



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 166 OF 2012 CONSOLIDATED WITH NOS. 167 – 172 OF 2012

BARRE ALI FARAH

ABDI MOHAMED

ALI HUSSEIN HASSAN

ABDIKARIM NUR SHIRE

BASHIR MOHAMED ELMI

ABDDIRIZAK ABDULAHI ALI

ABDIFARUK HUSSEIN ALI APPELLANTS

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 3601 of 2009 of the Senior Principal Magistrate's Court at Mombasa – Hon. J. Gandani - SPM)

JUDGMENT

The appellants herein were Convicted and Sentenced to twenty (20) years imprisonment for the offence of piracy contrary to section 369 (1) as read with Section 371(a) of the Shipping Merchants Act No. 4 of 2009.

There are seven appeals which have been consolidated as they emanate from the same trial. The main grounds are that the trial was a nullity and the Conviction and Sentence too.

Secondly, the Sentence was manifestly harsh.

Counsel for the Appellants submits that the trial magistrate did state that she was under pressure to

arrive at a certain decision.

He takes issue with the definition of piracy under the Merchants and Shipping Act.

It is his contention that, the Actus reus contemplated therein would be an act of violence or detention and only if committed for private ends and by a crew or a passenger of a private ship.

That the charge sheet presented before the court did not suggest that the appellants were a crew or passengers of a private ship. The charge sheet does not include allegations of violence to have been committed. That it does not accuse the appellants of committing violence to the crew or passengers in the ship.

Further it is submitted that PW 1 who was the captain of the ship did state that what he saw was a skip, so the question is posed whether a skip or a small boat is a ship. It is the contention by counsel for the defence that under the merchant and shipping Act a boat is not shown to mean or include a ship.

It is further submitted that the captain of the ship (PW 1) merely said that they saw the boats being driven at high speed and became suspicious of their intentions.

The question posed is whether speeding at high seas amounts to an offence?

Counsel submits further that the appellants were fishermen as they were found with fishing gear.

Counsel for the state Mr. Mureithi submits that nowhere in the proceedings is it shown that the trial magistrate did comment that she was under pressure to arrive at a certain conclusion.

Secondly, that section 369 of the Merchants and Shipping Act does in its definition include the issue of threats.

As to whether a magistrate Court has jurisdiction to entertain matters under the shipping Act, he submitted that the issue was conclusively dealt with by the Court of Appeal in Criminal Appeal No. 113 of 2012 which had emanated from similar proceedings.

As to the question whether a boat is a ship it is submitted that there is no conclusive definition.

On the issue of the actus reus itself it is submitted that PW 1 the captain of the ship received information that there was a vessel sailing at 12 knots and heading to their direction. Upon checking at the radar he saw two boats approaching their ship at high speed. Two flares were fired but they did not heed, that when military action was undertaken.

A perusal of the charge sheet shows that the appellants were charged with piracy contrary to section 369(1) (a) (ii) as read with Section 371 (a) of the Merchant Shipping Act No. 4 of 2009 Laws of Kenya.

The particulars being that on the 27th day of October, 2009 upon the High Seas in the Gulf of Aden, jointly, armed with offensive weapons namely firearms, three knives and grappling hook attacked a fishing trawler captain St. Vincent and at the time of such act put in fear the lives of the crew members of the said vessel.

Section 369(1) defines armed robbery against ships as to mean

“any unlawful act of violence or detention or any act of depredation or threat, thereof, other than an act of piracy, directed against persons or property on board such a ship with territorial waters or waters under Kenyan jurisdiction”.

Piracy is defined to mean

“(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 air craft and directed

(ii) against a ship, aircraft persons or property in a place outside the jurisdiction of any state”.

Section 370 (7) of the Merchant Shipping Act defines **“act of Violence”** to mean any act done.

(a) In Kenya which constitutes the offence of murder, attempted murder, manslaughter, or assault, or

(b) Outside Kenya which, if done in Kenya would constitute such an offence as is mentioned in paragraph (a)

Miss Mwaniki for the state had powerfully submitted on the definition of piracy in the lower court and in particular the meaning of assault. She did persuade Court to take the meaning of assault as provided in Arch bold (pages 1660) which states that,

“assault is any act or omission by which a person intentionally causes another to apprehend immediate unlawful Violence”.

Blackstone's Criminal Practice page 186- **“An assault is an act that causes another to apprehend violence”**, fear is assault page 187). Page 187 **“Stalkers can be prosecuted for assault”**.

In the present case the prosecution evidence is that the captain of St. Vincent was informed by his crew that they had seen 2 vessels approaching theirs. Upon checking with the Radar he saw two boats approaching theirs at a speed of 24 knots. He increased his speed to 13 knots then put on an alarm for piracy attack.

While evaluating the evidence adduced before her the trial magistrate did appreciate the definitions of assault as argued before her by learned state counsel and did proceed to find that the two skiffs were moving at high speed, towards the complainants ship causing them to apprehend danger. When flares were fired at the skiffs they did not stop but proceeded on their course towards the ship. Ammunition, knives and grappling hooks were recovered from the skiffs. The prosecution witnesses had also seen other items being thrown overboard from the skiffs.

The trial magistrate was of the view that this act must have definitely caused the crew to apprehend danger and fear for their lives and hence this was an act of violence.

Further that though in their defence the Appellants had alleged that they were fishermen, the trial court was not convinced because no proper fishing gear, fish or fish storage facilities were found in the skiffs. I find no reason to fault her finding. The Conviction was safe. As for jurisdiction. This matter was exhaustively argued before the Court of appeal in Criminal Appeal No. 113 of 2013 Nairobi whereby it was held that magistrate Courts have jurisdiction in matters pertaining to the piracy under the Merchants and Shipping Act. I need not delve more on that issue. The last issue is that of Sentencing. In the present Case the Appellants were Sentenced to twenty (20) years imprisonment. Several piracy cases have been determined by the Courts in Mombasa with various imprisonment terms being meted out. In an attempt to harmonize Sentencing and in appreciating that times have changed in Somalia, Sentences have been reduced to a period of five (5) or seven(7) years and or ten(10) years. Mr. Mureithi for the state however, had asked for enhancement of Sentence on the grounds that Section 371(a) provides that,

“Any person who commits any act of piracy..... shall be liable upon Conviction to imprisonment for life”.

The word **“shall be liable”** does not mean that its mandatory to Sentence to life imprisonment all those found guilty of the offence of piracy. It is noted that before Conviction the accused persons had

been in custody for a period of four (4) years. Bearing that in mind the Sentence of twenty (20) years imprisonment is hereby altered and or reduced to six(6) years.

The upshot is that the appellants will serve six years imprisonment from the time of Conviction. This appeal succeeds to that extent only.

Judgment delivered dated and signed this 14th day of November, 2013.

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M. MUYA

JUDGE

14TH NOVEMBER, 2013

In the presence of:-

Learned Counsel for appellants Mr. Magolo

Learned Counsel for the State Mr. Mungai

Court clerk Musundi.