REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Application 434 of 2009

IN THE MATTER OF: AN APPLICATION BY MOHAMUD MOHAMED HASHI alias DHODI, MOHAMED ALI AW-DAHIR alias OROD DHEER, MOHAMED DOGOL ALI CADE, ABDIWAHID MOHAMED OSMAN, ABDULLAHI OMAR MOHAMED alias INDAGURAN, ABDIRAHMAN MOHAMUD CASER, KHADAR MOHAMED JAMA, ABDIRIZAK HASSA ALI alias DAWAGORADI and MOHAMED CIRFER ISMAIL alias MOHAMUD ABDULLAHI ISMAIL FOR LEAVE TO APPLY FOR ORDERS OF PROBIBITION.

AND

IN THE MATTER OF: THE PENAL CODE – CAP. 63 LAWS OF KENYA

AND

IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT AT MOMBASA CRIMINAL CASE NUMBER 840 OF 2009.

BETWEEN

REPUBLIC

VERSUS

THE CHIEF MAGISTRATE'S COURT, MOMBASA ……..…… RESPONDENT

AND

THE ATTORNEY GENERAL …… INTERESTED PARTY

EX-PARTE

MOHAMUD MOHAMED HASHI alias DHODI and EIGHT (8) OTHERS

JUDGEMENT

The Applicants, nine (9) in number were arraigned in the Chief Magistrate's Court at Mombasa on 11th March, 2009 in Criminal Case No. 840 of 2009 and charged with the offence of Piracy

contrary to Section 69 (1) as read with Section 69 (3) of the Penal Code, Chapter 63 of the Laws of Kenya.

The Applicants are: -

1. Mohamud Mohamed Hashi alias Dhodi
2. Mohamed Ali aw-Dahir alias Orod Dheer
3. Mohamed Dogol Ali Cade
4. Abdiwahid Mohamed Osman
5. Abdullahi Omar Mohamed alias Indaguran
6. Abdirahman Mohamed Caser
7. Khadar Mohamed Jama
8. Abdirizik Hassna Ali alias Dawagoradi
9. Mohamed CIRFER ISMAIL alias Mohamud Abdullahi Ismail.

The particulars of the offence are that the above-mentioned Accused persons **"…. on the 3rd day of March, 2009 upon the High Seas of Indian Ocean jointly being armed with offensive weapons namely three AK 47 Rifles, one pistol make Tokalev, one RPG – 7 portable Rocket Launcher, one SAR 80 Rifle and one Carabire rifle, attacked a machine sailing vessel namely MV COURIER and at the time of such act put in fear the lives of the crew men of the said vessel."**

All the Accused pleaded not guilty. They made applications for bail through their counsel Mr. Magolo. It was opposed by the State through the Assistant Director of Public Prosecutions, Mr. Ondari. The trial court refused to release the Applicants on bail pending the trial. The trial commenced on 27th April, 2009 before the Honourable Senior Resident Magistrate Ms. T. Mwangi. The prosecution called 15 witnesses. After hearing the prosecution case and evaluating the evidence, the Honourable Magistrate placed all the Accused persons on their defences on 24th August, 2009. The defence hearing was fixed for 22nd October, 2009.

It is at this stage that the Accused applied for leave to institute judicial review proceedings for the above Order of Prohibition. The Chamber summons for leave was filed on 17th September, 2010. Leave was granted the next day on 18th September, 2010.

The substantive Notice of Motion dated 23rd September, 2010 was filed on the said date.

The relief sought by the Applicants: -

1. **"An Order of Prohibition, prohibiting the learned Chief Magistrate Mombasa or any other Magistrate's Court under her from hearing, proceeding with, dealing with, entertaining and/or otherwise allowing the prosecution of Criminal Case No. 840 of 2009 commenced on 11th March, 2009.**
2. **Costs of the Application be provided for."**

The **FACTS** in the statement which give rise to the Application are stated to be: -

(i) The ex-parte Applicants have been charged in the Chief Magistrate's Court with the offence of Piracy contrary to Section 69 of the Penal Code since 11th March, 2009.

(ii) Evidence has now been given which clearly show that the alleged offence took place in the Gulf of Aden beyond Kenya and its Territorial Waters.

(iii) The Ex-parte Applicants have indicated their desire to be represented by Lawyers of their choice but their said Lawyers have been denied audience.

(iv) The Ex-parte Applicants have as well been subjected to discrimination.

(v) The Ex-parte Applicants have as well been subjected to discrimination including the denial of bail.

(vi) The Ex-parte Applicants cannot possibly have a fair trial.

The Grounds on which the reliefs are sought are set out in the statutory statement. They are: -

(a) That the Kenyan Courts do not have jurisdiction under section 5 of the Penal Code to try the Applicants.

(b)That evidence has been given that clearly show that the court has no jurisdiction.

(c) That the facts of lack of jurisdiction has been drawn to the court's attention but the court has insisted in proceeding with the trial.

(d)That the decisions to proceed with the trial is illegal and in excess of the court's jurisdiction.

(e) That the Applicants have been denied their rights to have counsel of their choice and to proceed with the trial is to condone such denial.

(f) That the continuation of the trial shall clearly prejudice the Ex-parte Applicants.

(g) That the court is acting without jurisdiction.

Together with the Chamber summons for leave to file for judicial review Orders, the applicants filed a Verifying Affidavit as required by the Rules. It was sworn by the First Applicant MOHAMOUD MOHAMED HASHI alias DHODI on 17th September, 2009 on his own behalf and on behalf of the other Applicants having been authorized to do so. The essential facts deponed in the affidavit are, inter alia, that: -

- The Applicants are currently held at Shimo La Tewa on a charge of Piracy contrary to Section 69 (1) of the Penal Code.

- After being charged with the offence they were supplied with the statements from witnesses and they showed that the incident under inquiry took place at the Gulf of Aden. They annexed a copy of one such statement made by a witness namely Grahame

Anthony Dick, Naval Officer, U.S. Lieutenant Commander, who was in Command of Helicopter Aircraft, the MAGNUM 441 on the USS MONTEREY (C.G 61), a Naval ship. At all material times, the MAGNUM 441 was flying in the Gulf of Aden.

- They waited and participated in the trial as all prosecution witnesses testified and confirmed the following: -

  (a) That the alleged attack took place in/at the Gulf of Aden.

  (b)That at no time did the attack proceed to Kenyan waters or Kenyan Territory.

  (c) That no Kenya goods, crew or ship was involved.

- That through their advocates it was submitted that the court has no jurisdiction but the court, proceeded to rule that it would proceed with the trial/case.

- That having been shown and explained the provisions of Sections, 2, 5 and 6 of the Penal Code together with Part XVI of the Merchant Shipping Act, they believe that the court had no jurisdiction over this matter.

- That they had also sought to secure the services of their preferred lawyers, but the Hon. Attorney General who is the Prosecutor refused to grant them leave to retain the said lawyers.

  The applicants produced in the court a letter dated 4th April, 2009 written by their Kenyan Advocate, Mr. Jared Magolo, in which the Applicants asked for the Attorney General's consent to allow them to be represented by 4 Lawyers practicing in Germany, namely Mr. Oliver Wallasch, Mr. Michael Koch, Mr. Andreas Schulz and Mr. Markus Goldback. By a letter dated 16th April, 2009, the Attorney General replied ad stated that Mr. Magolo had not given all facts that are necessary to enable him consider the request like the particulars of the 4 Germany – based lawyers and what special knowledge or skill they have in this case which cannot be readily handled by an advocate admitted to practice in Kenya.

- That the trial is prejudicial to the Applicants.

The attorney General as counsel for the Respondent, the Chief Magistrate's Court, Mombasa did not file any replying affidavit or Grounds of Opposition but notified the court that the Respondent would oppose the Application. In judicial review proceedings a respondent and/or any Interested Party may participate in the proceedings and respond by way of submissions at the hearing.

At the hearing, the applicants were represented by Mr. Jared Magolo Advocate while the Respondent was represented by Mr.Ondari Assistant director of Public Prosecution.

Mr. Magolo at the start informed the court that the applicants would not pursue any Constitutional issues raised in the application and would confine themselves to judicial review questions only. The Applicants also abandoned to raise any issue in respect of their desire to be represented by Foreign Lawyers. This, therefore, in effect left what is really the true and substantive question to be determined by the High Court in this judicial Review Proceedings, to wit: -

Whether the Chief Magistrate's Court had jurisdiction to try the charges against

the Applicants in this case and also over the Applicants. Simply, did the court have jurisdiction over the matter before it?

Mr. Magolo made submissions in support of the application which are on record. He also submitted that: -

- The only law applicable in this case at the close of the Prosecution's case was Section 69 (1) and (3) of the Penal Code.

- That while it was a fact that the entire Section 69 of the Penal Code was repealed by virtue of Section 454 of the Merchant Shipping Act, which came into force during the pendency of this case on 1st September, 2009, and a new provision in respect of Piracy came into force through Section 371, yet there had been no amendment of the charge as may have been required by virtue of Section 214 of the Criminal Procedure Code before the close of the prosecution case.

- The prosecution had closed its case and no application for amendment had been made. As a result, the law applicable and being used to prosecute the Applicants was Section 69 (1) of the Penal Code.

- The place where the incident occurred was in the Gulf of Aden which is in **"the High Seas"** between Somalia in Africa and Yemen in the Arabian Peninsula.

- That the offence alleged was committed outside the territorial jurisdiction of Kenya and outside the Kenyan waters.

- That neither a Kenyan citizen or Kenya property was involved.

- The arrest was made by the German Navy taking part in operations in the Gulf of Aden.

- The arresting officer was not a Kenyan and there was no nexus or Kenyan connection.

- That jurisdiction could only be conferred by written law, namely, the Kenya Constitution, the Judicature Act and the Magistrate's Court Act.

- That the jurisdiction of the Courts of Kenya is donated by section 5 of the Penal Code and this extends to places within Kenya including territorial waters.

- The legislation denies the Kenyan Courts jurisdiction to deal with offences committed outside the Kenyan territory.

- If the Penal Code confers jurisdiction to the country's territorial waters then on what legal basis did the court extends its jurisdiction to offences committed in the High Seas?

- Section 6 of the Penal Code confers jurisdiction on the local courts where offences are committed partly within and partly beyond or outside the jurisdiction of the courts and the person alleged to have committed the offence is within the jurisdiction of the courts in Kenya.

- That the enactment of the Merchant Shipping Act and operationalisation on 1st

September, 2009 do not affect the Applicants.

- That if the courts had jurisdiction before then why did Parliament pass the new law?

- The court is proceeding without jurisdiction.

Counsel for the Applicants in conclusion urged this court to direct the Magistrate's Court that it had no jurisdiction in the case and as a consequence the High Court do issue an **Order of Prohibition**.

Mr. Ondari, the Assistant director of Public Prosecutions on his part as counsel for the Respondent submitted inter alia, as follows: -

- That the Applicants have not referred to any legislation prohibiting the Magistrate's Court considering the case and that indeed the court had appropriate jurisdiction and was competent to try the case – Section 69 of the Penal Code, Chapter 63, Laws of Kenya.

- That the charge of Piracy here was ***Piracy "Jure Gentium"***and was different from a charge of **Piracy** by **statute**, per se.

- Piracy Jure Gentium is defined in Section 4 of the Offences Against Crown and Government Chapter 12 of Laws of the United Kingdom. That the offence is against the **Law of Nations"**. It can be punished by any state or jurisdiction.

- That even landlocked countries can deal with **"Piracy Jure Gentium"**. One does not have to have territorial waters or a coast/coastal line to prosecute this offence as it is a crime against all Nations and Humanity.

- That there is no requirement to prove any nexus between the offender and the offended.

- That Section 69 of the Penal Code gives **"Universal"** jurisdiction to the Magistrate's Court of First Class in Kenya.

- That Section 69 of the Penal Code ought to be construed and interpreted in the context of the title of Chapter 8 under which it is enacted, namely: -

> **"CHAPTER VIII – OFFENCES AFFECTING RELATIONS WITH FOREIGN STATES AND EXTERNAL TRANQUILITY."**

- That in effect, the objectives of the legislation ought to be taken into account when interpreting Section 69 of the Penal Code and the intention must have been the extention of jurisdiction to incidents in the High Seas outside local or territorial jurisdiction.

- That the court ought to read and apply the provisions of Sections 2 (b), 5 and 6 together of the Code. Section 2 (b) provides that nothing in the Penal Code shall affect the trial and punishment of any person under any law in force in Kenya relating to the jurisdiction of the courts of Kenya for an offence or an act done beyond the ordinary jurisdiction of such courts.

- That in connection with the above, that by virtue of the Judicature Act, Chapter 8, Laws

of Kenya, the Section 3 (1) (b) and the Schedule thereto in Part 1 and Part II, the Kenyan Courts have jurisdiction to invoke and apply the Admiralty Offences (Colonial) Act, 1849 and this Act applies to Kenya. That section 1 of the said Act in effect confers jurisdiction to the Magistrates Court to try the charge of piracy committed in the High Seas.

- Under the provisions of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, despite the repeal of Section 69 of the Penal Code, it has been **saved** by Section 23 (3) (e) and the court has the jurisdiction and power to continue with the present case to its conclusion/finality.

- That the charge relates to substantive law and not procedural law.

- That under Section 4 of the Criminal Procedure Code, the offence of piracy is to be tried by the Subordinate Court of the First Class, presided over by a Chief Magistrate, a senior Principal Magistrate, a Principal Magistrate or a Senior Resident Magistrate.

- That the issue of the Magistrate's Court's jurisdiction in considering cases of piracy was raised in a previous High Court Appeals, to wit, **HIGH COURT APPEAL NOS. 198 – 207 OF 2008 (as consolidated) – HASSAN M. AHMED AND OTHERS – V – REPUBLIC (MOMBASA)** in which the High Court dismissed the appeal on among others, the ground of want of jurisdiction. The High Court on 12th May, 2009 upheld the convictions and sentences in respect of the charges of piracy in the High Seas.

- That the application herein for prohibition has been filed after 15 witnesses had testified and the prosecution had closed its case and it was belated and there was inordinate and inexcusable delay.

- That circumstances existed which precluded the grant of relief. Relying on **"De Smith's Judicial Review of Administrative Action"** 4th Edition, P. 422, Mr. Ondari referred to the following circumstances: -

    (i) Conduct of the Applicant

    That the remedy of Prohibition is in general, a discretionary remedy and the conduct of the applicants should disentitle them to a remedy. That the Applicants went through with the prosecution case. Witness statements were supplied and the case is over half-way through and they have waiver their right to object to a jurisdictional defect. They have lost any right to prohibition by acquiescence or waived by conduct.

- That there has been unreasonable delay in making the application for judicial review. That the court should find that the grant of the Order would cause substantial hardship or prejudice or be detrimental to Good administration.

- That the case had reached the defence stage and is at an end.

- That the expeditious hearing was taken at the insistence of the Applicants.

- On the issue of amendment of the charge upon the repeal of Section 69, Penal Code and enactment of the Merchant Shipping Act, as stated above he relied upon Section 23 (3) (e) of the Interpretation and General Provision's Act. That the new law was a Consolidating Act passing the offence of **piracy by statute** in conformity with the provisions of the United Nations Convention on the Law of the Sea (hereinafter referred to as **'UNCLOS'**. However, this did not mean that the court did not have jurisdiction as it had that in respect of **Piracy Jure Gentium**.

Counsel for the Respondent called upon this court to dismiss the application as it lacked merits. He submitted that the trial do proceed to its logical conclusion.

In his reply, Mr. Magolo submitted further that: -

- There was no proof that the **"Colony"** envisaged in the Admiralty offences (Colonial) Act, 1849 envisaged the **"Republic of Kenya"**.

- That if the provisions of the Admiralty offences (Colonial) Act were applicable then it was mandatory that the said provisions therein be set out and included in the charge sheet. That it cannot be implied or imported by submissions by counsel in these proceedings.

- That the charge sheet did not refer to **"High Seas"** in the offence as envisaged by Section 6 of the Penal Code.

- That there was no partial commission of the offence in Kenya.

- Decision in **HASSAN M. AHMED & OTHERS – VS – REPUBLIC**,dwelt on with Section 69 of the Penal Code and not Sections 5 and 6. It was distinguishable on the facts and circumstances.

The foregoing fairly outlines and sets out the background to this application, the questions in issue and the arguments and presentations by the parties through their respective counsel.

I have carefully considered the application together with the Statutory Statement, Verifying Affidavit, application for leave, the submissions by counsel, the statutes and authorities submitted to court.

The applicants are charged with the offence of Piracy contrary to Section 69 (1) as read with section 69 (3) of the Penal Code; chapter 63, Laws of Kenya. Section 69 (1) provides as follows: -

> **"69. (1) any person who in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of Piracy.**
>
> **……."**

The offence was included in the Penal Code by Act 24 of 1967 – in section 6. The Penal Code first came into effect before Kenya's independence when it was a Colony in 1930. Section 69 (3), provides for the sentence for offence of Piracy. It reads as follows: -

> **"69. (3) any person who is guilty of the offence of piracy is liable to imprisonment**

for life."

In the charge sheet, it is stated that the alleged offence took place on 3rd day of March, 2009 upon the High Seas of the Indian Ocean. In the 1st Applicant's affidavit he deponed that from the statements of witnesses and the prosecution witnesses the alleged act/s of piracy took place in the Gulf of Aden in the Indian Ocean. By the close of the prosecution case having called 15 witnesses, it became certain that the place where the alleged incident under inquiry took place was in the Gulf of Aden.

By the time the Applicants filed this application, they had been placed on their defences but had not commenced the same. The proceedings or trial was ordered to be stayed by this Court pending the hearing and determination of this application as it raised jurisdictional issues and by its nature and remedy sought. As a result, for the purposes of this application, it must be deemed which I do that the offence took place if it did in the Gulf of Aden, in the lndian Ocean. This is the place set **out** in the charge sheet and established by the prosecution to date.

The charge sheet in its particulars states that the offence took place on **"… 3rd day of March, 2009 upon the High Seas of Indian Ocean, …"**

From the foregoing, it can be said to be undisputed or a non-issue in this application that the alleged offence of **Piracy jure gentium"** was not committed in **territorial waters** within the territorial jurisdiction of the Kenyan Courts.

The next question was the offence committed in the **"HIGH SEAS"**. Where are the High seas and what is their legal definition?

In preparation of this judgement, I relied intensively on the legal materials supplied to the court by the two counsels on record, i.e. the pleadings, statutes, case law, and text books. I also relied on their elaborate, incisive and enlightening submissions. I am sincerely grateful to their industry and articulation of the facts, issues and respective client's cases. I would perhaps have been lost in some high sea with my limited experience in Admiralty and Piracy jurisprudence. Any inadequecies in this judgement is not for any omission on their part for they each gave an excellent account of themselves.

The question of jurisdiction to try cases by the Kenyan Courts has not been the subject of much judicial interpretation and very few cases are reported on the subject. This scarcity in judicial interpretation is explained by the fact that until very recently the Kenyan Courts did not try piracy cases with the first reported case heard by courts in 2006. However, I am obliged to place it on record that I was fortunate and privileged to have access to Legal Papers presented by Kenyan Legal Scholars, Legal Practitioners and Jurists. I had the benefit of writings of possibly the leading legal expert and source on Maritime Law in Kenya, Dr. Paul Musili Wambua Ph D (Gent), Lecturer in Maritime and Commercial Law at the University of Nairobi and which I intend to refer to shortly. I also had the benefit of a legal paper presented by Mr. Francis O. Kadima Advocate – **"The Legal Challenges of Prosecuting Suspected Pirates in the Region"** at the regional Meeting of Judges on Environmental Security in East Africa held in Victoria, Seychelles between 30th November – 2nd December, 2009, and at which I had the privilege to be one of the representatives of the Kenya Judiciary. It will be incomplete not to mention that I also considered the useful presentations made by the Hon. Justice of Appeal, Mr. Justice Onyango Otieno, Mr. Makaloo, Advocate and Dr. Kithure Kindiki at aforesaid workshop in Seychelles.

In his paper referred to above Mr. Francis Kadima observed as follows: -

"……

Under the repealed Kenyan law, any person, who in territorial waters, or in the High Seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy. Though Kenyan territorial waters is defined/known as 640 km Coastline North eastern bordering Somalia South borders Tanzania and 14 nautical miles from Coastline towards the Indian Ocean (eastern side of Kenya), the High Seas is not defined in the repealed Merchant Shipping Act, Penal Code or even the interpretation and General Provisions Act. It is only after the domestication of the UNCLOS in the new Act that the High Seas has been defined.

…….."

Dr. Paul M. Wambua in a paper – **<u>Maritime Security; Issues in Piracy and Terrorism</u>** a lecture delivered for the Foregn Servce Institute in Mombasa on 30th April, 2010 of the High Seas **defined** in UNCLOS: -

"……

Combating maritime insecurity is made very difficult by the vastness of the ocean and the fact that no single state has the responsibility/obligation to police and secure the maritime domain forming the High Seas. The jurisdiction of states over the maritime domain is determined in accordance with particular maritime zones. Maritime offences are also classified according to the maritime zones.

…….

There are five main zones recognized by United Nations Convention on the Law of the Sea (UNCLOS) namely; Internal Waters, Territorial Sea, the Contiguous Zone; the Exclusive Economic Zone, the Continental shelf and the High Seas.

(a) - …….

(b)- …….

(c) - …….

(d)- ……..

(e) <u>The High seas</u>

- **The High Seas are all parts of the sea that are not included in the Exclusive Economic Zone (EEZ), in the Territorial Sea or in the Internal Waters of a state; or in the archipelago waters of an archipelagic state. In other words the High Seas are the equivalent of "nomans land"; the High Seas are open to all states. The basic principle is the "mare libertum" theory developed by Hugo Grotius, a Dutch scholar.**

  Article 89 of UNCLOS provides that no state may validly purport to

subject any part of the High seas to its sovereignity ….”

From the foregoing, I form the opinion that our laws under which the Applicants are charged does not provide for an express definition of what constitutes **“the High seas”**. One can only deduce what it may refer to by exclusionary interpretation, deduction and logic. What can be stated with certainty is that the High Seas as contemplated by section 69 (1) excludes, territorial waters. In other words, the High Seas are outside the territorial jurisdiction of the Kenyan Courts.

This brings me to the main question for determination in this judicial review application –

Do the Kenyan Courts have jurisdiction to try the charges against the Applicants in this case?

Jurisdiction of the Local Courts to adjudicate on all matters under the Penal Code is given by Section 5 of the Penal Code which reads that: -

> **“5. The jurisdiction of the Courts of Kenya for the purpose of this Code extends to every place within Kenya, including territorial waters.”** (Emphasis mine)

From what this court has discussed above I do hold that the Kenyan Courts are not conferred with or given any jurisdiction to deal with any matters arising or which have taken place outside Kenya. The Kenyan Courts have no jurisdiction in criminal cases and in particular in the offences set out in the Penal Code where the alleged incident or offence took place outside the geographical area covered by the Kenya state or the Republic of Kenya. The Local Courts can only deal with offences or criminal incidents that take place **within** the territorial jurisdiction of Kenya.

The High Seas are not and cannot be a place in Kenya or within the territorial waters of Kenya. In fact by definition they are strictly deemed to be outside the jurisdiction of all states in the world or on earth unless some law in the state brings it into their local jurisdiction whether Municipal Law or an International Convention etc.

For the purpose of the case, the exact area or locality where the incident or offence took place was in the High Seas in the Gulf of Aden in the Indian Ocean. This is a matter of fact on the basis of the evidence of the prosecution after closing its case. This factual aspect is not disputed and in any case cannot be disputed before any rebuttal by the defence after their hearing of their defence of the case reaches that stage. In fact, to the contrary, the Applicants appeared to rely on this fact and do not intend to challenge the statement in the charge sheet that the incident took place in the High Seas of the Indian Ocean.

A natural and ordinary interpretation of Section 5 of the Penal Code is that the Magistrate’s Court in Criminal Case No. 840 of 2004 lacked jurisdiction to try the Applicants in respect of the charge of piracy under section 69 (1) of the Penal Code. The said Court had no jurisdiction over the matter when the charges were preferred, and when the proceedings took place. The said court acted without jurisdiction when they took the pleas of the Applicants and heard the case upto the close of the prosecution case. The whole process was therefore null and void, *ab initio*. A nullity from the word go.

I do maintain this legal position despite the provisions of Section 69 (1) of the Penal Code under which the Applicants were charged. It is pertinent to set out the said provision. It provides: -

> **“ S. 69 (1) any person who, in territorial waters or upon the high seas, commits any act of piracy gentium is guilty of the offence of piracy.”**

This provision or section is inconsistent with the Section 5 of the Penal Code to the extent that it included **"the High Seas"** in respect of where the acts of piracy gentium are committed. It is Section 5 which donates to or confers on the Kenyan court jurisdiction over matters under the Penal Code. It is the defining provision with regard to jurisdiction of the Kenyan Courts in so far as the Code is concerned. As a result, I do hold that Section 5 is juridically paramount to and overrides Section 69 (1) to the extent of this inconsistency. This is what I may refer to as a legislative misnomer. However, this does not affect any prosecutions or trials of the offence in territorial waters. The law to this extent is still sound and enforceable and is not fatal to the entire provision until Parliament corrects its clear error in purportedly extending the court's jurisdiction to the High Seas in clear breach of the jurisdictional limits stipulated in Section 5. It is the judicial duty of this court to interpret the said written law and give it its correct legal application and meaning.

Can the aforesaid legislative error be saved by Section 2 of the Penal Code as suggested by the counsel for the Respondent? Section 2 (6) provides as follows: -

> **"2. Except as hereinafter expressly provided nothing in this Code shall affect**
>
> **(a) ……**
>
> **(b)The liability of a person to be tried or punished under the law in force in Kenya relating to the jurisdiction of the courts of Kenya for an offence in respect of an act done beyond the ordinary jurisdiction of such courts or**
>
> **……..."**

The preamble in Section 2 is very clear, the exception would be in respect of any matter provided outside the code i.e. in any other written law or otherwise outside the Code. It is my opinion that the jurisdictional limits set out in Section 5 of the Penal Code would not apply to any other law which provides or legislates for punishment or trial of acts done beyond the **"ordinary jurisdiction of such courts"** (emphasis mine). The ordinary jurisdiction of our courts is that set out in Section 5 of the Penal Code. This interpretation is made easier to understand if the Section 2 (b) is read together with the provision in the Section: -

> **"2. (a) - ……..**
>
> **(c) - …….**
>
> **(d) - ……..**
>
> **(e)**
>
> **Provided that, if a person does an act which is punishable under this code and is also punishable under another written law of any kind mentioned in this Section, he shall not be punished for that act both under that written law and also under this Code."** (emphasis mine).

As a result, Section 2 which as a saving provision does not save the enforcement of acts done in the High Seas as had been unprocedurally attempted by Section 69 (1) of the Code.

Does Section 6 of the Penal Code confer any jurisdiction to the trial court to deal with and hear the charges and case against the Applicants? Section 6 of the Code provides that: -

> **"6. When an act which , if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within jurisdiction."**

First and foremost, I must say that this provision is consistent with Section 5 of the code. In fact it enhances the conclusion and decision I have reached in respect of Section 5. It proves that the jurisdiction of the Kenyan Court is over and limited to acts done or offences committed within the jurisdiction of the court. However, section 6 makes a qualification that where offences are committed partly within and partly beyond the jurisdiction of the courts then the courts assume legal or legitimate jurisdiction over the matter. As part of the offence is committed within the jurisdiction of Kenya e.g. within the territorial waters of Kenya, then such would be tried and punished under the Code by the Local Courts.

In this case, the charge sheet speaks for itself. There is no statement in the particulars alleging that the offence took place partly within the territorial waters of Kenya. Also, there are no allegations in the evidence of the 15 prosecution witnesses that such a situation arose. As a result, Section 6 of the Code has no application in this case.

The State through counsel argues that the court ought to consider the Title of Chapter 8 under which Section 69 (1) falls namely: -

> **"1. CHAPTER VIII – OFFENCES AFFECTING RELATIONS WITH FOREIGN STATES AND EXTERNAL TRANQUILITY"**

It was argued that the above objectives must be considered when interpreting the

question of the jurisdiction of the court in respect of the offence of piracy *jure*

gentium. That it was the intention of Parliament to extend jurisdiction to

Incidents beyond jurisdiction i.e. to the High Seas with a view of curbing the criminal activities in the High seas and thereby promoting co-operation and external tranquility and the security of nations.

This may have been the intention perhaps but Parliament should therefore have gone further to legislate expressly in the statutory provisions that matter i.e. sections of the statute. Titles and marginal notes are only of reference and are interpretive tools but not the Law. If this was the intention then there ought to have been an exception to Section 5 i.e that provided the jurisdictional limits thereof did not preclude offences in the High Seas or in the alternative make a specific exception as done in Section 6 of the Penal Code for offences committed partly beyond jurisdiction. The title therefore is of no use on the question of jurisdiction.

Should the court invoke the provisions of Section 3 1(b), of the Judicature Act and find that the Magistrates Courts have jurisdiction as the said Section has made the Admiralty offences (Colonial) Act 1849 part of the laws of Kenya to be enforced by the Magistrates Court? I would agree with Mr. Magolo that if indeed this is a correct interpretation then it would have been necessary and mandatory to the Section 1 of the said Act which conferred

jurisdiction on courts in the colonies to try piracy *jure gentium* case. These Sections of the said Act, if they applied are not included in the charge sheet and this court has no jurisdiction to imply them or assume their existence in the case. The prosecution would have to apply to amend the charge sheet for this question to be considered. It would also be questionable if, strictly, such a Colonial statute whose existence in England today is unknown if not doubtful, would be applicable in Kenya today; an independent and sovereign state which has its own Parliament and has passed anti-piracy laws, however, inadequate. This is really academic now.

Of more relevance is whether Section 4 of the Judicature Act should not have been considered before Parliament conferred the jurisdiction of the trial of piracy cases to the Magistrate Courts through Section 4 of the Criminal Procedure Code and First Schedule. The latter Section seems to contradict the provisions of Section 4 of the Judicature Act which vests exclusive jurisdiction in the High Court to: -

> **"… exercise admiralty jurisdiction in all matters arising in the High Seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya."**

In discussing the case; **HASSAN M. AHMED & OTHERS – V – REPUBLIC (2009) e KLR**, Dr. Paul M. Wambua in a paper titled – **"The Legislative Framework for Adjudication of Piracy Cases in Kenya; Review of the Jurisdictional and Procedural Challenges and the Institutional Capacity"** delivered to an International Forum in Freiburg Germany on 27th – 28th November, 2009, observed: -

> **"In HASSAN M. AHMED and OTHERS – V – REPUBLIC , ….. the Appeal Judge did not consider the apparent contradiction between Section 4 of the Criminal Procedure Code and Section 4 of the Judicature Act.**
>
> **……**
>
> **….**
>
> **Upon a closer look at the provisions of Section 4 of the Judicature Act, it is reasonable to argue that its mandatory provisions (by the use of the word "shall") on jurisdiction are to be preferred to the permissive provisions (by the use of the word "may") in the Criminal Procedure Code whose objective is to make provisions for the procedure to be followed in Criminal Cases. Although it is difficult to predict what the appeal Judge would have found had the point been argued before him, at least it is reasonable to argue that such an argument would have found favour with the court as the most reasonable way to give effect to the provisions of the two statues."**

I am persuaded by the aforesaid argument and think that there is a case for Parliament and the Chief Justice to look at these statutory anomalies, of course, subject to any new situation or approach in view of the repeal of Section 69 of the Penal Code by the enactment of the Merchant Shipping Act, act No. 4 of 2009 which came into force on 1st September, 2010 just before this application was filed in court on 17th September, 2009.

Dr. Paul M. Wambua went further in the said Paper to add at a time the old Constitution was still in force: -

> **"The Constitution of Kenya is the Supreme Law of the Country and any other law which is inconsistent with it is void. The Constitution in section 60 grants the**

High Court "Unlimited original jurisdiction in Civil and Criminal Matters and "such other jurisdictions and klpowe4rs as may be conferred on it …….by any other Law". Two other such Laws which confer admiralty jurisdiction are the Judicature Act (under Section 4) and the repealed Merchant Shipping Act. Reading Section 60 of the constitution together with Section 4 of the Judicature Act and the repealed Section, it is reasonable to argue that the three Sections vest universal jurisdiction in the High Court of Kenya to try piracy cases as a Court of Admiralty. The view is supported by other scholars who have commented on the nature of the Admiralty jurisdiction vested in the High Court of Kenya."

Lastly, I now turn to the repeal of section 69 of the Penal Code by the Merchant Shipping Act, 2009 and the consequences thereof. The Merchant Shipping Act, 2009 repealed, inter alia, section 69 of the Penal Code. Section 454 (1) of the new statute reads: -

"454. (1) the Merchant shipping Act, the Lakes and Rivers Act, section 69 of the Penal Code and Sections 56, 57, 58, 59, 60, 61, 63, 64 and 65 of the Kenya Railways Act are hereby repealed."

The new Act came into force on 1st September, 2009, while this case was still pending and just after the prosecution closed its case. The Applicants filed this application on 17th September, 2010 before the new Act enacts the offence of **"Piracy"** under Section 369 (1) as read together with Section 371 thereof.

Had the repeal of Section 69 not taken place, I would have been to conclude this judgment at this stage as I have held that the trial court has no jurisdiction over this case as the offence complained took place in **"the High Seas"** and not within the territorial waters of Kenya. However, in view of the said repeal and passing of new law, what is the legal position now? It is the duty of this court to make a finding in view of the new development. Mr. Francis Kadima in his paper referred to hereinabove posits an appropriate and relevant question – he asks: -

"……

The challenge to the prosecutor is what happens to the cases that commenced before the new Act became operational since the Act does not operate retrospectively?"

Mr. Ondari for the State submitted that despite the repeal of Section 69, it has been saved by Section 23 (3) (e) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which reads: -

"23. (1) ……

(2) …….

(3) where a written law repeals in whole part written law, then, unless a contrary intention appears, the repeal shall not –

(a) ……

(b) ……

(c) ……

(d) ……

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as a foresaid, and any such investigation, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealed written law had not been made."

He added that on this basis, the trial court has the jurisdiction and power to continue with the present case to its finality. That the charge relates to substantive law and not procedural law.

I have carefully considered the submissions of both counsel, the repealed law and provisions in the new Act. I find two problems.

The first is that it is a fact that the Section 454 (1) which repealed it did not have an express saving or transitional provision. This omission has deprived or denied the prosecution the direct and unchallengeable right or advantage of proceeding with the prosecution and the court to continue with the trial. This is why the Respondent is left ill-equipped to fall back to interpretive provisions in other statutes rather than the express and possessive take-over of the repealing statute. Without invoking the Interpretation and General Provisions Act, the prosecution is faced with a fait accompli position, to wit, there is no saving of the offence under the repealed Section 69 of the Penal Code to enable the prosecution and the court to continue with the case.

Does Section 23 of the Interpretation and General Provisions come to their aid? This can be determined by looking at the purported new law replacing Section 69. The new Act does not re-enact Section 69 but introduces new provisions on the offence of piracy. Section 371 reads: -

"371. Any person who –

(a) commits an act of piracy,

(b)in territorial waters, commits and act of armed robbery against ships shall be liable, upon conviction to imprisonment for life."

Piracy is defined in Section 369 (1) as: -

"Piracy means –

(a) any act of violence or detention, or any act of depredation, committed for private ends by the crew or the passenger of a private ship or a private aircraft, land directed –

……”

By a simple reading of this offence, it becomes clear that it is not the same definition or description of piracy given in the repealed Act. The piracy envisaged in Section 69 was **“piracy jure gentium”**. This was not expressly defined. The question that arises is whether **“piracy”** under section 371 of the new Act is the same as **“piracy jure gentium”** in the repealed Act. In the repealed Section the offence was not defined and the court was obligated to find and determine its ingredients through other interpretive sources e.g. Dictionaries, texts and precedent. In this case, the definition is expressly given. It s not possible to state by reading the provision whether **“piracy”** defined in section 371 of the new Act is **“piracy jure gentium”** as stipulated in the repealed Act.

I do hold therefore that the offence of Piracy in section371 of the Merchant Shipping Act is certainly different from the offence of **“piracy gentium”** in Section 69 of the Penal Code, (now repealed). This was, in passing admitted by Mr. Ondari; when he submitted that the new law was **“piracy by statue”** as envisaged by **“UNCLOS”**.

I do therefore, hold that the offence of piracy in Section 371 of the new Act is a **new offence** and separate and distinct from the **“piracy jure gentium”** which came into existence centuries ago and found its way into our law in 1967. This leads to the second problem, namely, whether the new offence can be substituted with the repealed one in the circumstances. Also, the place the offence took place is no longer **“the High seas”** in the new law. Section 371 (i) refers to: **“against a ship, aircraft, or persons or property outside the jurisdiction of any state”**.

In my view, this can bring debate on interpretation as to whether **“the High Seas”** is the same as **“outside the jurisdiction of any state”**. Taken together, a Continuation of the case against the Applicants, a totally new offence must be introduced on the charge sheet wholly **“amended”**. In fact, this would not be an amendment but substitution of charges and offences.

I do find and hold that the offence of “piracy” under Section 371 f the new Act cannot in law substitute the offence in the repealed Section 69 of the Code by amendment of the charge or institution of fresh charges which is not possible under the constitution, present and past.

Section 77 (4) of the old Constitution of Kenya which was in force when Section 69 was repealed provided that: -

> **“No person shall be guilty of a criminal offence be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for such a criminal offence that is severer in degree or prescription than the maximum penalty that might have been imposed for that offence at the time it was committed.”**

This constitutional provision in the old Constitution has been replicated wholesome in Article 50 of the New Constitution promulgated on 27th August, 2010.

Analyzing the same issues above, Dr. Paul M. Wambua wrote in his second Paper above as follows: -

> **“……**
>
> **…**
>
> **The definition of piracy in the repealed Section has often presented a problem to**

both the prosecutions and the court as no specific definition is given of the offence of piracy jure gentium and therefore the elements of the offence are not given. This lack of clear provision on the elements of the offence of piracy was raised in HASSAN M. AHMED case and has also been raised in all other pending piracy cases brought under the provisions of the repealed Section. In the HASSAN M. AHMED case the court went round the problem by a blanket adoption of the definition of piracy in the UNCLOS on the ground that Kenya had ratified the convention. …….

Before examining the Universal jurisdiction to try piracy cases in Kenya, there is one more challenge to the court's jurisdiction which is likely to be raised by the accused in respect of the pending piracy cases; lack of the court's jurisdiction to convict on the basis of a non-existent provision of the Law. As it was noted above all the pending piracy cases were commenced under the repealed Section. Upon repeal, a Section of Law ceases to exist and no offence can be created under the (non-existent) section. Consequently no court can convict or sentence on the basis of the repealed Section. Similarly the accused persons cannot be rearrested and charged afresh under the Merchant Shipping Act, 2009 as the offences with which they were would subsequently be charged with would be deemed to be ex post facto crimes which are prohibited under the Kenyan Constitution. The present quagmire and untidy situation of the Law is likely to lead acquittals as it would be illegal and in utter breach of the Constitution to convict and sentence the suspected pirates in respect of an offence not known to Kenyan Law. Perhaps the situation would have been saved by a sunset clause in the Criminal Procedure Code that the repeal of the repealed Section would not affect the power of the court to convict and sentence the accused persons in respect of the pending piracy cases and offences committed prior to the commencement of the MSA 2009. Without such a sunset clause to save the jurisdiction of the court to try the pending piracy cases, the accused persons are entitled to outright and unconditional acquittal.

I wholly agree with the view of the writer which go to fortify the findings and holding of this court on the salient questions in this case. The last and fatal omission on the part of the Legislature and the Attorney General who is deemed to have presented the new Merchant Shipping Act, k2009 to Parliament was not to have such a sunset clause to provide for the transitional period until the conclusion of the pending cases under the repealed Section 69, Penal Code. The Sexual Offences Act, 2006 had such a sunset clause which resulted in a smooth transition from the Penal Code to the new Act.

The net result from the foregoing is that the Magistrates court in Chief Magistrate's Court Criminal case No. 840 of 2009 and any other Magistrate's Court in Kenya do not have jurisdiction to try the charges against the Applicants in this case and the court has no jurisdiction over the Applicants and matter before it in the circumstances.

What is the consequence where a court has no jurisdiction in a matter? The Hon. Justice of Appeal |Mr. Nyarangi in the case of **"ONWERS OF THE MOTOR VESSEL "LILLIAN S" = V = CALTEX OIL (KENYA) LIMITED** (1989 KLR 1, AT P. 14 stated: -

> **"……**
>
> **I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

I wholly agree with the above decision and I am bound by it. It is always joyous for me to read the everlasting wisdom of the Late J.A. Nyarangi on jurisdiction. In the text "Words and Phrases Legally defined in volume 3: 1 – N P. 113 relied upon by J.A. Nyarangi, it is stated: -

> **"……**
>
> **Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."**

In the light of the foregoing, in a criminal case which involves the liberty of the Accused and his fundamental individual rights and freedoms, the notions of delay or laches to raise the question of jurisdiction cannot arise. I am not persuaded that such principles would override the Statutory and Constitutional Provisions touching on life and liberty. In any case, there was no delay as the Applicant raised the matter once the prosecution had closed its case and the facts settled on the locus quo, i.e. place where the incident occurred.

The Application for an order for Prohibition must therefore succeed. I do hereby allow the application and do hereby grant an **Order of Prohibition**, prohibiting the Learned Chief Magistrate, Mombasa or any other Magistrate's Court under her from hearing, proceeding with, dealing with, entertaining and/or otherwise allowing the prosecution of criminal case No. 840 of 2009 commenced on 11th March 2009.

I make no order as to costs against the Respondent as the court only received the Applicants when they were arraigned in court and discharged its duties in accordance with the law, including the inherent exercise of discretion and lawful decisions independently and without fear or favour irrespective of any findings of any other Court Superior in hierarchy to it, appellate or otherwise. Perhaps, it would have been different if the Respondent the Attorney General was included as a Respondent as most likely, the court would have awarded costs.

This brings me to the end of this judicial Review proceedings. However, this court seized of this matter and the Applicants being before it will be failing in its Constitutional duty as the High Court to inquire into the consequences of the Order of Prohibition.

This court has now declared that the Kenyan Courts in effect have no jurisdiction to try and hear charges brought under Section 69 (1) of the Penal Code (now repealed) and granted an Order of Prohibition against inter alia,

the continuation of the criminal charges and proceedings.

What should happen now should the court stop there and leave it to the Attorney General and the State to deal

with the legal ramifications, implications and consequences of this decision.

With respect to any other notions, I think that this court would be abdicating its jurisdiction, powers and authority and its Constitutional obligations in ensuring the protection of the fundamental rights and freedoms of the Applicants who find themselves in a perilous, insecure and unenviable situation in a strange country to which they were brought without their wish or volition.

The Applicants were arrested in the High Seas of the Gulf of Aden in the Indian Ocean by a German Naval Vessel, or Frigate with the help of the U.S. Navy using air support. This was on the morning of 3rd March, 2009. The German Naval Vessel – the FGS Rhineland - PFALZ with the help of its helicopters and U.S. helicopter assigned to a U.S. Naval ship the USS – Monterey accosted the Applicants in the Gulf of Aden in their small boat (skiff) and arrested them.

Having been arrested them, the Commander and/or officers of the German Naval Vessel, brought the Applicants to Mombasa Kenya and placed them in the custody of the Kenyan police and authorities on 10.3.2010, ten days after being captured in the Gulf of Aden. The Applicants were then charged with the offence of piracy on 11.03.2009, thirteen days after being captured in the Gulf of Aden.

On the 11.03.2010, they were arraigned in court and pleaded not guilty to the offence. Their advocate applied for bail. The prosecution opposed bail on the ground that the Accuseds, nationalities were unknown and they had no permanent place of abode. That the temptation to abscond was real. The court denied to grant bail to the Applicants.

In view of the foregoing which came to this Court's knowledge when preparing the above decision, I do hold that this court is obligated not to stop with the Order of Prohibition but also to give directions on the release, liberty and security of the Applicants.

The Applicants were brought to Kenyan territory and jurisdiction against their will, and under coercion and compulsion. They were arraigned in court and prosecuted for the offence of piracy. This court has terminated the proceedings. It follows that the Applicants must be released forthwith and arrangement s made by the Kenyan Government to procure their safe return and passage to their countries of origin.

The Prison Authorities cannot and have no power or authority to release the Applicants to the Police or Immigration authorities without Orders of this court.

I do hold and direct that this court after concluding the judicial review proceedings is under a duty to invoke the provisions of the Constitution of Kenya promulgated on 27th August, 2010.

Every person in Kenya under Article 29 has the freedom and security of the person. Article 29 provides: -

> **"Article 29 – Every person has the right to freedom and security of the person which includes the right not to be**
>
> **(a) deprived of freedom arbitrary or without just cause detained without trial**
>
> **(b)……..**
>
> **(c) ……**

(d)……

(e)Treated or punished in a cruel, inhuman or degrading manner.

This court in exercise of its jurisdiction/power and authority under Article 165 of the Constitution is apprehensive and concerned that in view of the peculiar, very unique and exceptional circumstances in which the Applicants find themselves after the Order of Prohibition, they are extremely vulnerable and need protection and security. It is on the basis that the High Court without necessarily being formally moved by any party can by itself suo moto, declare a **"vulnerable person"** to be **"a ward"** of the court. I do declare the Applicants herein to be wards of the court who need protection.

In the light of the order of Prohibition, I do hereby Order the immediate and unconditional release of the Applicants from Prison custody and they shall be so released unless otherwise lawfully held.

It is my view that having been released the Applicants have no reason to remain in Kenya and the Kenya Government have no business in detaining them whatsoever.

In fact I do declare that it is the obligation of the Kenya Government under the Constitution and all International Conventions on Human Rights to ensure the safe passage and delivery of the Applicants to their country of origin as they may disclose.

I do Order that the Attorney General do advise the Ministry of Immigration, Ministry of Foreign Affairs, the Police and all other Law Enforcement Agencies of the provisions of the Constitution of Kenya as **'enacted'** by the People of Kenya. The Government of Kenya and in particular the Ministry of Immigraton and Registration of Persons is hereby ordered to forthwith make arrangements upon consultation with the Applicants and procure their safe passage and delivery to their respective countries of origin. In default, this court hereby requests the U.N.H.C.R. to take custody and care of the Applicants and consider them as **Displaced persons** who require their protection and to assist them relocate and be repatriated to their country or countries of origin as they may disclose.

Orders accordingly.

M.K. IBRAHIM

JUDGE

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 9TH DAY OF NOVEMBER, 2010

M.K. IBRAHIM

JUDGE