



THE CATHOLIC UNIVERSITY OF EASTERN AFRICA

A. M. E. C. E. A MAIN EXAMINATION

P.O. Box 62157
00200 Nairobi - KENYA
Telephone: 891601-6
Fax: 254-20-891084
E-mail: academics@cuea.edu

MAY – JULY 2018 TRIMESTER

FACULTY OF LAW

REGULAR PROGRAMME

CLS 202: LAW OF EVIDENCE I

Date: JULY 2018

Duration: 2 Hours

INSTRUCTIONS: Answer Question ONE and ANY OTHER TWO Questions

- Q1. On 12th December 2002, at approximately 12. 00 noon, Maria, then a secretary with Ndovu Agencies, was at the firm's offices in Mombasa, when at about 12.15 p.m. three men entered and requested to see the director of the firm, TumboKubwa. She was in the office with Gladys. TumboKubwa had clients in his office and so the three men were asked to wait for those clients to leave before they would be allowed in. Maria testified that she was able to observe and talk to these three men. Eventually, the clients in TumboKubwa's office came out and Maria asked the three gentlemen to go in. Two of the men went in leaving one with Maria. Maria testified that the man who was left behind was the appellant. His explanation for not accompanying his two companions into TumboKubwa's office was that the 'two were enough'.

As soon as the two gentlemen entered TumboKubwa's office, some explosion, as that of gunshots was heard from outside. Maria stood up to find out whether it was an electric fault but was prevented from leaving her office by the appellant who blocked her way and pushed her back. Soon after, the gentlemen who had gone into TumboKubwa's office came out. One of them had a firearm in his hand which he pointed at Maria and at the same time commanded her to raise her hands up. A client of the firm who was waiting to see TumboKubwa was likewise ordered to raise his hands. Both complied. The appellant then immediately sped out of the office. Maria checked on TumboKubwa and found him lying on the ground with a bullet wound. She made arrangements and the injured man was rushed to hospital for treatment but was pronounced dead on arrival.

Maria testified that immediately she found TumboKubwa lying on the ground she raised an alarm. Some people saw the appellant and his confederates escaping.

They pursued them shouting 'thief, thief'. Police constable Rono who was on duty with a colleague, Kamau, heard the shouts and saw three people running towards them. He decided to join the chase. He saw the three people confront a motorist, Rashid who had yielded at a roundabout, pulled him out of the car, a Toyota Corolla, registration number KAG 224X, and tried to drive it off. Rono ordered them to stop and when they defied his order he fired his weapon aiming at the person who had sat behind the steering wheel. The man was fatally injured. The others came out and ran away. Rono testified that he observed the two as he pursued them and never lost sight of them. He fired and shot one of them in the buttocks as a result of which the latter fell down. The third man fired back and injured one of the people who were pursuing them. The person whom Rono injured was the appellant.

On the 15th of December, 2002, an identification parade was organized with Maria and Gladys as identifying witnesses and the appellant as the suspect. Both witnesses picked the appellant as the person they had seen at their office in the company of two others who fatally shot their boss. Maria swore that she could remember the appellant extremely well. Rashid, on the other hand, did not observe the appellant as to be able to identify him before the appellant was arrested nor did he say he identified any of his attackers. He saw the appellant after he was arrested.

The above narrative is not fictional. The Court of Appeal in Mombasa Criminal Appeal No. 142 of 2005 had to make a decision whether or not to uphold the decision on a second appeal.

- a) Identify and discuss the evidential issues particularly those relating to relevancy and admissibility of evidence that arise. **(10 marks)**
- b) In whose favor do you think the issues were resolved? **(2 marks)**
- c) What in your view was the decision of the Court of Appeal and what was the basis for the said decision? **(3 marks)**
- d) Assuming that the identification parade was conducted fairly, what was the probable procedure employed by the police in this regard? **(5 marks)**
- e) Supposing that the Court of Appeal upheld the decision of the Superior Court and the trial court, what usual factors would the Court of Appeal warn itself of or take into account? **(10 marks)**

Q2. Under section 118 (a) of the evidence Act, "where it is proved that a person has not been heard from for seven years by those who might be expected to hear

from him or her if he was alive, there shall a rebuttable presumption that he/she is dead. This was the holding in **Chard vs Chard (1956) 2 ALL ER 259**. What in your opinion does Presumption of Death entail ? **(20 marks)**

Q3. The “Onus Probandi” in civil cases is different from that in Criminal Cases, However there is law indicating that this may shift from time to time. Advise your client Miss Msupa Kuruka who comes to seek your opinion in this regard. **(20 marks)**

Q4. CAP 80 Laws of Kenya (Kenya Evidence Act) indicates a need for Opinion Evidence. Discuss further by use of examples and Case Law

- a) The role of Handwriting experts **(8 Marks)**
- b) Identification parades **(6 Marks)**
- c) Corroboration of identity by Police Dogs **(6 Marks)**

Q5. There are four instances within the larger study of Evidence Law when Privilege and or Public Policy can be relied upon by a witness under section 128 Evidence Act CAP 80 Laws of Kenya.

- a) What instances are these **(10 marks)**
- b) When does Privilege of Spousal Communication “back fire” literally. Apply case law in considering a suitable answer. **(10 marks)**

END