REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

HASSAN M. AHMED…….……..…..APPELLANT

VERSUS

REPUBLIC……...……RESPONDENT

JUDGMENT

The appellants, Hassan Muhamud Ahmed, Diwan Maalim Abdullah, Abdikadir Labhale Warsame, Hussein Noor Ali, Liban Abdi Ali, Muktah Mohamed Hassan, Mohamed Ali Farah, Mohamed Abdi Fitah, Mohamud Mohamed Jama and Aweh Mohamed Hassan were charged in Mombasa Chief Magistrate's Court (B. T. Jaden, Principal Magistrate) Criminal Case No. 434 of 2006 with the offence of piracy contrary to Section 69 (1) as read with Section 69 (3) of the Penal Code (Cap 63 Laws of Kenya). The particulars of the offence were that the appellants, on 16th January 2006, upon the High Seas of the Indian Ocean, jointly attacked and detained a Machine Sailing Vessel called Safina Al Bisarat-M.N.V-723 (hereinafter the Indian Ship) and, at the time of, or immediately after such acts, assaulted and put in fear of their lives, the crew of the said vessel and made demands upon its captain Akbar Ali Suleman for a ransom payment of US $ 50,000.

The appellants pleaded not guilty. After a full trial, the appellants were convicted of the offence charged and each was sentenced to serve seven (7) years imprisonment.

Being dissatisfied with their convictions and sentences, the appellants have appealed on the same grounds which are expressed as follows:-

1) That the Learned Principal Magistrate erred in Law in her finding that she had jurisdiction to try the case.
2) That the Learned Principal Magistrate erred in Law in her finding that she could try the offence under the Penal Code even when the offence was committed miles away from the Kenyan Coast.
3) That the Learned Principal Magistrate erred in Law in her evaluation of the evidence and coming to the wrong conclusion.
4) That the Learned Principal Magistrate erred in Law in relying on the accomplice evidence of the crew of the Safina Al Bisarat.
5) That the Learned Principal Magistrate erred in Law, in dismissing the appellants defence.
6) That the sentence of seven years was manifestly excessive given the facts that the appellant were first offenders.

In his oral submissions before me, counsel for the appellants Mr. Hassan raised three broad issues namely that the trial court lacked jurisdiction to try the case since, the appellants and the complainants were not Kenyans and the offence was committed outside the jurisdiction of Kenyan courts. The second and third broad issues raised by counsel challenged the Learned Principal Magistrate's conviction of the appellants when the charge which they faced was not proved to the required standard and when there was conflict in the evidence presented by the prosecution.

The appeals were opposed by Mr. Onserio, Learned State Counsel for the Republic. He contended that the offence of piracy which faced the appellants existed and was punishable under the Penal Code and it mattered not whether the complainants or the appellants were Kenyan or that the offence took place far away from the Kenyan Coast. With regard to the evidence which was adduced before the trial Magistrate, the Learned State Counsel contended that the same was sufficient and did sustain the charge of piracy and further that the conflict alleged by the appellants was insignificant.

This is a first appeal. That being the case, this court is mandated to reconsider and re-evaluate the evidence which was adduced before the trial court and arrive at its own determination on whether or not to uphold the conviction, of course, bearing in mind that the court did not see or hear the witnesses testify. (See **Njoroge – v – Republic [1987] 1KLR 19).**

In a nutshell, the facts of the case were that Safina Al-Bisarat a cargo ship, flying an Indian flag, under the captainship of Akbar Ali Suleman with a crew of 15, set sail from Dubai heading to Kismayu in Somalia. The ship offloaded its cargo at Kismayu on 7th January 2006 and was loaded with charcoal and set off for Dubai on 14th January 2006. While at sea, about 275-280 miles away from the Coast of

Somalia the ship was attacked by the appellants who approached the ship in high speed boats as they fired in the air. Eight appellants gained entry onto the Indian ship via ladders. They were armed with AK 47 rifles and revolvers. Two of the appellants remained in the boats.

The appellants roughed up the crew on the Indian ship and demanded to be given USD 50,000 and an International mobile phone. The appellants took control of the Indian ship from 16th January 2006 upto 21st January 2006 when American Navy officers intercepted them. Before the interception, the appellants had launched attacks on three other ships one of which had made a distress call which was picked by the American Navy officers - hence the interception. The American Navy officers initially placed both the Indian crew members and the appellants in their custody, but after investigation decided that the Indian crew were victims of piracy committed by the appellants.

A search by the American Navy officers led to the recovery of several items including a pistol, AK 47 rifles, ammunition, rocket propellers, grenades, launchers a book on maritime guide, a map of shipping routes, mobile phones and a motor boat engine. The appellants' boats were then sunk in the sea for health reasons. The appellants were kept in the custody of the American Navy officers and later flown to Mombasa to face the said charge of piracy. The crew of the Indian ship on the other hand were brought to Mombasa by sea and so was their ship.

The appellants gave unsworn testimony. Their testimony was the same. They testified that they were fishermen and operated with three boats. The larger of the boats was used for storage of food, fishing equipment and fish. One morning, while on the fishing operations at sea, the large boat's engine broke down and the boat started drifting on the sea. They spotted the Indian Ship and called for help which the crew gave. After a while, the American Navy ship intercepted them and they were all arrested together with the crew of the Indian ship. The Americans tortured the appellants and destroyed two of their boats together with their fishing equipment and their catch. The Americans were cruel to them and called them Islamic extremists. They asked them to identify certain people in photographs and they failed to do so. The Americans threatened to take them to Guatamala base. They were then later charged in Kenya with piracy. The appellants denied the charge and the exhibits produced before the trial Magistrate.

That in a nutshell is the evidence upon which the Learned Principal Magistrate based her conviction of the appellants. The Learned Principal Magistrate accepted as true the evidence given by Akbar Ali Suleman (PW 1), Ahmed Salem Amed Bhadd (PW 2) and Jaffer Karim Maka (PW 3). The three were crew members on the Indian ship and testified that they were attacked by the appellants who were armed with pistols and rifles and demanded USD 50,000/= and a cell phone from them. They described how the appellants used their ship to launch attacks on three other ships using AK 47 rifles and RPE launchers and how they were then rescued by American Navy officers. The Learned Principal Magistrate found that the said witnesses had identified the weapons used in the attack by the appellants. The evidence of the American Navy Officers PW 4, Luca Michael Craft, PW 5, Robert Keith Adams, PW 6, Michael Behar, PW 7, Lt. Mark William Reid and PW 8, John Fielder was also accepted by the Learned Principal Magistrate as corroborating that of the said crew members.

The Learned Principal Magistrate then considered the testimony of the appellants and found the same unconvincing in view of the testimony of the prosecution witnesses which she found credible. She also appreciated contradictions in the evidence of the prosecution witnesses but found the same immaterial. On the issue of jurisdiction, the Learned Principal Magistrate determined that she had jurisdiction to hold the trial under the Penal Code which is in accord with International Law. She specifically held that piracy is **"a crime against mankind which lies beyond the protection of any state."**

Having independently reconsidered and re-evaluated the evidence which was adduced before the Learned Principal Magistrate, I am unable to disagree with her conclusions. PW 1, Akbar Ali Suleman Saad was the Indian ship's captain. He testified that on the material date and time, two speed boats approached their ship. He suspected piracy and ordered speed- increase. However, when the speed boat occupants started firing in the air, he ordered speed-reduction. In quick succession, 8 occupants of the boats gained entry onto their ship and roughed up PW 1 and other crew members. The attackers were armed with AK 47 rifles and revolvers. Four of them beat up PW 1 with gum butts and one, the 1st appellant, demanded USD 50,000 and a special mobile phone which PW 1 could not produce. Two attackers remained in one of the boats to guard the said boats. According to PW 1, they were held captive from 16th January 2006 to 21st January 2006 when they were rescued by the US Navy.

It was PW 1's further testimony that during the period they were held by the attackers, they (the attackers) launched attacks on three other ships without success. They ate their food, kicked, slapped, tortured and humiliated them.

Ahmed Salem Amad Bhaddi, PW 2, corroborated the evidence of PW 1. Briefly, he testified that he was a chief officer on the Indian Ship. When they were 300 miles away from the Somalia Coast, on the high seas on the material date and time, he spotted two speed boats approaching their ship. They fired from their guns and he went to alert PW 1, who instructed a speed-increase and when the firing continued, they reduced their speed. Eight of the attackers led by the appellant climbed onto their ship and beat up the crew members. The 1st appellant demanded USD 50,000 and an International phone from PW 1 which he could not give. PW 2, was assaulted with gum butts. The guns: AK 47 and revolvers, looked like the ones which were produced before the Learned Principal Magistrate. PW 2, witnessed the attackers

disembark from their ship and launch unsuccessful attacks on three other ships before they were rescued by the US Navy officers.

The testimony of Jaffer Karim Moka (PW 3), supported that of PW 1 and PW 2. He testified, so far as material that on a date he could not recall, three boats approached their ship. The occupants climbed onto their ship and roughed them up. They beat them and demanded USD 50,000. The attackers were armed with AK 47 rifles and pistols. They attacked other ships during the period they held them. After a while they were rescued by American Navy Officers.

The evidence of PW 1, PW 2 and PW 3, completely displaced the testimony of the appellants that they had a broken down boat and that they had sought and were given assistance by the crew of the Indian ship. It cannot be true that the appellant's boat had an engine breakdown when they used the same boats to launch attacks on other ships. It cannot also be true that they were being helped at the time the American Navy Officers arrived on the scene, in view of the testimonies of PW 1, PW 2 and PW 3 that they were held captive, beaten, humiliated and money and a mobile phone demanded of them by the appellants.

The evidence that the appellants were armed with AK 47 rifles, revolvers and big guns was cogent. PW 1, identified the revolver and stated that the AK 47 rifles which were exhibited looked like the ones used by the appellants on the material date. He also identified the big guns used by the appellants to attack other ships during their captivity. PW 2 ,also identified the AK 47 rifles, revolvers and big guns. PW 3, although illiterate, gave the following testimony:

"They rounded us up. They beat us up and demanded US Dollars 50,000. The pirates were armed with……like these AK 47 rifles and pistols……These big guns…….were in that boat……."

The evidence of the manner in which the appellants were armed completely displaced the testimony of the appellants that they were innocent fishermen as the appellants stated in their testimony.

The evidence of PW 4, Lucas Michael Grant a US Navy Officer, PW 5, Robert Keith Adams a US Navy Criminal Investigator, PW 6, Michael Behar US Attorney cum US Navy Officer, PW 7, Mark William Reid and PW 8, John Fielder a US Naval Attaché provided the nexus from the rescue of the Indian Crew members to the handing over of the said Indian ship, and the appellants to the Kenyan authorities. Their evidence completes the chain of events from the rescue to the arraignment of the appellants. I don't think that much should turn on the initial decision of the American Navy Officers to treat both the Indian Crew and the appellants as suspects. At the time of the rescue, they could not have distinguished the victims from the attackers. The signal they had received suggested that the attack on other ships had been launched from boats associated with the Indian Ship. A decision on who were the culprits could only be made on further enquiries. In the premises, I find and hold that the mere arrest and initial suspicion of the American Naval Officers of PW 1, PW 2 and PW 3 and their mates did not make them accomplices in the crime of piracy and their evidence was not weakened by the said arrest or suspicion.

On my own reconsideration and re-evaluation of the evidence that was presented before the Learned Principal Magistrate, I have come to the inescapable conclusion that the offence of piracy was committed by the appellants.

I turn now to the ground that the Learned Principal Magistrate had no jurisdiction to try the case. That complaint is raised in grounds 1 and 2 of the Memorandum of Appeal. The basis of this contention is that none of the parties involved is Kenyan and that the offence was committed miles away from the Kenyan Coast. Piracy is described in Churchill & Lowe "The Law of the Sea 3rd Edition at page 209 to include **"any illegal act of violence detention or depredation committed for private ends by the crew or passengers of a private ship (or aircraft) against another ship (or aircraft) or persons or property on board (or over) the high seas."** The actions of the appellants clearly fitted this description. They were crew members of private vessels. They attacked the crew of the Indian ship and detained them. They even deprived them of food and demanded from one of them USD 50,000 and an International mobile phone. Those demands were clearly for private gain. The attack took place about 300 kilometers off the Somalia coast on International waters of the Indian Ocean. I have no doubt in mind that an act of piracy was committed by the appellants. Section 69 (1) and (3) of the Penal Code reads 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.

(3) Any person who is guilty of the offence of piracy is liable to imprisonment for life

Under the Section, the offence of piracy is triable and punishable in this country. There are no limitations under the Section. The court with jurisdiction is that of a 1st Class Magistrate of all ranks save the rank of a Resident Magistrate. The Learned Principal Magistrate therefore clearly had jurisdiction under the Penal Code and the Criminal Procedure Code (See the schedule thereto) to try the appellants.

Even if the Penal Code had been silent on the offence of piracy, I am of the view that the Learned Principal Magistrate would have been guided by the United Nations Convention on the Law of the Sea which defines piracy in Articles 101 as consisting of any of the following acts:-

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew of the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against persons or property on board such ship or aircraft;

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

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a private ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in paragraphs (a) or (b).

At the trial Mrs. Mwangi, the Learned Assistant Deputy Public Prosecutor informed the Learned Principal Magistrate that the United Nations Convention on the Law of the Sea had been ratified by Kenya and that Kenya had domesticated the Convention. At the hearing of these appeals, Mr. Onserio relied upon Mrs. Mwangi's submissions at the trial on her contention that the said Convention had been ratified and domesticated. A contrary view was not given by counsel for the appellants. Indeed that status of the Convention in Kenya seems to have been accepted by counsel for the appellants. In the circumstances, I must hold that the Learned Principal Magistrate was bound to apply the provisions of the Convention should there have been deficiencies in our Penal Code and Criminal Procedure Code.

I would go further and hold that even if the Convention had not been ratified and domesticated, the Learned Principal Magistrate was bound to apply international norms and Instruments since Kenya is a member of the civilized world and is not expected to act in contradiction to expectations of member states of the United Nations. That is the view expressed in the Text book on International Law by Martin Dixon NA at page 76. The Learned author writes at paragraph 5.2.3 page 76 as follows:-

"Under international Law, there are certain crimes which are regarded as so destructive of the international order that any state may exercise jurisdiction in respect of them. This is a jurisdiction which exists irrespective of where the act constituting the crime takes place and the nationality of the person committing it……..

It seems clear that piracy, war crimes and crimes against humanity (e.g genocide) are crimes susceptible to universal jurisdiction under customary international Law."

The Learned author adds at page 77 as follows:

"The universal principle of jurisdiction rests then, on the nature of the 'crime' committed rather than the identity of the perpetrator or the place of commission."

In the premises, the grounds of Appeals on want of jurisdiction must fail.

With regard to sentence, the appellants were liable to be imprisoned for life which is the maximum sentence which could have been handed down to them. They were however, sentenced to serve seven (7) years imprisonment. That sentence in my view cannot be described as harsh in the circumstances of the appellants. I therefore decline to interfere with the same.

The upshot is that these appeals are absolutely without merit and are dismissed in their entirety.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Appellants and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

12TH MAY 2009