



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Miscellaneous Application 105 of 2010**  
**REPUBLIC ..... APPLICANT**  
**VERSUS**  
**HASSAN JAMA HALEYS**  
**alias HASSAN JAMAL & 5 OTHERS ..... RESPONDENTS**

**RULING**

The six (6) accused persons in the **Criminal Case 1340/10** before the Chief Magistrate's Court Mombasa, had been jointly charged with the offence of **PIRACY CONTRARY TO SECTION 369(1) (a) (ii) AS READ WITH SECTION 371(a) OF THE MERCHANT SHIPPING ACT NO. 4 OF 2009**. At the commencement of the proceedings before the subordinate court the accused persons were represented by **MR. MAGOLO** Advocate. However on 14<sup>th</sup> July 2010 when the matter was mentioned before **HON. KIZITO**, Senior Resident Magistrate, Mr. Magolo made an application to withdraw from acting for the accuseds. The learned magistrate allowed his application to withdraw from acting but in doing so made orders directing the Hon. Attorney General of the Republic of Kenya to provide legal defence services for the accused. By a letter dated 14<sup>th</sup> July 2010 **MR. MUTETI MUASYA**, learned Senior State Counsel has approached the High Court seeking a review of this order. Mr. Muteti contends that it is the responsibility of an accused person to source for legal representation on his/her own, and that there is no provision in the Kenyan law **compelling** the Hon. Attorney-General to provide legal representation for an accused person.

I have given careful consideration to this matter. I have taken into account the relevant provisions of the Constitution of Kenya. S. 77(2)(d) of the said Constitution provides

***1. Every person who is charged with a criminal offence .....***

***1. Shall be permitted to defend himself before the court in person or by legal representative of his own choice."***

It is clear therefore that the decision on whether to act in person or to engage legal counsel lies squarely with the accused person. This is not a decision that a court ought to make on a suspect's behalf. The only class of suspects who are provided with legal counsel at the cost of the State are suspects in murder trials. The law does not extend this right to any other category of accused persons. Whilst it would be desirable to have a Legal Aid Scheme in place in this country to cater for suspects who may be unable to engage legal counsel for themselves, unfortunately at this present time no such system exists. No doubt the learned trial magistrate's heart was in the right place, but in making the orders that he did he acted ultra vires the law and therefore made orders which have no legal basis whatsoever. For the above reasons I do review the decision of the trial court and hereby quash the orders made on 14<sup>th</sup> July 2010 directing the Hon. Attorney-General to provide legal representation for the six accused persons.

Having said that and before I end I must note that the *'piracy trials'* have presented a unique challenge to the Kenyan legal system. We cannot ignore the fact that these are suspects who having been arrested by foreign naval forces on the High Seas are brought to Kenya for trial. They are strangers in the country, do not understand the legal system, may not know what their rights are and do not understand the language. With such barriers it would in my view be crucial that the Kenyan Government and the International partners supporting these trials put in place a system to provide free legal representation for the suspects in these piracy trials. This is the only way that their rights to a fair trial can be guaranteed

**Dated this 15<sup>th</sup> day of July 2010.**

**M. ODERO**

**JUDGE**