REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 7 OF 2014

ABDIAZIZ ALI ABDULAHI alias SISOW & 23 OTHERS.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 2006 of 2012

of the Chief Magistrate's Court at Mombasa – Hon. R. Odenyo - SPM)

JUDGMENT

The 24 Appellants were Convicted and Sentenced to seven (7) years imprisonment for the offence of Piracy contrary to section 369(1) (b) as read with section 371(a) of the Merchant Shipping Act of 2009.

The particulars being that on the 12th day of May, 2011 upon the High seas while armed with offensive weapons namely AK 47 rifles and RPG voluntarily participated in the operation of a ship F.V Ariya with knowledge of facts making the same to be a pirated ship.

The appellants withdrew/abandoned the first ground of their appeal which was in respect of jurisdiction of the trial Court in entertaining hearing and determining his case which was brought under the Merchant Shipping Act 2009.

The second ground is in respect of a conviction allegedly based on a defective and invalid charge.

The third ground is, to the effect that the learned trial magistrate erred in law and in fact in finding that the offence charged had been proved.

Fourthly that he erred in law and in fact in illegally taking over a matter and pronouncing a Judgment and proceeding to convict.

Fifthly that the Judgment, Conviction and Sentence were a nullity.

Sixthly, that the magistrate erred in law and in fact in shifting the burden of proof to the appellant.

That the Sentence was manifestly excessive.

Counsel for the Appellants Mr. Magolo submits that its not clear as to which magistrate delivered it between Honourable Odenyo and Honourable Riechi Chief Magistrate who are both stationed in

Mombasa Court. It is contended that its not indicated in the proceedings why one magistrate was taking over from another. He further submits that section 200(1) of the Criminal Procedure Code was not available to the Court as it contemplates a situation where the trial magistrate has ceased to have jurisdiction either by transfer or any other reason.

Further that Honourable Riechi Chief Magistrate had not ceased to have jurisdiction on the matter and therefore Honourable Odenyo Senior Principal Magistrate did not have authority to take over the matter and the decision made was a nullity.

The appellants had been charged with three Counts.

The first one was that of Piracy contrary to section 369(1)(a) as read together with section 371(a) of the Merchants Shipping Act of 2009.

The particulars for the charge were that:-

> ***"On the 20th day of October, 2010 upon High seas within the Gulf of Oman, jointly, armed with offensive weapons namely AK 47 Rifles and Rocket propelled Grenades attacked FV ARIYA and at the time of such act used violence against the crew of the said vessel".***

Count II. They were charged with the offence of hijacking a ship contrary to section 370(1) as read with sub section 6 of the Merchant Shipping Act of 2009 in that:-

> ***"On the 20th day of October, 2010 upon the High seas of Gulf of Oman, while armed with offensive weapons namely AK47 Riffles and Rocket propelled Grenades, jointly hijacked FV ARIYA and at the time of such act used violence against the crew of the said vessel".***

The third Count (In which they were Convicted) they were charged with piracy contrary to section 369 (1)(b) as read with section 371(a) of the Merchant Shipping Act of 2009 in that:-

> ***"On the 12th day of May 2011 upon High Seas with offensive weapons namely AK47 rifles and Rocket propelled Grenades voluntarily participated in the operation of a ship FV ARIYA with knowledge of facts making the same to be a pirated ship".***

It is the contention by Counsel that the Appellants were acquitted in Counts I and II and further that Count III cannot be sustained due to lack of complainants who are the crew of the vessel they were alleged to have hijacked. It is his submissions that without evidence from the crew of the vessel allegedly hijacked it would not be possible to make a finding to the effect that the appellants were voluntarily participating in the operation of a ship which they knew to be a pirate one.

It is further contended that the trial magistrate shifted the burden of proof to the appellants to explain how and the reasons why they were in the pirated ship.

On the Sentence its submitted that it was manifestly excessive in the circumstances of this case. In that they had been in remand custody for three years and the trial magistrate had later Sentenced them to seven (7) years imprisonment.

Counsel for the Respondent Miss Mwaniki submits that at the time the Defence appeared before Honourable Odenyo – Senior Principal Magistrate they did not object to him passing Sentence as would have required under section 382 of the Criminal Procedure Code which provides,

> ***"Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure***

of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings"

Further that at the time Honourbale Riechi had been nominated as a Judge awaiting appointment and swearing and it was in order for Honourable Odenyo Senior Principal Magistrate to pass Sentence.

On the issue of the charge being defective Counsel for Respondent contended that the inclusion of the 3rd Count in which the Appellants were convicted was made as a result of the absence of the crew members of the vessel Ariya. They were to testify, through video link from Tahran – Iran but this was not to happen owing to disruptions caused by the appellants themselves. Later the video went missing and the victims disappeared.

As to whether the prosecution shifted the burden of proof to the Defence, it is contended that the Appellants were found in MV Ariya. It is argued that under section 211 of the evidence Act it was incumbent upon themselves to explain the circumstances in which they found themselves in a pirated ship.

On the issue of Sentence, the Respondent had issued a Notice of enhancement of Sentence from seven (7) years to that of imprisonment for life. Its Counsels contention that under Section 371 of the Act, the mandatory Sentence for life is provided for.

On the issue as to whether there was illegality occasioned when Honourable Riechi Chief Magistrate wrote and signed a Judgment on 20th January, 2014 and handed it over to Honourable Odenyo Senior Principal Magistrate to deliver and pass Sentence, my view is that , owing to the fact that the Judicial Service Commission had during that time nominated Honourable Riechi Chief Magistrate as a Judge, the presumption was that he was to be appointed without undue delay to that substantive post by his Excellency the President. That appears to be the reason why section 200 of the Criminal Procedure Code was being put into effect.

Section 200 of the Criminal Procedure Code provides,

"Subject to sub section (3) where a magistrate after having heard and recorded the whole or part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction the succeeding magistrate may,

(a) deliver a Judgment that has been written and signed but not delivered by his predecessor".

Its apparent that there was a honest but mistaken believe that the process of being appointed a Judge had started in earnest. Article 159 (2) (d) of the Constitution provides,

"In exercising Judicial authority, the Courts and tribunals shall be guided by the following principles:-

(a) Justice shall be administered without undue regard to procedural technicalities".

Section 382 of the Criminal Procedure Code has a proviso to this effect,

"provided that in determining whether an error, omission or irregularity has occasioned a failure of justice, the Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings".

It is not denied that when Honourable Odenyo Senior Principle Magistrate took over this matter the defence did not object at that time but the reason for that failure, is that silence does not in itself confer

jurisdiction.

The question that comes to mind is whether the irregularity or omission if any did occasion a failure of justice? The case in question had been heard to its conclusion and a determination made by way of a Judgment which was written and signed by Honourable Riechi Chief Magistrate. What was remaining was the reading of that Judgment and subsequent Sentencing. I find no in justice was occasioned to the Appellants for any omission or irregularity that may have occurred.

A perusal of the record of proceedings indicate that the Appellants were convicted on the third Count but acquitted on the 1st and 2nd Counts. The third Count was introduced after the learned trial magistrate delivered a ruling dated 8th August, 2013 in which it was noted that the defence would have an opportunity to have any Witnesses who had testified recalled and to give fresh evidence or be cross-examined. The charges on the 3rd Count were read over the Appellants to which they entered a plea of not guilty.

Counsel for the Defence did confirm that they did not seek the recalling of any of the Witnesses.

The necessity of addling the 3rd Count was brought about by the failure of the crew of the motor vessel Ariya to tender evidence in Court.

They were to testify through video link from Tehran– Iran. There was objection by the Defence.

Later the appellants themselves became unruly and the case was adjourned. The video machine was later stolen and went missing. The crew members of the motor vessel Ariya later disappeared. This prompted the prosecution to add the 3rd Count which they thought that the evidence adduced so far covered.

Section 369(I) of the Merchant Act provides,

> ***" In this part – piracy means -***
>
> ***(a) Any act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed***
>
> ***i. against another ship or aircraft or against persons or property on board such ship or aircraft; or***
>
> ***ii. against a ship aircraft persons or property in a place outside the jurisdiction of any state.***
>
> ***(b) <u>any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft".</u>***

In the present case there is overwhelming evidence that the appellants were found aboard MV Ariya where several exhibits were recovered. These were (1) 2 skiffs, a private ladder, 10 Rocket propelled Grenades, Rocket propelled Launcher, boaster chargers, several magazines ammunitions, Jackets, flash lights, GPS and clothe masks. All these were produced as exhibits in Court.

Evidence was adduced to the effect that there was an exchange of fire which led to the death of Four (4) of the suspects and the injury of some of the appellants in this case (six in number).

It is contended by the Defence Counsel Mr. Magolo that the learned trial magistrate shifted the burden of proof to the Appellants. In their defence they alleged that they were fishermen under the employment of Alfraquin Fishing Company Limited and had boarded a boat belonging to their Company and going by the company's name Alfraquin and went fishing only to be attacked by a ship belonging to Denmark under the suspicion that they were pirates. They only had the fish nets and knives. In his Judgment at page 15 line 4 the learned trial magistrate had this to observe,

" From the evidence on record which is not challenged there were 2 groups of people in the "Jelbet 24" and one of the Accused group appeared to be the domain group from where one or more of them pointed weapons at the Naval ship. They were ordered to stop, but did not do so but instead shot at the Naval ship. It I snot in contention that the weapons recovered and produced in Court were found in the vessel "Jelbet 24".

He further deduced from the evidence adduced before the Court in the absence of the Complainants that the Accused persons committed the offence. I find no good reason to fault the evaluation of the evidence to the effect that the appellants voluntarily participated in the operation of a ship MV Ariya with knowledge of facts making the same to be a pirate ship. I find no good reason to disturb the Conviction. On the issue of Sentencing its contended by Counsel for the Defence Mr. Magolo that the Sentence of seven (7) years is excessive whereas counsel for the prosecution Miss Mwaniki is of the view that the Sentence was not legal as section 371 (a) of the Merchant Shipping Act provides,

"Any person who

(a) Commits any act of piracy shall be liable, upon conviction to imprisonment for life".

She has cited the Appeal Court Criminal Case No. 5 of 2008 ***Narols Joseph Njuguna Mwaura & Others –Vs- Republic*** which was a robbery with violence case whereby the court upheld the death Sentence.

She also cited the case of ***Kelvin Adika –Vs – Republic Criminal Appeal No. 102 of 2005*** where the Court of Appeal as upheld the death sentence. These cases are distinguishable to the present one. The two authorities dealt with the offence of robbery with violence. The language used is different. In the present case the language used is ***"shall be liable"*** which is not the same as ***"shall suffer"*** death.

In the present case the Court has discretion in Sentencing.

I find no reason to enhance the Sentence to that of life imprisonment. In the same vein I find no reason to interfere with the sentence of seven(7) years imprisonment. I do not find it to be excessive or harsh.

The appeal has no merit and is disallowed.

Judgment delivered dated and signed in open Court this **17th** day of **November, 2014.**

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M. MUYA

JUDGE

17TH NOVEMBER, 2014

In the presence of:-

Mr. Magolo for the appellants.

Mr. Muteti holding brief Miss Mwaniki for the Respondents.