



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. 5 OF 2018**

**YOSUF YAQOOB.....APPLICANT**

**YAQOOB IBRAHI.....APPLICANT**

**SALEEM MUHAMMAD.....APPLICANT**

**BHATTI ABDUL GHAFOR.....APPLICANT**

**HAKHSH MOULA.....APPLICANT**

**PRABHAKARA NAIR PRAVEEN.....APPLICANT**

**PAK ABDOLGHAFFARS.....APPLICANT**

**VAKAS BALWAM.....APPLICANT**

**MUHAMMAD SWALEH.....APPLICANT**

**KHALID AGIL MOHAMMED.....APPLICANT**

**MOHAMEED OSMAN AHMED.....APPLICANT**

**MAUR ABDALLA BWANAMAKA.....APPLICANT**

**VERSUS**

**REPUBLIC (THROUGH THE OFFICE OF THE DIRECTOR OF**

**PUBLIC PROSECUTIONS).....RESPONDENT**

**RULING**

1. The Court has been moved pursuant to the provisions of Section 362 to 367 of the Criminal Procedure Code. The Applicants seek the courts revision of the ruling by the trial court, Nang'ea CM, dated 23/11/2017 by which the applicants were found to have a case to answer and thus put on their defences.

2. The charge facing the accused persons was that of Trafficking in narcotics drug contrary to Section 4(a) of the Narcotic drugs and psychotropic substances control Act, 1994. The particular of the charge were that on dates between 2<sup>nd</sup> July 2014 and 18<sup>th</sup> July 2014 at Kilindini port, in Berth No. 8 within Mombasa County, jointly with others not before the court were found Trafficking by conveying in the cargo deck of ship **Amin Darya** also known as **Al Noor**, Narcotic drugs.

3. The contention by the applicants is that the narcotic having been found in the cargo deck of a foreign vessel, the same cannot be deemed to have been found in Kenya and therefore under Section 6 of the Act, the offence was committed outside Kenya hence the court lacked jurisdiction to entertain the charge. It is the contention of the Applicants that the trial court glossed over the issue of jurisdiction yet it was a matter not fit for being deferral to defence hearing in that doing so amount to shifting the burden upon the accused to prove their innocence after the prosecution failed to prove their guilt.

4. It was contended that the decision to postpone the determination for defence hearing would prejudice the applicants in that there are critical pieces of evidence not on record to assist the court know where the ship was when intercepted because that is a science beyond the access and reach of the applicant but are well documented in the document called bridge log book. To them that question can only be determined when the bridge logbook for the vessel and that of the worship which intercepted it are availed but so far the same have not been availed.

5. In conclusion article 92 of the UNITED NATIONS CONVENTION ON THE LAW OF THE SEA was relied on for the proposition that the exclusive jurisdiction of any offence committed in a vessel is that of the flag state in this case the Islamic Republic of IRAQ a fact confirmed by the limited jurisdiction under Section 65 of the Narcotic Drugs and Psychotropic Substances Control Ac.

6. For those reasons, the court was urged to invoke its jurisdiction under Section 362 to 367 and issue appropriate orders on revision. In support of the request for revision the Applicants filed two sets of written submissions on 6/3/2018 by Muthee Sony & Associates Advocates as well as by Jackline Waihenya Maina & Co. Advocates.

7. In addition to the set filed by Muthee Sori & Co. Advocates on the 5/3/2019 the two firm of advocates jointly represented the Applicants with exception that Ms. Muthee who was not appearing for the 7<sup>th</sup> Applicants. Together with the submissions were also filed lists of authorities all seeking to underscore the fact that the jurisdiction of the Kenyan courts are limited to the territorial boundaries and that a ship takes the nationality of its flag state and deemed an extension of the territory of that state.

8. On their side the Respondents' also filed written submissions on 8/8/2018 together with a list of some 17 authorities contending that the application was misconceived. Based on the papers filed, the court gave directions that all the three other related files; criminal appeal no. 210/2017, misc no. 22/2017 as well as the trial court file be availed and put together for hearing. On the date set for hearing counsel from the Appellant in HCR 210/2017 sought that file be divorced from the rest but the court declined the request and said it would amount inefficient and imprudent application and employment of judicial time to do.

9. After the preliminaries and exchange of submissions parties then attended court to highlight and argue their respective positions. I have had the benefit of reading the very able submissions offered by the parties and I do appreciate the industry by counsel.

10. From the papers filed and submissions offered, the main issue for determination is whether the Kenyan courts have jurisdiction over criminal offences committed outside its borders including foreign registered vessels.

11. The starting point is that international law urges restraint by states from seeking to enforce their national law outside their territorial boundaries. That has for a longtime been encouraged for the sake of territorial integrity and sovereignty of each state and intended to avoid instances of conflict over violation of territorial rights. That is the general theme of the law which limit the court's jurisdictions within the territorial boundaries of the county.[\[1\]](#)

12. However owing to trade and the need for free movement of goods and services coupled with basic social dimensions like the need to encourage research and control of diseases for general and common good of the international community, it has become necessary that jealousy with which territorial rights are guarded be tinkered with.

13. The law is never constant but develops to answer to the needs of society. As nations create trade and political blocks, needs arise to modernize the law to meet the needs of much developments. Such needs have necessitated development of international statutes espousing international law and principles.

14. In this matter both parties agree that under Article 2(5) of the constitution the general rules of international law is part of the law of Kenya. They have infact cited to court the provisions of the

**UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**. For the Applicants submissions are made and position taken that the law, to which Kenya was a signatory, restricts and limits the jurisdiction of the Kenyan courts within its territorial boundaries as defined by article 5 of the constitution. Articles 27, 89, 92 and 108 thereof were said restrict and outlaw any enforcement of Kenyan law outside the territory of Kenya.

15. The decision in *Al Sahah vs Grupotores SA [2005] UKPC 1, [2005] 2 AC 333* was then cited for the proposition of the law that national law are only applicable within the territory and not beyond. According it submit that it was wrong to seek to enforce Kenyan law inside a foreign vessel.

16. For the Respondent reliance was placed on article 2(5) & 6 and 159 it being submitted that the subject ship was stateless for flying no flag when intercepted by the Kenya Naval officers. In fact it was submitted that the, 1988 United National Convention against illicit Traffic in Narcotics Drug and Psychotropic Substances, gives Kenya the right to assert jurisdiction over vessels trafficking drugs into our ports. Reference was then made to the decision of the *Court of Appeal in AG vs Mohamud Mohamed Hashi & 8 Others* for the proposition of the law that Kenyan courts should feel free to try international crimes like Piracy as part of its duty to the community of Nations.

17. Having reviewed the entire corpus of the material availed to me, I have noted regrettably that even though the dispute centered upon the interpretation of the international convention, none of the counsel referred the court to Article 28 of the UNCLOS which provides:-

**“1. Criminal jurisdiction of the coastal state should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or conduct any investigations in connection with any crime committed on board the ship during its passage save only in the following causes:-**

a) Consequence of the crime extends to the coastal state

b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea.

c) If the assistance of local authority by the master has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag state or

d) If such measures are necessary for the suppression of illicit traffic in Narcotic drugs or psychotropic substances.

**2. The above provisions do not effect the rights of the coastal state to take any step authorized by its law for the purposes of arrest or investigation on board a foreign ship passing through the territorial sea after leaving the internal waters.**

18. I read and understand these provisions to say that Kenya is not restrained for exercising its criminal jurisdiction outside its territory where the four listed instances exist and for the purposes of enforcing its law.

19. In this case the Kenyan authorities arrested the Applicants, among others, and on the material presented and admitted by counsel in submissions, while aboard a vessel on whose cargo deck there was a large haul of narcotic drugs. I hold the view that in doing so Kenya was merely executing its duty to the community of nations as a coastal state to prevent passage of the vessel with its contraband cargo in terms of article 28 of the UNCLOS.

20. This is surely a law the trial court is bound to appreciate and apply and I see no prejudice that awaits the Applicants to have the same determined at the defence hearing. I see no prejudice because in deciding whether an accused has a case to answer, the court is not obligated but expected not to delve into detailed reasons lest it embarrass itself later in its judgment. The trial court was entitled to be brief as it did and cannot be fairly criticised for having glossed over the issue. In any event whether or not a court has jurisdiction in a matter is for the trial court to determine.

21. For the foregoing reasons, I do find that there was no impropriety, incorrectness or illegality committed by the trial court when it declined to decide on its jurisdiction and differed the matter for a later date. The effect ad upshot is that the request for review fails and is dismissed. Let the trial court file be remitted to that court for further hearing.

22. It is unfortunate that owing to unforgiven and inevitable circumstances, including engagement of the court and respondent's counsel on duty outside station, this matter which should have been dealt with within a very short-time never had a chance of being dealt with so.

**Dated and delivered at Mombasa this 19<sup>th</sup> day of November 2019.**

**P.J.O. OTIENO**

**JUDGE**

---