



KISII UNIVERSITY
UNIVERSITY EXAMINATIONS

SPECIAL EXAMINATIONS
SECOND YEAR EXAMINATION FOR THE AWARD OF THE
DEGREE OF BACHELOR OF LAWS
FIRST SEMESTER, 2021/2022
(FEBRUARY - JUNE, 2022)

LLBK 212: LAW OF EVIDENCE I

STREAM: Y2 S1

TIME: 2 HOURS

DAY: TUESDAY, 8:00 – 10:00 A.M.

DATE: 26/07/2022

INSTRUCTIONS

- 1. Do not write anything on this question paper.***
- 2. Answer question ONE (Compulsory) and any other TWO questions.***
- 3. Illustrate your answer with relevant cases and statutory provisions where applicable.***

QUESTION ONE

Below is an excerpt taken from the case of *Republic v Mark Lloyd Steveson [2016] eKLR [High Court of Kenya at Kiambu, Criminal Revision 1 of 2016]*

“On 2nd November, 2015, one of the Complainants, Susan Harris, took the stand to testify as PW2. Among other things, she sought to testify that she had received assurances through phone, SMS and email about repayment of her money in a transaction which had given rise to a charge of obtaining by false pretences by the Accused Person. This is what transpired:

HARRIS: I received 34,000 dollars from Charlotte. I received money from PW1. It was 4000 dollars. When PW1 also received he shared with me and Charlotte. We later got SMS, telephone calls and meetings regarding how our money would be received back.

[Email dated 9th March, 2011 – MFI 11]

KIRIMI: I did not get this document. At the point of its production, I will raise an objection.

KINYANJUI: The one I am showing the witness is email dated 9th March, 2011

KIRIMI: That I have. There is, however, a long one I don't have. I will raise an objection.

COURT: Email dated 9th March, 2011 to be marked for identification for now. Any objection to be raised when produced.

The date for that production came on 13th May, 2016. The Prosecution had the Investigating Officer, Gideon Wamocha who testified as PW7 on the witness stand. In the midst of a flurry producing other documents, Gideon Wamocha testified as follows:

WAMOCHA: MFI11 is an email printout dated 9th March, 2011 to Susan Harris and copied to Timothy Wimo. It is titled as "Susan Loan Agreement Final." There is an attachment which is a loan agreement and a chronology of events. The author is one Mark Stephenson. The document was brought to me by Mark Stephenson accompanied by his lawyer Sam Keengwe on the day I recorded his statement.

MR. KIRIMI: We object to reference to that document. It amounts to a confession. It does not meet the fundamentals of recording a confession. It is an email printout. No accompanying certificate as per section 64 of Chapter 80. That will be against principles of justice of self-incrimination. It will greatly compromise the mind of Court to the detriment of the Accused Person. May the witness not continue to refer to it. The same is not even signed by the Accused so it bears no mark that it came from the Accused Person.

PROSECUTING COUNSEL: We oppose. The witness has talked of an email presented to him in the course of investigations. Section 78(A) of Chapter 80 classifies emails as admissible evidence. Section 78(b) court should not deny admissibility [on the grounds] that it is not signed. In any event those are issues for cross examination. It came from Accused. The objection should be denied.

KIRIMI: In reply. The counsel is misleading the Court. Email is addressed to Susan Harris and copied to Timothy Nimmo. None of them referred to it when they testified. The document allegedly attached in the email is not signed. In any event this amounts to admitting accused's statement before he is put on defence. The same section 78(a)(4) has qualifications to be met before emails are produced. So many courts disallow the same."

a) Assuming that the court before which the case was handled found that the document was inadmissible in evidence, using case relevant law, discuss why, in your view, the court would arrive at such a decision. [10 Marks]

b) From the summary, Mr. Kirimi argues that the document amounts to a confession. Assuming you are in the position of the trial magistrate, discuss what amounts to a confession and decide whether or not the argument is valid [10 Marks]

c) The following are brief facts taken from the case of *Muthuri Ntara & another v Francis Mworira Igweta [2016] eKLR*.

“In summary, the Respondent is the plaintiff in Meru CMCC NO 233 of 2005 and holder of a judgment in the sum of Kshs 255, 656. The said judgment was entered into against the Appellants on 9th August 2011. The Respondent obtained warrant of arrest in execution of the decree against the Appellants. To obviate the execution, the Appellants applied to the trial court for stay of execution via Application dated 2nd February 2012. The major ground presented as a basis for stay execution of the decree in the lower court was that a moratorium staying all proceedings in respect of claims covered by Blue Shield Insurance Company had been declared in HCCC NO.465 of 2011. The trial magistrate considered the application and dismissed it on 27th April 2012 thus provoking this Appeal.” “...the Appellants have argued that the trial court should have taken judicial notice of HCCC NO.465 of 2011 (OS) at Milimani Law Court and ought to have found that the order was binding on the court.”

You have been approached to advise the parties on whether or not the court should have taken judicial notice of the case under reference. Giving relevant examples for each point, discuss the basis for and practice on judicial notice in Kenya. [10 Marks]

QUESTION TWO

a) “Evidence is relevant if it is logically probative or disapprobative of some matter that requires proof.... It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e. logically probative or disprobative) evidence is evidence that makes the matter that requires proof more/less probable”, PER Lord Simon in ***DPP v. Kilbourne (1973) AC, 729, 756.***

Discuss this phrase, taking care to explain the exclusionary rules of admissibility should not be offended [10 Marks]

b) “Circumstantial evidence may sometimes be conclusive but must always be narrowly examined – because such evidence may be fabricated to cast suspicion on another” – ***Tepper v R. (1952) AC 380, 489.*** Discuss the place and use of circumstantial evidence as envisaged in the judge’s statement above. [10 Marks]

QUESTION THREE

a) Mr. “Nguku, who was a police officer, had on 19th January, solicited for a bribe which was eventually handed over to him on the 21st January. He was charged only with receipt of the bribe on 21st January and not the soliciting of the bribe on 19th January. At his trial, the prosecution sought to prove the soliciting of the bribe on 19th January and that evidence was strenuously objected to on the ground that the prosecution was trying to adduce evidence of the commission of another offence with which Nguku was not charged.” *Andriano Oyugi v Republic [2002] eKLR*.

Discuss the admissibility of this evidence on solicitation of the bribe on 19th January, in relation to a charge of receiving a bribe on 21st January.

[10 Marks]

b) Using relevant cases, explain the three presumptions of, namely, commorientes, immutability of things and that of regularity. [10 Marks]

QUESTION FOUR

a) With the aid of relevant case; law distinguish between cause of action estoppel and issue estoppel. [10 Marks]

b) Explain how estoppel by representation arises and its peculiar characteristics [10 Marks]

QUESTION FIVE

In the law of evidence, certain categories of people enjoy the chance of privilege when the issue of adduction of evidence comes into play. With the aid of decided cases, explain the categories. [20 Marks]