

COUNCIL OF LEGAL EDUCATION.



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

ATP 101: CRIMINAL LITIGATION

MONDAY 20TH MARCH, 2023.

DURATION: 3 HOURS.

Instructions to Candidates:

- (a) This paper contains **SEVEN (7)** printed pages including the cover page, with a total of **SIX (6)** questions.
- (b) A Candidate **MUST** answer **FIVE (5)** 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

- A. On the 24th of January, 2015, Honourable Mwamburi Mwanzo and another were arraigned before the Chief Magistrates Court at Mutongwe Law Court, where they were jointly charged with two offences in Count 1 and Count 2.

In Count 1, the two were jointly charged with the offence of Creating Disturbance Contrary to Section 95(1) (b) of the Penal Code. The particulars of the offence were stated as follows:

On 24th Day of January, 2015, at about 8.30am at NISI center in Mutongwe, within Mombasa County, jointly created disturbance by shouting and uttering abusive words at PC Mwamba, while demanding release of motor vehicle KMCH0002B which had been impounded by PC Mwamba for failure to comply with traffic rules.

In Count 2, both accused persons were jointly charged with the offence of Intimidation Contrary to Section 238 (1) of the Penal Code. The particulars of the charge were stated as follows:

On 24th Day of January, 2015, at about 8.30am at NISI center in Mutongwe, within Mombasa County, jointly intimidated PC Mwamba a duty officer at NISI patrol base by invoking the name of senior government officers with the intention of causing him to release motor vehicle KMCH 0002B which had been impounded for failure to comply with traffic rules.

The accused persons pleaded not guilty to both charges. The two were released on cash bail pending the hearing and determination of the case. Two weeks later, a pre-trial conference was conducted and the case was set for hearing. The Prosecuting Counsel indicated to the court and to the defense that he intended to call 15 witnesses during the trial. The trial process began in June, 2015, before Hon. TGG, who was then Senior Principal Magistrate. Hon. TGG heard the evidence of seven witnesses, while the 8th Prosecution Witness was stood down. Hon. TGG was then transferred before completion of the case.

Before Hon. TGG was transferred, the Prosecution had applied to the court to introduce a CD containing a video of the incident in question which was taken vide an iPhone belonging to PW 8. Which iPhone could not be traced for production in court. The application was opposed by the defense, the trial court disallowed the playing of the subject CD without a certificate as prescribed under section 106B of the evidence Act. On 13th February, 2020, the Hon. KBB, chief Magistrate took over the case, the prosecution recalled Prosecution Witness No.8 and applied once more to rely on the CD as they complied with the requirements under the evidence Act. The application was allowed on the basis that the Prosecution had availed the Certificate as required.

Dissatisfied with the ruling of the Court, the defense filed an appeal in the High Court on various grounds. While the Criminal Appeal was pending, the defense filed an application for stay of proceedings. The application was filed under certificate of urgency, it was heard *ex parte* and a stay order issued. The Appeal was heard and determined in June, 2022. At this point, Hon. KBB had been transferred and the case was taken over by Hon. JLL, Chief Magistrate, who heard the remaining 8 witness and both accused persons placed on their defense.

The accused persons once again appealed the ruling of the court on the basis that the Prosecution had not established a *prima facie* case against them. While the appeal was pending before the High Court, Hon. JLL was transferred. On 20th December, 2022, the Deputy President of the Republic of Kenya made a statement on the national television that all criminal cases where accused persons had been charged unfairly should be withdrawn! This statement prompted the 2nd accused person to write a letter to the Director of Public Prosecutions requesting for review of the evidence and particularly that she was willing to plea bargain. The appeal is yet to be heard and determined. The Prosecuting Counsel requested the court for typed proceedings and upon perusal, he discovered that none of the two trial magistrates, Hon. KBB and Hon. JLL, complied with the law requiring the Court to inform the accused of their right to recall witness or to rehear the case.

- i. Discuss 5 Criminal Trial Procedural Issues the Prosecution Counsel encountered in this case. (10 Marks)
 - ii. Discuss 5 procedural safeguards that have been put in place to protect and support vulnerable witnesses and offenders. (5 Marks)
- B. Marsha, a mother of three has been charged for the murder of her three children. During the trial, evidence adduced pointed to the fact that the murder was occasioned by Marsha's desire to avenge her husband's decision to marry Furaha as a second wife. After the close of the hearing, the court found that Marsha had a case to answer. On the date set for the defense hearing, Marsha was not availed in court. The Report furnished by the Prison authorities stated that Marsha had been experiencing acute depression and had been incoherent in speech. She had since the last court attendance attempted to walk out of the prison facilities purporting to be leaving for work, which affairs led the authorities to believe she was not in a proper mental condition.
- Explain to the Court the procedure of handling Marsha's trial. (5 Marks)

QUESTION TWO

Ndoige Sugunyo was convicted by the Chief Magistrates Court at Makadara for the offence of defilement contrary to Section 8(4) of the Sexual Offences Act. Upon conviction, the Resident Magistrate, Hon. John Said sentenced Mr. Sugunyo to life imprisonment, stating that it was a necessary sentence, “due to the rising cases of defilement” within that Court’s jurisdiction. Part of the trial court’s judgement dated 11th November 2022 reads as follows:

“On the question of age, I am convinced without doubt that the complainant in this matter was below the age of 18 years as submitted by the Prosecution. Even though an original birth certificate was not produced in this case, I am convinced that an age assessment was not necessary as the copy of the birth certificate produced indicated that the complainant was aged 17 at the time of the offence. Furthermore, the complainant had not completed her secondary school education having dropped out in form three that year. This evidence is therefore conclusive enough to reach a determination that age as an essential element of this offence was satisfied.

The accused, in his defence, has argued that he was led to believe that the complainant was not a minor and in this regard he has relied on Section 8(5) and (6) of the Sexual Offences Act to argue that the complainant held herself out as an adult which led him to reasonably believe that she was one. The accused further argued in his defence, that he had stayed with the complainant as “husband and wife” for a period of one year with the knowledge of her parents. That this complaint arose from his failure to raise 50,000 Kenyan shillings which had been demanded by the complainant’s father. I find this defence unsustainable as the accused ought to have known that the complainant was a minor having been in the same secondary school.”

Ndoige Sugunyo has now approached you to pursue an appeal on his behalf.

- a) Draft the necessary appeal. (7 Marks)
- b) Citing case law and relevant legal provisions, advise your client on the possibility of being granted bail pending appeal. (3 Marks)

QUESTION THREE

Mzuri intended to purchase land to construct a house for her mother. Her colleagues at work referred her to Ngamwaya, a land broker. Ngamwaya led her to Tapeli Bonoko who showed her a half an acre plot of land at Maji Mazuri area. She was then shown copies of title deed and a search for land Ref. No. K/Maji Mazuri/VJ/2. She was referred

to the land registry to meet one, Baya, for faster processing. Baya confirmed to her that the land belonged to Tapeli and issued her with a search certificate. Mzuri and Tapeli executed a sale agreement before an Advocate who is a friend to Ngamwaya. Baya, Ngamwaya, and Tapeli's wife, Giza, were all witnesses to the sale agreement. Mzuri paid Kshs. 2,000,000/= being 75% of the purchase price as deposit and the balance was to be paid by the purchaser once she receives all completion documents to help her effect the transfer. Upon execution of the agreement, she took possession and moved to fence off the plot. She was stopped by Mzee Moja who claimed to be the owner of the plot for over three decades. He showed her the title documents in his possession. She then tried to call Tapeli but the line went dead. She could not reach Ngamwaya and Baya either. She went to the Lands registry to follow up and found out that no one by the name Baya or his description is an employee of that office. She reported the matter to the police upon discovering that the copies of title deed and search certificate she was given were all forgeries.

On learning this, her husband who had financed the transaction by taking a loan from a bank was distraught. This strained their relationship leading to separation. He lost his job from the impact of the anguish and as a result their children were transferred to public schools in the village.

After a manhunt, the police arrested Baya. He led them to Ngamwaya, Tapeli, and Giza. On investigation, it's been discovered that the money paid on the transactions was used for different purposes. Tapeli had bought a car, Ngamwaya was on holiday in Ukunda, while Giza and Baya had received Kshs. 100,000/, and Kshs. 20,000/= respectively.

(a) Explain the action to be taken against Baya, Ngamwaya, Tapeli and Giza.

(4 marks)

(b) Given the circumstances of Mzuri, explain the role of Victim Impact Assessment.

(6 Marks)

QUESTION FOUR

Jaani Jaanu is a prominent opposition figure in the Republic of Dagostan (a commonwealth country) where he unsuccessfully vied for presidency in the last general election 5 years ago. In the build-up to the upcoming general election, key members of his Freedom Party have been subjected to arrests on allegations of planning to overthrow the government of incumbent President, Tan Tun, who has sought re-election. Despite these arrests, pollsters have placed Jaani Jaanu ahead by a huge margin against President Tan Tun. One week ago, a warrant of arrest was issued against Jaani Jaanu on allegations of committing the crime of "gross unpatriotism" contrary to Section 5 of the Patriotic Act, a legislation which has been criticized by human rights bodies for being a tool for targeting political dissenters. Many of the political dissidents

who have been tried under this law have been detained for years without trial. Dagostan has also been cited by the United Nations Committee Against Torture for its use of unconventional methods of interviewing suspects which include, “being placed in the same room with menacing dogs while in police detention” in order to extract false confessions. Fearing for his life, Jaani Jaanu left the Republic of Dagostan for Nairobi where he is currently being hosted by political dissidents from his country. President Tan Tun’s government has made a formal request for the extradition of Jaani Jaanu to face justice.

Citing case law, advise the Director of Public Prosecutions on the chances of success of the request were it to be taken to court for determination. (10 marks)

QUESTION FIVE

Goodlyyfe, a famous public figure in the Republic of Kenya had an illicit affair with a socialite girlfriend Qeun Saly. He was so fond of her that in his drunken stupor he would indicate that he was willing to do anything to make her happy. Unknown to Goodlyyfe, Qeun Saly was a drug peddler wanted by the United States of America on charges of trafficking narcotics in Mombasa County. On several occasions, Goodlyyfe sent ‘fare’ amounting to Kshs 2million to Qeun Saly for trips to Nairobi and Maasai Mara. While on a trip to Diani, Qeun Saly discovered that Goodlyyfe had accumulated about Kshs 2 Billion in his bank Account. She was able to secure the password to his account and transferred Kshs 500 million into an account in Uganda. She disappeared in the pretext of a sick mother and could not be traced. Goodlyyfe was able to locate her in Uganda having a good time with her Tanzanian boyfriend. He reported the matter to the Banking Fraud Unit for investigations.

The investigators through their informal channels managed to convince her to return to Kenya for a bigger and more lucrative deal. On arrival at Jomo Kenyatta International Airport, she was accosted by the investigators from Banking Fraud unit who arrested her and detained her at JKIA Police Station.

You have learnt from the investigating officer that they intend to arraign her in Court to face charges of Obtaining by False Pretense contrary to Section 313 of the Penal Code among others and that bail will be opposed by the State since she had been out of the jurisdiction of the Court for long. Her partners in the drug trafficking business have heard that you are a hot shot lawyer who has ability to secure her freedom.

Evaluating the relevant provisions of the statutory provisions, case law and legal principles, develop an appropriate strategy you will use to secure your client’s freedom pending trial. (10 Marks)

QUESTION SIX

A demonstration organized by *Unga Revolution*, a local Non-Governmental Organisation, over the high cost of living turned violent leading to the intervention of police on 20th December, 2022. As a result of the police intervention, over 20 demonstrators were arrested in downtown Nairobi and bundled into police cars. Most of the demonstrators who were arrested were later released without charge and 2 were charged at Milimani Law Courts for unlawfully damaging buildings contrary to Section 86 of the Penal Code, Cap. 63 of the Laws of Kenya.

Kiombo Okiomeri, the leader of the demonstration, who was among those arrested was however neither charged nor released more than 24 hours since he was last seen being bundled into police car, registration GKX911. The *Daily Gossip*, a nationwide newspaper contained a photo of Kiombo Okiomeri being bundled into the police car in its publication, a day after the riots with a headline, '*Police Break Violent Food Protest.*' The family of Kiombo Okiomeri in efforts to trace his whereabouts has visited all the police stations in Nairobi and nearby counties to no avail. It has now been more than a month since Kiombo Okiomeri was arrested but the police have officially denied having him in custody through a letter signed by the Regional Commander, Nairobi County.

Abu Kiombo, Kiombo Okiomeri's father has now retained you to file the necessary application in Court to help find his son. Draft the application. (10 Marks)

