

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWARIJA, J.A., KOROSSO, J.A. And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 130 OF 2019

- | | |
|----------------------------------|---------------------------|
| 1. MOHAMED NURU ADAM | 1 ST APPELLANT |
| 2. BASHIR YUSUPH ROOBLE | 2 ND APPELLANT |
| 3. MUHSIN SHEHE HAJI | 3 RD APPELLANT |
| 4. ABDULWAIDI ABDALAHAMANI | 4 TH APPELLANT |
| 5. FARAHANI ALI ABDUL | 5 TH APPELLANT |
| 6. ALLY NURU ALLY | 6 TH APPELLANT |
| 7. OMARY MOHAMED @ MUDHEE | 7 TH APPELLANT |

VERSUS

THE REPUBLICRESPONDENT

(Appeal from the decision of the High Court of Tanzania,
at Dar es Salaam)

(Mlyambina, J.)

dated the 18th day of April, 2019
in

Criminal Session Case No. 123 OF 2015

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JUDGMENT OF THE COURT

20th October, 2021 & 8th March, 2022

MWARIJA, J.A.:

In the High Court of Tanzania sitting at Dar es salaam, the appellants, Mohamed Nuru Adam, Bashir Yusuf Rooble, Muhsini Shehe Haji, Abdulwaidi Abdalahamani, Farahani Ali Abdul, Ally Nuru Ally, and Omar Mohamed @ Mudhee (the 1st- 7th appellants respectively) were charged with and convicted of the offence of piracy contrary to s. 66

(1) (a) (i) and (2) of the Penal Code [Cap 16 R.E. 2002 as amended by Act No. 11 of 2010, now R.E. 2019] (the Penal Code). It was alleged that on 3/10/2011, in the Indian Ocean within the Tanzania Exclusive Economic Zone, by using firearms, the appellants attacked a vessel known as Sams All Good.

The appellants denied the charge. However, after having heard the evidence of 14 prosecution witnesses and that of the appellants who were the only witnesses for the defence, the learned trial Judge (Mlyambina, J.) found that the case had been proved beyond reasonable doubt against the appellants. They were consequently convicted and sentenced each to life imprisonment.

The facts leading to the appellants' arraignment and ultimately their conviction and imprisonment, may be briefly stated as follows. In October, 2011, there was oil and gas exploration activity being carried out off the coast of Tanzania within the Exclusive Economic Zone, 150 nautical miles from Mtwara port. The exploration was being undertaken by the offshore drilling rig known as Ocean Rig Poseidon. Security of the Ocean rig and the crew at the exploration area was being taken care of by a foreign company known as Drum Cussac Group in collaboration with the Navy branch of the Tanzania People's

Defence Forces (TPDF). The foreign team was under the leadership of one Mr. Steven Anthony Stockton. The Tanzania soldiers were stationed in three foreign guard boats named as Dampier, Monck and Frobisher. Other TPDF soldiers were in a Tanzania boat named TNS Mchomvu. As for the foreign soldiers, they were stationed in the attacked foreign vessel, Sams All Good which was the largest at the area.

On 3/10/2011 at about 8:06 p.m. while in his room, Capt. Jonas Samwel Mwangiga (PW1), a TPDF officer, was informed by the team leader, Mr. Steven Anthony Stockton, that through a night vision microscope, a suspicious boat had been seen behind the Frobisher boat. The suspicious boat was spotted by S/Sgt Lusekelo George Mwambaja (PW2) of the TPDF. According to PW1's evidence, the team leader Mr. Stephen Anthony Stockton ordered that the search lights be switched on. When that was done, PW1 saw a movement of people in the Sams All Good vessel, meaning that the persons who were in the suspicious boat had entered into the said vessel. The suspicious boat, which was a skiff boat, had been roped to the Sams All Good vessel. PW1 ordered Lt. Iddi Haji Mwanzini (PW3), the leader

of TPDF soldiers in the Monck boat, to move their boat near the Sams All Good vessel.

PW3 did as ordered and when those persons saw that the Monck boat was approaching, they started to attack it by firing bullets and as a result, perforated it. The firing caused three big holes on the said boat. Realizing that from their acts, those persons were likely to be pirates, PW1 moved to the back of the Frobisher boat and together with Lt. Kipango (PW4), Capt. Sylvanus Joseph Peter (PW8) and Sgt. Albinus Julius Kasore (PW5) retaliated by opening fire at the attackers. In the process, the skiff boat's engine was destroyed and one of the attackers who had remained therein was injured. That person did however, manage to jump into the Sams All Good vessel. Having been overcame by the TPDF soldiers who used medium machine guns, those persons surrendered. They were captured and thereafter a search was conducted in the Sams All Good vessel whereupon the following items were found; one magazine cover, 16 live ammunition, 23 cartridges, a torch and pain killers.

According to the prosecution, the persons who were arrested at the scene were the appellants. After investigation which was conducted by a special task force comprising of police officers from

the Police Headquarters and the TPDF, the appellants were charged as shown above.

In his evidence, PW2 stated that, on the material date at about 7:00 p.m. while on guard in Frobisher boat, he saw through the aid of a night vision microscope, a small boat sailing closer to their boat. He thus informed the head of the security, Mr. Steven Anthony Stockton who in turn, relayed that information to PW1 who was with Capt. Hamad Juma Kipango (PW4), one of the army officers constituting the team of TPDF soldiers assigned to take care of the security at the exploration area. As stated above, the others included PW5 and PW8 as well as Lt. Iddi Haji Mwanzini (PW3).

It was PW4's evidence that, on the material date at about 8:06 p.m. while in Frobisher boat, he heard an alarm followed by an order requiring the soldiers to assemble at the bridge area of the said boat (at the deck). Having been informed of the danger of being attacked, they were ordered to take their positions ready to counter attack. He went on to testify that, he witnessed the shooting of the Monck boat by the suspected pirates. Following that incident, their boat (Frobisher) was navigated near the Sams All Good vessel so as to take over from the soldiers in the Monck boat; the duty of confronting the

attackers. He stated further that after two hours of exchange of fire, the suspects surrendered after they had been required to do so by PW1. PW4 said that those who surrendered were the seven appellants who included the one whose leg was injured. He added that, after they had surrendered, the appellants were moved from the Sams All Good vessel to the Frobisher boat and upon being questioned, each one of them mentioned his name.

PW3, who was the leader of the Monck boat, testified that when he moved the boat near the Sams All Good ship following the order of PW1, that boat was attacked, the result of which three bullet holes were caused on it. Following that attack, he was ordered by PW1 to return the boat near the ocean rig. He obeyed the order and after the Frobisher boat had been moved closer to the Sams All Good vessel, the soldiers who were in that boat took over. They destroyed the skiff boat and after exchange of fire, the seven persons who turned out to be the appellants, the Somali nationals, had to surrender. They were arrested and later charged.

In their evidence PW4, PW5 and PW8 who were together with PW1 and PW2 in the Frobisher boat, gave similar evidence. They supported the evidence of the latter two witnesses (PW1 and PW2) to

the effect that, the pirates started to attack the Monck boat and later, while in the Sams All Good vessel, fired at the Frobisher boat but were contained and captured after a counter attack by the TPDF soldiers.

After their arrest, the appellants together with the items which were seized from the Sams All Good vessel were transported to the TPDF Navy Headquarters at Dar es Salaam. They were transported from Mtwara by Lt. Col. Nicholas Bernard Nagunwa (PW13) in a boat known as Galugalu. In his evidence, PW13 testified that the appellants and the seized items were handed over to him by PW1 at Mtwara. It was the former's further evidence that, at the Navy Headquarters in Dar es Salaam, he handed over the appellants and the seized items to ACP Ahmed Msangi (PW7).

On his part, PW7 told the trial court that he went to TPDF Navy Headquarters with other police officers including Insp. Anthony Mwita (PW14) and found there the seven appellants, one of them having an injury on his leg. PW7 ordered that the appellants be taken to the Criminal Investigation Department (CID) except the injured one who had to be taken to hospital first. It was his evidence further that, he saw the seized items which, according to him, were handed over to ACP Japhet Ezekiel Mabeyo (PW12).

Testifying, PW14 averred that he was one of the police officers who visited the scene of crime. He stated that he recorded the statement of the person who was the interpreter (Kiswahili-Somali and vice versa) at the time when the appellants were being interrogated at the police station. According to his evidence, the interpreter, one Abdul Ally Mursali, recorded a statement in which he stated that, during their interrogation, the appellants admitted that they committed the acts of piracy. The witness sought to tender the interpreter's statement on account that the said person had passed away as evidenced by the testimony of Ikbari Dini Khalfani (PW9). It was his evidence that the said person, who was his co-worker, was killed in December, 2012 by bandits while he was on the way going to bank his employer's money.

All counsel for the appellants objected to the admission of the statement on the grounds, **first**, that an interpreter cannot be turned into a witness and **secondly**, that the statement was not listed as one of the documents which the prosecution intended to rely upon as evidence in terms of s. 249 (3) of the Criminal Procedure Act [Cap 20 R.E. 2002, now R.E. 2019] (the CPA). The objection was overruled for the reasons which the learned trial Judge reserved and gave them

later in his judgment. The same was admitted in evidence as exhibit P6.

On his part, PW12 testified that he took the 16 live ammunition, 22 cartridges and a spent bullet to the CID, Forensic Bureau, for examination by a ballistic expert. The examination was conducted by ASP. John Sangija Mayunga (PW6). According to PW6's evidence, after having conducted examination on the live ammunition, he found out that the same were for AK 47 firearm. The witness sought to tender the 16 ammunition, 22 cartridges and a spent bullet as exhibits. The same were admitted in evidence as exhibits P2 collectively despite the objection which, the learned trial Judge also overruled and gave his reasons later in his judgment.

As stated above, Stephen Anthony Stockton was one of the persons who was at the scene of crime and thus witnessed the incident. Another person was Christopher Roy Lamb. The two persons recorded their statements before the police officers, ASP. Shagililu Rifulondama (PW10) and Insp. Omari Wawa (PW11) respectively. The two witnesses were called to tender the statements of the said persons. Together with the statement of Stephen Anthony Stockton, PW10 sought also to tender the report of the incident

prepared by Drum Cussac Petrobras support team. The photographs of the appellants were enclosed with the report. PW10 sought also to tender the report which he prepared after visiting the scene. Despite the objection by the advocates for the appellants, the statements and the reports were admitted in evidence in the way on which exhibit P6 and P2 were admitted. The report of the incident prepared by Drum Cussac Petrobras support team and the statement of Stephen Anthony Stockton were admitted as exhibit P4 collectively while the statement of Christopher Roy Lamb and the report prepared by PW10 were admitted as exhibit P5 collectively.

In their defence, the appellants denied the charge. They gave similar evidence which is to the effect that, at the time of their arrest, they were en route to South Africa to search for better living conditions, having left their country, Somalia, because of poverty. They stated that, due to political instability in their country, the transportation sector was in shambles and thus their travel arrangements were made by unofficial agents who did not issue them with any receipts or travel documents.

Testifying through an interpreter, (Somali-Kiswahili and vice versa), the 1st appellant Mohamed Nuru Adam (DW1) stated that he

left Somalia at Raskamboni port aboard a small boat with other passengers. After having sailed for about five days, they met another boat and from it, he heard announcement through a loud speaker, but could not understand the message because the announcement was made in the language which he did not understand. He went on to testify that, shortly thereafter, he heard bullets being fired in the air and in a panic, he dived into the water and so did his fellow passengers. As they were struggling to swim, they were rescued by some people who took them into a ship. He went on to state that, later on, he was blindfolded and taken to the mainland. When his eyes were unfolded, he realized that he was under the custody of more than ten armed persons who were in civilian clothes. After having been photographed, he was taken into the room in which he found other persons who were also Somali nationals. Those persons informed him that he was at the police station in Tanzania. He was later taken to court and charged as shown above.

As stated above, the testimony of the appellants is almost a stereo type evidence. The 2nd -7th appellants (DW2-DW7) gave an account similar to what was testified to by DW1 as regards the circumstances under which they came to be arrested. They stated

that, each one of them made his own arrangement through an unofficial agent to travel to South Africa. They coincidentally found themselves in the boat which had a total of about 100 passengers. According to their evidence, after their boat had been intercepted as stated above, a commotion ensued in their boat causing them to fall into the water. It was their further evidence that, after having been rescued from the water, they were taken to the mainland and later charged in this case. In his evidence, DW7 added that, during the commotion in the boat, his leg was injured by what he considered to be the boat's propulsion rod.

In his judgment, the learned trial Judge was of the view that the evidence of PW1-PW4 and PW8 was credible as regards the acts which were alleged to have been committed by the appellants at the scene. He also relied on the evidence of exhibit P2 collectively. With regard to the appellants' defence, the learned trial Judge was of the view that the same did not raise any reasonable doubt in the prosecution evidence. He was of the opinion that the same was an afterthought.

The appellants were aggrieved by the decision of the High Court hence this appeal. In their joint memorandum of appeal filed on 16/1/2020, they have raised a total of fifteen (15) grounds of appeal.

The grounds, which were raised by the appellants in person, are stated in a narrative form. Later on 28/5/2020, they filed a supplementary memorandum containing nine (9) grounds and on 19/5/2021, the 1st and 3rd - 7th appellants filed a supplementary memorandum of appeal consisting of three (3) grounds of appeal. Like the first memorandum of appeal, the same is also in a narrative form. On 20/5/2020, the appellants filed yet another supplementary memorandum of appeal consisting of nine (9) grounds. For reasons which will be apparent herein, we will not consider all the grounds of appeal raised by the appellants but grounds 1 and 2 only.

At the hearing of the appeal, the appellants were represented by Messrs. Dominicus Nkwera and Denice Tumaini, learned advocates while the respondent Republic was represented by Mses. Mkunde Mshanga, Cecilia Shelly, learned Principal State Attorneys and Sabrina Joshi, learned Senior State Attorney.

In ground 1 of the memorandum of appeal, the appellants contend as follows:

"1. That, the learned trial High Court Judge misdirected himself in convicting the appellants [relying] upon a defective charge/information

as the particulars of the offence missed the following [words]: -

(i) 'Knowingly' and 'voluntarily' between the words 'Indian ocean' and 'using a skiff boat'.

(ii) 'Jointly and together' and 'intentionally' between the words 'firearm' and 'did an act of violence'.

They contend further in ground 2 of the memorandum of appeal as follows:

"2. That the learned trial High Court Judge erred in law and fact to convict the appellants in a case that was unfairly conducted as:

(i) The interpreter didn't lay foundation of his expertise.

(ii) The appellants were not given opportunity to comment on whether or not they had objection for assessors.

(iii) the evidence of all prosecution [witnesses] was not authenticated and not transparent, that is; the trial Judge failed to append his signature and the abbreviation ROFC at the end of each PW's testimony.

(vi) The court allowed other appellants to defend in Swahili while they were not knowledgeable in the language.”

The appellants’ contention in the first ground of appeal is that the charge is defective because the particulars thereof were not sufficiently stated so as to give reasonable information to them as required by s. 132 of the CPA. They argued in their written submission that the prosecution did not state in the particulars of the offence, that the appellants knowingly and voluntarily committed the acts constituting the offence and that they did such acts jointly and together.

In her reply to the arguments made in support of that ground, at first, Ms. Joshi supported the appeal on the basis of the stated defects. On reflection however, she argued that the omission to state that the appellants knowingly, did jointly and together commit the offence, is not fatal. Relying on the Court’s decision in the case of **Khamis Said Bakari v. Republic**, Criminal Appeal No. 359 of 2017 (unreported), the learned Senior State Attorney argued that, from the wording of s. 66 (1) of the Penal Code under which the charge was preferred, the particulars of the offence as stated by the prosecution were sufficient to inform the appellants that they did jointly and

together commit the acts which to their knowledge, constituted the offence charged.

In rejoinder, Mr. Nkwera, reiterated the argument that the omission to state those words in the particulars of the offence rendered the charge defective.

We have duly considered the parties' rival arguments on this ground of appeal. The issue which arises is whether it ought to have been stated in the particulars of the offence, that the appellants knowingly and voluntarily, did jointly and together commit the acts constituting the offence charged. To determine the issue, we find it instructive to reproduce the provision of the Penal Code under which the appellants were charged. It state as follows:

"66-(1) Any person who-

(a) does any act of violence or detention or any act of degradation, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed-

(i) against another ship or aircraft or against persons or property on board such ship or aircraft; or-

(ii) ...N/A

(b) ...N/A

(c) ...N/A

(2) A person who does or participate in piracy commits an offence of piracy and on conviction is liable to imprisonment for life."

It is clear, as argued by Ms. Joshi, that from the wording of the provision which has been reproduced above, there is no requirement of showing that the appellants had knowingly committed the acts constituting the offence charged. It is such kind of an offence which a person committing it is taken to have actual knowledge of it or ought to have such knowledge. This applies also to non-use of the word voluntarily. The wording of the section suggests that the offence is committed by an offender for his private ends. This means that the acts are done intentionally and therefore, in this case, it was not necessary to show expressly in the particulars of the offence, that the appellants had willingly committed the acts of piracy.

With regard to the argument that the omission to show that the appellants committed the offence jointly and together rendered the charge defective, that contention is equally devoid of merit. It is clearly shown in the particulars of the offence that the offence was committed by all the appellants. It is furthermore, clear from the

evidence that the appellants were duly informed that they were alleged to have jointly and together committed the offence.

In any case, even if it would have been necessary to state in the particulars of the offence the words complained of by the appellants, the issue whether or not the appellant had malice or otherwise or that they jointly and together committed the offence, are matters which were to be proved by evidence. On the basis of the foregoing reasons, we do not find merit in this ground of appeal. The same is hereby dismissed.

In the second ground, it is contended in item (iii) thereof that the learned trial Judge did not append his signature at the end of the recorded evidence of each of the prosecution witnesses. In their written submission, the appellants argued that the omission is fatal having the effect of vitiating the proceedings. In response, Ms. Mshanga conceded, **first**, that the learned trial Judge did not sign the recorded evidence of the witnesses and **secondly**, that the omission is an incurable irregularity.

It is indeed true that from the record, the learned trial Judge did not authenticate the recorded testimonies of not only the prosecution witnesses but also the defence witnesses. With regard to the effect of

the omission, we agree with both the learned counsel for the appellants and the learned Principal State Attorney that the omission is an incurable defect. In the case of **Yahanis Mussa Makumbi & Another v. Republic**, Criminal Appeal No. 556 of 2015 (unreported), after having found that the trial Judge did not append her signature after the recorded testimonies of the witnesses, the Court held as follows:

"We are thus satisfied that, failure by the Judge to append his/her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted. Besides, this emulates the spirit contained in section 210 (i) (a) of the CPA and we find no doubt in taking inspiration therefrom."

The rule had been subsequently applied in other decisions including: **Sabasaba Enos @ Joseph v. Republic**, Criminal Appeal No. 411 of 2017, **Magita Enoshi @ Matiko v. Republic**, Criminal Appeal No. 407 of 2017, **Chacha Ghati @ Magige v. Republic**, Criminal Appeal No. 406 of 2017 and **Yohana Filipo v. Republic**,

Criminal Appeal No. 235 of 2020 (all unreported). The position applies in the case at hand. In the event, we find that the omission renders the trial a nullity. We thus hereby nullify the proceedings and the judgment of the High Court, quash the appellants' conviction and set aside the sentence.

From the evidence of the prosecution witnesses, the substance of which has been outlined above, we find that the interests of justice requires that a retrial be ordered. We consequently order a retrial before another Judge and a new set of assessors.

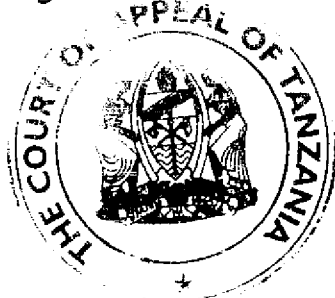
DATED at DAR ES SALAAM this 4th day of March, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered on this 08th day March, 2022, in the presence of Mr. Denis Tumaini, learned counsel for the appellants and Mr. Nasoro Katuga, learned Senior State Attorney for the Respondents/Republic, is hereby certified as a true copy of the original.




G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL