confused, she stood still. The next thing she heard was a loud crash. The invaders had shattered the door with a huge stone. Three of the invaders walked in while the others surrounded the house. There were loud demands for money but Ms Sinachuki said she had none. Both internal and external electric lights were on. For a short while the invaders argued between themselves whether to just take valuables and leave or kill Ms Sinachuki. There was no agreement. Ms Sinachuki did not know any of the invaders. The three who had entered the house led her from room to room demanding money but she repeated that she had none. For about five minutes the invaders searched various places in the house but found no money.

Ms Sinachuki observed the features of the invaders as follows: all were black. The first was about six feet three inches tall and had a limp on the right hand side; the second was about five feet eight inches tall, pot-bellied and had a husky voice; while the third was about five feet three inches tall and had a scar on the forehead. In a fit of anger, one of them hit Ms Sinachuki with a metal bar on the head and she fell down. All the three got hold of her legs and dragged her out of the house. The other three members of the gang who were outside immediately entered the house and also ransacked it. The three who dragged Ms Sinachuki out started beating her up while tearing off her clothes. One of them stepped on her stomach with both feet while another pulled off her underwear. They forced her to have sex with them one after another until she lost consciousness. When she came to her senses the entire gang of six was gone. She reported the matter to Jicho Pevu Police Station and gave the police the descriptions of the three gangsters whose feature she had observed as above. Their names turned out to be Mtwana Defrao, Mteja Daima and Sichoki Kudanganya, respectively.

Ms Sinachuki confirmed that the household goods lost during the invasion included her sewing machine valued at Kshs.12,000/=, a refrigerator valued at Kshs.11,000/=, two ear rings valued at Kshs.7,000/= and a dressing table valued at Kshs.10,000/=

You have been instructed by the officer in charge of Jicho Pevu Police Station to investigate this case. In the course of the investigation you arrest three suspects answering to the descriptions of the three persons who dragged Ms Sinachuki out of her house and forced her to have sex with them as aforesaid.

- a) During the arrest of the suspects, what would you have announced as the reason(s) for their arrest? (2 marks)
- b) What legal procedure will you invoke to ensure a fair and objective outcome? (2 marks)
- c) Describe the process of implementing the above-mentioned procedure. (7 marks)
- d) Describe the contents of your prosecution file before handing it over to the prosecutor. (4 marks)

6. (a) Outline the contents of a judgement in a criminal court in exercise of its original jurisdiction and indicate the law where guidelines on the subject are prescribed.

(5 marks)

- (b) Mr. Gunda Weche aged seventy years stands charged with murder, contrary to section 203 as read with section 204 of the Penal Code (Cap.63 Laws of Kenya). The particulars of the offence are that on 11<sup>th</sup> November, 2011 at Kichinjioni village in Shikaadabu District of Imanipotovu County accused murdered Sina Makosa. The main evidence, given on oath, was as follows:-

P.W.1: Mititigo Kulewa

I am aged about 45 years and live at Kichinjioni Village. The deceased came to Kichinjioni village about five years ago. Soon after his arrival, news started spreading that he had been chased away from his former place of abode as he was rumoured to practice witchcraft. In the last five years various, people have died mysteriously in and around the village. The deaths have tended to be preceded by similar symptoms, namely, swellings of the abdomen which defied whatever medication was administered from traditional medicine men. The talk of the village was that as long as the deceased was around, anyone who seemed to be better off than him was in danger. All the traditional medicine men consulted expressed fears similar to those commonly held in the village about the deceased. The accused joined those who developed a dislike for the deceased and he (accused) later killed him in the belief that the deceased had bewitched and killed the accused's relatives, the last of whom died one week before the accused killed the deceased in this case.

Cross-Examined by Defence Counsel

I have never witnessed any activity by the deceased that may be associated with witchcraft. But it is a fact that lots of people, including the accused, were suspicious and lived in fear of him.

Re-Examined by Prosecutor

Nil.

P.W.2: Mutiriri Karimiko

I am aged about 40 years and reside at Kichinjioni Village. I knew the deceased from his previous place abode, namely, Chakechake where I too used to live. He was unpopular there because he was associated with witchdoctors and there was general belief that he practiced witchcraft. I lost a relative at Chakechake and there was talk that the deceased had something to do with the death. The deceased later left Chakechake for some undisclosed place. Subsequently I migrated to Kichinjioni and found him there. A number of deaths at Kichinjioni were ascribed to the deceased after his arrival there. I also lost a relative at Kichinjioni and it was said the deceased had something to do with it but I never followed it up although I was bitter. I am aware that the accused lost relatives at Kichinjioni through a disease whose symptoms were the swelling of the abdomen. Virtually everybody in Kichinjioni Village was pointing accusing fingers at the deceased for the deaths. The accused

joined those who developed a dislike for the deceased and he (accused) killed the deceased in the belief that he had bewitched and killed the accused's relatives, the last of whom died one week before the accused killed the deceased in this case.

Cross-Examined by Defence Counsel

I never witnessed any activity by the deceased that may be associated with witchcraft. But it is a fact that lots of people, including the accused, were suspicious and lived in fear of him.

Re-Examined by Prosecutor

Nil.

P.W.3: John Kizungumkuti

Chief Inspector of Police attached to Kalahari Police Station. On 18<sup>th</sup> November, 2011 the Investigating Officer in this case brought the accused to me with a request that I record a charge and caution statement from him. I did so and after I administered the usual caution, the accused elected to make a statement in English and I recorded it in the same language. This is the statement, made voluntarily by the accused.

Defence Counsel

No objection to production of the statement.

P.W.3 (contd)

I produce the statement – Exhibit 1.

The accused confessed that he killed the deceased on the material day because he (accused) believed the deceased had bewitched and killed the accused's relatives, the last of whom died one week before the accused killed the deceased in this case.

Prosecutor

Close of prosecution case.

Court

Accused has a case to answer and is put on his defence.

D.W.1: Gunda Weche

I am the accused in this case. I killed the deceased Sina Makosa because he provoked me by bewitching a succession of my relatives, the last of whom died one week before I killed the deceased in accumulated anger. That is all. I have no witness to call.

Prosecutor

I stand by the evidence on record, which establishes the offence of murder. I urge the court to convict the accused accordingly.

Defence Counsel

The accused genuinely believed the deceased to have killed his relatives in series through witchcraft. The last of the victims died only a week before the accused, overwhelmed by anger which had accumulated and caused him to boil over, was provoked to do the killing which has landed him before this court. I urge the court to convict only for manslaughter at best.

Assignment

You are the Judge presiding over the accused's murder trial.  
Write the judgement.

(10 marks)