IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM REGISTRY)
AT DAR ES SALAAM

CRIMINAL SESSIONS CASE N0 123 OF 2015

REPUBLIC

VERSUS

1. **MOHAMED NURU ADAM**
2. **BASHIR YUSUPH ROOBLE**
3. **MUHSINI SHEHE HAJI**
4. **ABDULWAIDI ABDALAHAMANI**
5. **FARAHANI ALI ABDUL**
6. **ALLY NUR ALLY**
7. **OMAR MOHAMED@ MUDHEE**

JUDGMENT

Date of last Order: *…….17/04/2019*
Date of Judgment: *…….18/04/2019*

MLYAMBINA, J.

The accused persons namely; Mohamed Nuru Adam, Bashir Yusuph Rooble, Muhsini Shehe Haji, Abdulwaidi Abrahamani, Farahani Ali Abdul, Ally Nur Ally and Omar Mohamed @ Mudhee are charged as 1st, 2nd, 3rd, 4th, 5th, 6th and 7th accused persons respectively with the offence of piracy contrary to *Section 66(1)(a)(i) and (2) of the Penal Code, CAP. 16 as amended by the Written Laws (Miscellaneous Amendment) (No. 2) Act No. 11 of 2010.*

It was alleged before this Court that, on 3rd day of October, 2011 within Tanzanian Exclusive Economic Zone (EEZ) in the Indian Ocean using a skiff

boat and fire arms, all the accused person did an act of violence against a ship known as *Sams-All good* for their private ends.

During Preliminary Hearing, the following facts were not in dispute: *one*; that the accused persons are Somali nationals. *Two;* that the accused persons are charged with the offence of piracy. *Three;* the accused do not deny that they were arrested. *Four,* the accused admits that they are arraigned before the Court charged as presently.

During trial, the Republic was represented by Ms Mkunde Mshanga and Cecilia Shelly, all Senior State Attorneys and Mr. George Barasa, State Attorney while Mr. Aloyce Komba, Mr. Dominicus Nkwera, Mr. Abraham Rupia, Mr. Omary Msemo, Mr. Dennis Tumaini, Mr. Benedict Pius and Mr. Gelas Severine who was later replaced by Mr. Musa Kulita represented the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th accused persons respectively. Mr. Hassan Juma, Ms. Mwadawa Selemani and Ms. Jane Veilla Lema were un-objected selected to serve as Court assessors throughout the whole trial.

In this judgment in the first part, I will present briefly an overview of the Maritime Piracy at an international and municipal arena as well as the jurisdictional basis for trial of the piracy offence. In the second part, I will revisit and analyse the entire evidence adduced during the trial. I will then proceed to give reasons for the preliminary objections raised over admissionof various exhibits which I had reserved. Lastly, I will conclude the judgment by evaluating the evidence adduced and exhibits before rendering the verdict.

As briefed earlier, all the accused persons are charged of piracy contrary to *Section 66(1)(a)(i) and (2) of the Penal Code, CAP. 16 as amended by the*

Written Laws (Miscellaneous Amendment) (No. 2) Act No. 11 of 2010. Piracy is provided under *Section 66 of the Penal Code, CAP. 16*. *Section 19 of the Written Laws (Miscellaneous Amendment) (No. 2) Act No. 11 of 2010* redefines piracy under *Section 66 of the Penal Code* that:

(1) A 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) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;

(b) Participates in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or

(c) Does any act of inciting or of intentionally facilitating an act referred to paragraph (a) or (b) Commits an act of piracy.

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

The new Section 66(5) of the Penal Code, CAP. 16 reads:

(5) For the purposes of this Section:

"Pirate ship or aircraft" means a ship or aircraft under the dominant control of person who –

(a) Intend to use such ship or aircraft for piracy; or

(b) Have used such ship or aircraft for piracy, so long as it remains under the control of that person and "private ship or private aircraft" means a ship or aircraft that is not owned by the Government or held by a person on behalf of or for the benefit of the Government.

At international arena, piracy offence attracts universal jurisdiction. This point is captured by Andrew Palmar in his his book *The New Pirates: Modern Global Piracy from Somalia to the South China Sea*.[1] In other jurisdictions too as indicated by my learned brother Burhan, J. of the Supreme Court of the Seychelles in *Republic v. Ali*[2] quoted with approval the Privy Council decision in *re Piracy Jure Gentium*[3] where the Privy Council had this to

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[1] New York: Tauris and Company Ltd., 2014. See also Akiyama, Masahiro, "New Approaches to Protecting Shipping from Piracy and Terrorism," in Van Dyke, Jon M. *et al* (eds.), *Governing Ocean Resources: New Challenges and Emerging Regimes*, Leiden and Boston: Martinus Nijhoff Publishers, 2013, p. 375; Tuerk, Helmut, "Combating Piracy: New Approaches to an Ancient Issue," in Castillo, Lillian Del (ed.), *Law of Sea: From Grotius to the International Tribunal for the Law of the Sea*, Leiden and Boston: Brill Nijhoff, 2015, p. 469; Del Vecchio, Angela, "The Fight Against Piracy and the Erica Lexie Case," in Castillo, Lillian Del (ed.), *Law of Sea: From Grotius to the International Tribunal for the Law of the Sea*, op. cit. p. 397; and Nanda, Ved P., "Maritime Piracy: How can International Law and Policy Help Address this Growing Global Menace?" in Van Dyke, Jon M. et al (eds.), *Governing Ocean Resources: New Challenges and Emerging Regimes*, op. cit., p. 345.

[2] (2010) SLR 341.

[3] [1934] AC 586 at 589.

observe with regard to the municipal law and the international law applicable to piracy:

> With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis* and as such he is justiciable by any state anywhere: Grotius (1583-1645) "*De Jure Belli ac Pacis*," Vol. 2, Cap. 20, - 40. (emphasis added)

The Privy Council in *re Piracy Jure Gentium* (*supra*) meant that the trial and punishment of pirates is left to any state provided the offence was committed in high seas. The defence of nationality of the pirate offence accused person or of the piratic ship does not stand in the eyes of the law.

In *Republic v. Ali*[4] (*supra*) Burhan, J. went on to quote *inter alia, Halsbury's Laws of England* (4th edition) as revised in 1977 at 787 paragraph 1535 which states:

> By customary international law, a pirate is *hostis humani generis* and is subject to universal jurisdiction.

In the modern era, the starting point of articulately recognizing piracy is the *United Nations Convention on the Law of the Sea, 1982 (UNCLOS)* which came into force on 16th November, 1994 after the required 60 Party States deposited their ratification. [5] UNCLOS has also been termed the Constitution of the Ocean.[6]

UNCLOS in particular in its *Article 100 to 107 and 110* provides for framework for the repression of piracy under international law. The United Nations Security Council Resolution No. 1897 adopted on 30th November, 2009 repeatedly reafirmed that international law, as reflected in UNCLOS, sets the framework applicable for combating *inter alia* piracy and armed robbery at the sea.[7]

Article 101 of UNCLOS defines the offence of piracy to consists of any of the following acts:

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[4] (2010) SLR 341.

[5] See Bendera, Ibrahim Mbiu*, Admiralty and Maritime Law in Tanzania,* Nairobi: Law Africa Publishing (K) Ltd, 2017, pages 45-46).

[6] Ibid.

[7] See Kateka, James L., "Combating Piracy and Armed Robbery off the Somali Coast and the Gulf of Guinea," in Castillo, Lillian Del (ed.), *Law of Sea: From Grotius to the International Tribunal for the Law of the Sea,* Leiden and Boston: Brill Nijhoff, 2015, p. 456.

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

(i) On the high seas, against another ship or aircraft, or 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 pirate ship or aircraft;

(c) Any act of inciting or of intentionally facilitating an act described in subparagraph (i) or subparagraph (ii).

Essentially; the reading of *Article 101 of UNCLOS* gives five ingredients of piracy:

1. Piracy must include criminal acts of use of violence, detention or depradation.

2. The act must be committed for private ends;

3. The act must be committed using a private ship;

4. The attack must be directed against another vessel; and

5. The act must take place on the high seas and other places outside jurisdiction of any other state. That means, it must be committed in the high seas or in the Exclusive Economic Zone (EEZ).

Euro Just reports that the Piracy definition above has been accepted as a reflection of customary international law meaning that even States that are not parties to the UNCLOS are bound by that definition.[8]

The *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988* (hereinafter to be refereed as The SUA Convention) does not define Piracy but gives a broader definition of violence at sea to include Piracy, armed robbery committed at sea and ship hijacking within the scope of its application, acts committed outside the high seas, acts where only one vessel is involved and acts where the motive of the attack is not limited to private ends only.

Article 3 of SUA covers the following crimes:

1. Any person commits an offence if that person unlawfully and intentionally;

   (a) Seizes or exercises control over a ship by force or threat or any other form of intimidating; or

   (b) Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

[8] See *Maritime Piracy Judicial Monitor A EURO Just Report,* September, 2013 at page 6.

(c) Destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) Places or cause to be placed on a ship, by any means whatsoever, device or substance which is likely to destroy the ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) Destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) Injures or kills any person, in connection with the ComMsion or the attempted comMsion of any of the offences set forth in subpragraphs (a) to (f).

2. Any person also commits an offence if that person:

(a) Attempts to commit any of the offence set forth in paragraph 1; or

(b) Abets the comMsion of any of the offences set forth in paragraph 1 perpertrated by any person or otherwise an accomplice of a person who commits such offence; or

(c) Threatens, with or without a condition, as is provided for under national law, aimed at compelling physical or juridical person to do or refrain from doing any act, to commit any of the

offences set forth in paragraphs (b) (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

Article 103 of UNCLOS defines a a pirate ship or aircraft as follows:

> A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that Act.

Therefore, not all ships are deemed to be pirate ship. For the ship to be considered a pirate ship it must be a ship in dominant control by a person or persons and for the purpose of commiting an illegal act of violence or detention, or any act of depradation on the high seas, against another ship, or against persons or property on board such ship against a ship, persons or property in a place outside the jurisdiction of any State.

Article 105 of UNCLOS and *Artcle 4 paragraph 1 of the SUA Convention* provides for jurisdiction to apprehend pirates, the later with a broader scope of application of universal jurisdiction over maritime crimes.

While Somalia on its part ratified UNCLOS on 24th July, 1989; the United Republic of Tanzania ratifed UNCLOS on 30th September, 1985 and incorporated into the Municipal law 52 articles in *The Territorial Sea and*

Exclusive Economic Act, 1989[9] The preamble of the *Territorial Sea and the Exclusive Economic, 1989* (*supra*) reads:

> An Act to provide for the implementation of the Law of the Sea Convention, to establish the territorial sea and to establish an Exclusive Economic Zone, of the United Republic adjacent to the Territorial Sea, and in the exercise of the sovereign rights of the United Republic to make provisions for the exploration, exploitation, conservation and management, of the resources of the sea and for related matters.

Section 7 of The Territorial Sea and the Exclusive Economic Zone Act, 1989 establishes a 200-Neutical Miles Exclusive Economic Zone for Tanzania. It provides:

(1) There is established contiguous to the territorial waters, a marine zone to be known as the Exclusive Economic Zone.

(2) Subject to subSection (3), the *Exclusive Economic Zone shall not extend beyond 200 nautical miles from the baselines* from which the breadth of the Territorial Sea is measured.

(3) N/A

(4) N/A (emphasis added).

[9] Act No. 3 of 1989. See BENDERA, Ibrahim Mbiu Bendera, *Admiralty and Maritime Law in Tanzania,* op. cit.

The United Republic also acceded to the SUA Convention by depositing the instrument on 11th May, 2005. The date of entry into force was 9th August, 2005.

Furthermore*, Section 23 of the Penal Code of Tanzania Cap 16 (R.E. 2002)* provides for offences committed by joint offenders in prosecution of common purpose. It says:

> when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its comMsion was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

Section 301 of the Criminal Procedure Act of Tanzania Cap 20 (R.E. 2002) provides for the possibility of persons charged with offence to be convicted of attempt. It reads:

> where a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt.

With the legal position of maritime piracy offence clearly set out, I will now venture into the second part of this judgment, that is, the analysis of the evidence adduced before the Court by both sides.

In establishing their case against the accused persons, the prosecution invited a total of fourteen (14) witnesses that is; PW1 Lieutenant-Colonel Jones Samwel Mwangiga, PW2 Staff Sergeant Lusekelo George Mwambaja,

PW3 Lieutenant Iddi Haji Mwazini, PW4 Captain Hamad Juma Kipango, PW5 Infantry Remand Level 1 Alubinus Julius Kasore, PW6 Assistant Superintendent of police John Sangija Mayunga, PW7 Deputy ComMsioner of Police Ahmed Msangi, PW8 Captain Sylivanus Joseph Peter, PW9 Ikbary Dini Khalfan, PW10 Assistant Superintendent of police Shagihilu Rufulondama Nteminyanda, PW11 Inspector Omary Wawa, PW12 Assistant ComMsioner of Police Japheth Ezekiel Mabeyo PW13, Lieutenant-Colonel Nicolaus Benard Nagunwa and PW14 Superintendent of police Antony Mwita.

The prosecution tendered six (6) exhibits that, is, Exhibit "P1" comprising of: (a) A letter dated 23/11/2011 with Ref No. CID /HQ/114/11/VOL. V/86 from Director of Criminal Investigation to the Criminal investigation Laboratory, (b) Investigation/examination Report on exhibits of DC/IR/4048/2011 Concerning Piracy dated 13/1/2012 by Criminal Investigatation Department Forensic Bureau, and (c) Handover Notes of Exhibits letter with Ref FB/BAU/LAB/06/2012 dated 23/3/2012 collectively.

Exhibit "P2" comprising of: (a) 3 catridges CAL. 7.62 mm marked TA–1– TA-3 enclosed in an envelope marked FB/BALL/LAB/06/2012 CD/IR/4048/2011, (b) 22 Catridges CAL 7.62 MM enclosed in an envelope marked FB/BALL/LAS/06/2012 CD/IR/4048/11, (c) 13 Bullets in order CAL 7.62 mm Exhibits -4016 in an envelope marked FB/BALL/LAS/ 06/2012 CD/IR/40482011 and (d) 1 Bullet CAL 762 MM Exhibit "C" in an envelope marked FB/ BALL/LAB/06/2012 CD/IR/4048/2011 collectively.

Exhibit "P3" is a Handover Note dated 3/10/2011 while Exhibit "P4" comprised of statements of Stephen Antony Stockton and the Incident

Report recorded on 3rd October, 2011 at 20:10 at Petrobras Drilling Project Tanzania written by *Drum Cussac* Petrobras Support Team.

Exhibit "P5" covers statement of Christopher Roy Lamb made under *Section 34 B (2) of the Evidence Act, 1967* at Mtwara Port on 10th October, 2011 at 18:08 hrs before E. 9920D/Sergeant Omari Wawa also a Report signed by Christopher Roy Lamb on 06/10/2011 which were collectively admitted as exhibit "P5". Another prosecution exhibit is exhibit "P6", a statement of the interpreter one Abdul Ali Mursali.

On the defence side, all the accused persons testified as sole witnesses that is, DW1 Mohamed Nuru Adam, DW2 Bashir Yusuph Rooble, DW3 Muhsin Haji, DW4 Addulwaid Abdalahaman, DW5 Farahan Ally Abdul, DW6 Ally Nur Ally and DW7 Omary Mohamed @ Mudhee who have been charged as 1st, 2nd, 3rd, 4th, 5th, 6th and 7th accused persons respectively. Notably; on part of the defence, no document was produced as exhibit.

All the accused persons are Somali nationals of whom some possess knowledge in Kiswahili language said to have learnt while in remand custody. Basically, for the interest of justice and for the sake of fair hearing, most of the proceedings at different times were conducted through interpreters one Ally Suleiman Gulet and Ahmed Ally Koraleke who intepreted from Somali language into Kiswahili and *vice versa*. However, DW6 Ally Nur Ally and DW7 Omary Mohamed @ Mudhee at their own free will proceeded to testify in Kiswahili language without a need of interpreter. DW2 Bashir Yusuph Rooble also had a sufficient command of Kiswahili language.

The evidence adduced in Court by the prosecution goes that; on 23/08/2011, PW1 (a Navy captain), was at Kigamboni Navy Headquarters. He was

assigned guard duty in the Indian Ocean where there was an oil and gas exploration going on. The exploration ship was called *Ocean rig* (*Poseidon*). The oil and gas exploring crowbar was stationed at 150 Neutical Miles (N/M) from Mtwara Harbour. The Latitude was 07 Degrees and 49.4 Minutes South. Longtude was 04 Degrees 14.3 Minutes East. The total guarding crew included guarding *Frobisher* ship with 80 metres in length. Other involved vessels were: *Dampier, Monck and Sams - All good*. Also; a local boat called *TNS Mchomvu* which joined later. The guarding crew included other soldiers with guns and ammunitions in discharge of the duty. The assignment started with journey from Dar es Salaam to *Ocean rig* (*Poseidon*) on 23/8/2011 at 6:00pm. By using Costa bus, they arrived at Mtwara Town at 2:00 am.

On 24/8/2011 in the afternoon, the crew of *Frobisher* ship met a team leader of Drum Cussac (a company which was guarding the area) to agree on how to execute their duty. The convoy also involved foreign guards and other retired army officers from the Netherlands. On 27/8/2011, the second group arrived from Kigamboni with 8 soldiers making a total of 22 soldiers. On 03/10/2011 at around 8:06pm, while in his room PW1 was informed by the team leader (Mr. Antony Stockton– overall European leader) that they were under attack. The information has been provided to Mr. Antony by PW2 Staff Sergeant Mwambaja that a small boat was sailing fast behind *Frobisher* ship (the ship used by the guarding crew). PW2 saw the invaders through Night Vision Microscope with capacity of seeing something up to 200 metres distance.

After the said information had been received, the guarding crew met at the bridge in Frobisher Ship and ordered a switch of sound signal indicating that they were under attack. Antony who collaborated with Tanzanian Peoples

Defence Force (TPDF) in the guard, switched on search-light aiding vision of more than 200metres. Thereafter, PW1 saw movements of black people in the invaded Boat.

PW1 saw a skiff (a small boat) roped to Sams -All good ship which in most cases is used for administration works in big ships. Having suspected that the ship to be engaged in piracy, PW1 commanded lieutenant Mwanzini who was in *Monck* Ship to go near to *Sams-All good* Ship which was attacked. After taking *Monck near Sams-All good*, a lot of shots were fired towards *Monck* Ship which was then perforated with 3 big holes. PW1 then told Lieutenant Mwanzini to concentrate on their work, that is, being ready for everything.

Thereafter; PW1 went and joined second Lieutenant Kipango – PW4 (now a Captain) in the back of the ship to motivate and encourage him not to be scared by the shots. He also gave him instructions. About 3 shots were fired towards them. PW1 then went back to the bridge and switched on the Search light. He also told Lieutenant Mwanzini to destroy engine of the skiff boat so that it could not be used by the pirates to escape. Lot of ammunitions were shot to facilitate the order.

The testimony went further that; PW1 commanded his soldiers to desist from more shooting after destroying the engine of the skiff boat in which one of the pirates was in and who jumped to join his co–pirates in the attacked *Sams all – Good.* The shot skiff boat started sinking. PW1 informed his fellow soldiers that they had to concentrate on the pirates in the attacked *Sams all – Good* leaving the *Ocean rig* (Poseidon) valued at billons of Dollars. PW1 then commanded Lieutenant Mwanzini to leave the pirates in the *Sams all –*

Good and go to the *Ocean rig* (Poseidon) leaving the rest to deal with the pirates.

During the incident, *TNS Mchomvu* Ship and *Dumpier* were at Mtwara port meaning that, at the scene there was *Sams-All good,* "the attacked Boat", *Frobisher* and *Monck* (*Frobisher* and *Monck* are Civil Ships for security). Lieutenant Mwanzini was in the *Monck* Ship while Captain Peter was in the Boarding Party whereas the *Ocean rig* (Poseidon) was just stationed.

The guarding crew opted to face the pirates through *Frobisher* Ship by ordering the strong Search light to be switched on and directed towards the attacked Ship (*Sams- All good*). PW1 noted that, the crew had rushed to the strong room through channel ten. The engineers switched the ship off. The ship was thus changing direction as per the wind movement. PW1 wanted to use diplomacy in dealing with the pirates. In this he cooperated with a Poland Guard in *Drum Cussac*. They left the Ship Captain at the Bridge and headed to the upper side mounted with medium machine guns. PW1 switched on the manual search light towards *Sams-All good* Ship where the pirates were. For about 10 minutes, it was silent with no movements. PW1 left the Polish Guard at the upper side of the Ship to the Bridge where the ship was operated. PW1 thereafter took a microphone and made a call to the pirates to surrender on condition that they would not be harmed.

Thereafter, PW1 ordered the Captain of the ship commanding him to go 100 metres from *Sams-All good* Ship. He ordered the Navigation Officer to run the Ship 100 metres near *Sams-All good*. All the time, other ammunitions were been fired. The Polish Guard who was at the top (upper) side was worried to be a target to the pirates, hence, he switched off the search light.

PW1 commanded the Polish Guard at the upper to switch covering shot to make them worried. He fired about 20 shots in the air.

After the covering shots, silence was maintained. PW1 ordered the Polish Guard to switch on the search light and direct at *Sams-All good*. PW1 then went to the bridge and reannounced the surrender in Kiswahili and English. The Polish Guard informed PW1 that about six pirates had indicated the desire to surrender by dropping weapons in the Sea. PW1 saw one of the pirates doing that. The pirates left the bridge of the ship to the back open space and raised their hands to signal surrender at a place they could be seen. Upon counting them, they were seven in number. PW1 commanded them to sit down.

PW1 asked if they were only seven and if true, whether the weapons thrown in the sea were only those which they had. In order to pick the surrendered pirates and ensure the attacked ship (*Sams - All good*) is safe, a search and rescue must be done, that is, to go and inspect the ship to see if the same was safe.

PW1 assigned Lieutenant Peter (PW8)–now a Captain and three other soldiers to inspect the ship through some given procedures. They used ruber boat which is a big boat than the skiff filled with pressure. The distance from PW1's ship to *Sams all- Good* was between 100–150 metres by then whereas the Boarding Party had four people. PW1 commanded them to inspect the attacked Ship to see if there were other pirates, if yes, to take all of them to *Frobisher*. Thereafter, they took the Boarding Party to *Sams all–Good.* All the four Boarding Party members were armed and one had a robe.

After entering the ship, one from the guarding crew had to guard the seven (7) surrendered pirates. The Boarding Party was communicating with PW1 through UHF Radio Channel Ten. Upon entering the pirates' ship, the Boarding Party team leader told PW1 that the *Sams-All good* was safe. They also found apart from the 7 surrendered pirates, there was a magazine cover, 16 ammunitions in green colour, torch & pain killers.

After getting that information, PW1 asked the Boarding Party team leader to take to him both the pirates and physical exhibits. On receipt of all these items, PW1 cross checked the items and confirmed the accuracy of the information. The said exhibits were handed over to the Military Intelligence. After the pirates were taken to PW1, one of them had a wound on his leg and was bleeding profusely. They gave him First Aid including oxygen. The pirates were also given some refreshing drinks and sat with them in a friendly manner.

Besides, the one who was bleeding Omar Mohamed@Mudhee (DW7) told PW1 in English: "Captain just kill me". Asking him as to why, he responded that, if he goes to Somalia with that leg, what would he do? It is better to throw him in the Sea and be eaten by fish. PW1 directed DW7 to be taken to a room so that he could not jump into the Sea.

After all those events, PW1 gave information to Navy Headquarters in Kigamboni, Dar es Salaam. Notably; PW1 was able to identify the pirate who jumped from the skiff to *Sams – All good* one Mohamed Nuru Adam (DW1). Thereafter, on 05/10/2011, the Navy Headquarters sent a small boat (*Gayogayo*) to pick both the pirates and exhibits.

PW1 was then summoned to Navy Headquarters where he was informed by Brigadier Mwinjudi that a special task force had been formed to investigate the event. The task force comprised of security officers from Police Headquarters, Tanzania Peoples Defence Force and others. PW1 sailed with this group to *Ocean rig* (Poseidon) to show them where the incident happened.

Upon arrival at *Ocean rig* (Poseidon), the team also visited *Frobisher* ship where they asked some questions of which they were answered. Thereafter; the team went to *Sams - All good* and later left the same day.

The evidences by PW1 was corroborated by PW2, PW3, PW4, PW5 and PW8. It was further testimonies of PW2, PW3, PW4 and PW8 that they were all in the *Frobisher* ship which was in the guard on the fateful date. PW4 testified to be the one who was nearly shot in the head by the pirates. At the dock, PW4 managed to identify DW2, DW3, DW4 and DW7 to be among the attackers at the fateful incident. The involved ammunitions were investigated by PW6 with a report given proving that they were ammunitions. (Exhibits "P1" collectively and exhibits "P2" collectively).

The evidence of PW1 and PW6 was further corroborated by the evidence of PW8. A Handover Note (*Hati ya Makabidhiano*) dated 03/10/2011 presented by PW8 was admitted as exhibit P3. The evidence of PW1 was further corroborated by PW10. It is PW10 who recorded statement of Stephen Antony Stockton (Offshore Manager) and the incident report 20: 10hrs dated 3rd October, 2011 Petrobras Drilling Project Tanzania written by Drum Cussac Petrobras Support Team. (Exhibit "P4" collectively).

The evidence of PW1 was further corroborated by PW11. It is PW11 who recorded the statement given by Christopher Rayland, a British national who was the ship master. The same was made in terms of *Section 34 B (2) of the Evidence Act, 1967* at Mtwara Port on 10/10/2011 at 18:08 hrs before E. 9920D/Sgt Omari Wawa and Report signed by Christopher Roy Lamb on 06/10/2011. (Exhibit "P5" collectively).

It was the testimony by PW14 that; on 18/10/2011, he recorded the statement of Abdul Ali Mursar (interpreter) who told him how each of the accused admitted to have participated in the piratic incident. The said interpreter made the interpretation for all the 7 accused. After recording the interpreter's statement, the same signed and was discharged. The said statement of Abdul Ali Mursali was admitted as exhibit "P6".

In defence; it was the testimony by all the accused persons throughout that they were on the way to South African in search of a better living opportunities following drought and starvation in Somalia in the year 2011. They all denied to have engaged themselves in piracy and that they first met an interpreter at Kibaha Court, Coast Region when they were charged with piracy during committal proceedings.

All the accused persons denied to have taken part in the exchanging of fire on the fateful date but it was the testimonies by DW2 & DW3 that they heard firing of bullets in the air. They explained that they had no travelling documents as there was no Government in Somalia capable of issuing such documents. Their trips to South Africa were arranged through travelling brokers/agencies to whom money was paid by themselves, their parents, relatives and or siblings.

They explained further that after leaving Raskamboni, Somalia; they travelled for some days and nights before being accosted by a boat broadcasting using a microphone in unknown/foreign language to them. They testified further that, due to longevity of the journey, they were not in good situation as they were hungry and tired with safari. They testified further that on departure their boat had more than 100 people but the majority lost balance and fell into the ocean. The rest struggled for survival and the seven accused persons were rescued by a small boat and finally shifted into a big boat that shipped them to the Mainland. DW1 denied to have thrown himself into the ocean.

It was a specific denial by all accused persons that they were arrested with bullets and magazine. It was also their testimony that after their arrest, they were blind folded and led to some places where they were unfolded and given some human needs such as shelter or something to eat and drink. It was further testimony by DW7 that on the fateful date, he and a certain woman with a child fell in the Ocean where a revolving iron knocked his leg.

Thereafter, a small boat rescued and took him in a small boat while bleeding and he was unconscious. He woke up while in the room of the boat/ship to find his both legs tied together. After about one or two days, he was brought to the Mainland in the afternoon and one day he was taken to hospital at night where one of his leg was amputated. After a day, he was taken to Kibaha Court where piracy charges were read through an interpreter. DW7 added, it is his status of loosing his leg that enabled PW7 to identify him in Court. He denied to have made any confession regarding comMsion of the offence of piracy.

In final subMsion, counsel for the accussed persons submitted that; there is no evidence on record that the accused persons attacked *Sams-All good* vessel according to the testimonies by PW2, PW3, PW4 and PW5. They argued that, even existence of the alleged vessel has not been proved.

They added that, failure by the prosecution to describe and identify their attire on the fateful date discredits their case against the accused persons. Furthermore; they discredited PW4's testimony that the accused persons spoke Somali and that he managed to identify four pirates (2nd, 3rd, 4th and 7th accused persons) contrary to what is written in his statement to the police that he managed to identify more than four accused persons. Reference was made to the case of *Evarist Kachembo & Others v. Republic*[10] where the Court held that when such differences arise, such evidence cannot remain unshaken.[11]

The defence stressed on the issue of visual identification as held by the Court of Appeal in *Raymond Francis v. Republic*[12] that:

> It is elementary that in a criminal case where determination depends essentially on identification evidence on condition favouring a correct identification is of utmost importance.

[10] The citation of this case was however not provided by the Counsel citing it.

[11] See Court of Appeal decision in the case of *Michael Haishi v. Republic* [1992] T.L.R. 92.

[12] [1994] T.L.R. 100.

Besides, identification of attire, description and name should be made at the earliest time possible as held by the Court of Appeal in the cases of *Abdallah Ramadhan v. The DPP*.[13]

They went further to discredit the spent bullet found in *Sams-All good* which was never accounted for by PW1, PW2, PW3, PW4, PW5 and PW8. They argued that there are inconsistencies regarding shifting of pirates where PW2 testified to have seen seven pirates taken from *Sams-All good* to *Frobsher* ship with PW8 testifying to have seen four pirates shifted from *Sams-All good* to *Frobisher* ship and later three pirates shifted from *Sams-All good* to *Frobisher* ship. They thus urged for this Court to rule out in favour of the accused persons basing on the precepts of the contradictions as held by the Court of Appeal in *Mohamed Said Matula v. Republic*.[14]

The accused persons through their Counsels also argued about the the skiff been destroyed by gun shots while others arguing the same to have been taken away by strong waves after loosing control. Besides; the statement by Michael Vicent Mountford given at Police was that no pirate who entered into *Sams-All good* and there was no exchange of firearms between Tanzanian soldiers and the pirates thus contradicting with the testimonies by PW1, PW2, PW3, PW4 & PW8.

Furthermore, they argued that, no evidence was adduced to establish that accused persons were as such present in the alleged invading boat. The

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[13] Court of Appeal of Tanzania, Criminal Appeal No. 219 of 2009 (Unreported). Also referring the case of *Republic v. Mohamed Bin Akui* [1942] 9 E.A.C.A 72 and the case of *Ibrahim Songoro v. Republic*, Court of Appeal of Tanzania, Criminal Appeal No. 298 of 1992 (Unreported).

[14] [1995] T.L.R. 3.

defence argued against existence of the *Sams-All good* that no evidence has ever been given to establish its existence in Tanzania leave alone the referred invasion. They also refuted the alleged assertions and documents that the accused persons confessed to have taken part in committing piracy.

On their part, the Republic through services of learned Senior State Attorneys submitted that; all the accused persons were arrested in the Indinian Ocean whilst commiting piracy. They argued that, the act of violence was instigated by the accuseds' conduct of threatening through fireams shots that resulted into exchange of fireams with Tanzania Security Officers that lasted for about two hours with the same incidents resulting into injury of the 7th accused (DW7) that led into amputation of his leg.

They argued that, Exhibit "P2" (used cartridge) proved that the kind of ammunitions are not used by Tanzanian army through colour differentiation. Furthermore; during interrogation, all the accused persons confessed to have committed the charged offence of Piracy. They argued that, the accused persons were unknown to Tanzanian army forces, hence, no possibility of grudges or ill motive leading to malicious prosecution.

The Prosecution argued that the evidence by the interpreter (Abdul Ally Mursali), now deceased, which was admitted under *Section 34B of the Evidence Act* forms a critical part of evidence establishing confession of the accused persons. They argued that; the fact that there was no warrant for search and seizure cannot defeat validity of the said search and seizure under *Section 38(3) of the Criminal Procedure Act, CAP. 20* for the law caters for circumstances where search and seizure can be conducted without such compliance.

The prosecution side argued that they managed to prosecute the case and proved beyond reasonable doubt leave aside the few areas regarding bringing the skiff in Court which was badly destroyed during the incidents. In such few areas, they argued reliance to what was held by the Court of Appeal in *Magendo Paul and Another v. Republic*[15] that:

> … The law would fail to protect the community if it admitted fanciful possibility to deflect the Court of justice. If the evidence is strong against a man to leave only a remote possibility in his favour which can be disMsed with the sentence of course it is possible not in the least probable the case is proved beyond reasonable doubt.

They added that, *Sams-All good* could not be tendered in evidence as the same went back to United Kingdom after the exploration exercise. Hence non-tendering of such pieces of evidence cannot at any rate discredit the tendered oral evidence.[16]

They argued that, the defence evidence is no else than a "coached or concocted pieces of evidence" which should be discounted as held by the Court of Appeal in the case of *Manju Salum Msambya v. Attorney General and Kifu Gulamu Hussein Kifu*.[17] Besides, accused persons telling lies should be considered in finding them guilty as held by the Court of Appeal in the

[15] [1993] T.L.R. 220.

[16] See High Court decisions in the cases of *Edward Petro v. Republic* [1967] H.C.D. No. 296 and *Julius Bilile v. Republic,* [1981] T.L.R. 333.

[17] Court of Appel, Civil Application No. 2 of 2002 (Unreported).

case of *Mohamed Haruna @ Mtupeni and Another v. Republic*,[18] and in the case of *Paschal Mwita & Others v. Republic*.[19]

The above marks both the evidence by the prosecution and defence on one part and respective submissions by counsel for both defence and prosecution sides. Consideration to the above takes this Court into its deliberations regarding the charged offence of piracy against the accused persons. In criminal cases, one is held criminally responsible upon proof of the essential ingridients of the preferred charge against the accused person(s). Notably, this case is old referring to an offence that occurred on 3rd October, 2011, that is, its prosecution taking place after lapse of about 7½ years.

According to the testimonies by PW1 – PW14, it is crystal clear that on the 3rd October, 2011, a boat knows as *Sams-All good* was invaded in the Indian Ocean by some invaders who were in another small boat known as skiff (invaders boat). It was the evidence by the prosecution side that while on their guard in the Indian Ocean, they noticed a boat running in the direction of *Sams-All good*. Such information was communicated to S. Antony who shared the same with PW1.

The testimonies by PW1, PW2, PW3 and PW4 were to the effect that the invaders inflicted violence on the crew in the vessels involved in oil exploration causing the Tanzania forces to respond in retaliation. The incidents went further to an extent of the said invaders entering into the guarding boat (*Sams-All good*). The exchange of fire was tense that the

[18] Court of Appeal of Tanzania, Criminal Appeal No. 259 of 2007 (Unreported).

[19] [1993] T.L.R. 295.

Army Officers had to mount to the engine room of the *Sams-All good* in salvage of the danger through exchange of firearms.

According to PW1, the involved diplomatic measures in hand with the effected retaliation as strategies facilitated the said invaders (the accused persons) to surrender to the Tanzanian Peoples Defence Forces. At that point, it was proved beyond reasonable doubt that violence was involved in manifestation of the planned invasion. Furthermore, proof of use of violence was through the found used cartridge made of gold colour unlike the colour used by the Tanzanian Armed Forces.

Going through the tendered Exhibit "P1" and "P2" collectively, the same established clearly the use of firearms in violence in manifestation and execution of the planned Piracy.

As narrated in evidence, there was exchange of fire between the Tanzania army and the attackers to an extent of nearly hitting PW4 on the head. Considering that the said boat was unable to be recovered, the same could not be tendered in Court in evidence as correctly submitted by learned Senior State Attorneys for the prosecution side. Its availability could establish perforation of the same during the firearms exchange. Indeed, the oral evidence of PW1-PW14 and the documentary reports has not been discredited by the defence side by showing shadow of doubts. In that regard, this Court rules that there was exchange of firearms between the invaders and officers of the Tanzania army guarding the oil and gas exploration facilities including the guarding ships.

Importantly, the gathered exhibits from *Sams-All good* were seized in a boat which did not belong to the attackers (the pirates). Indeed, it was the

testimonies by PW1, PW2, PW3 and PW4 which established how the pirates invaded and got into the said boat. Such pieces of testimonies by the prosecution witnesses who did not know the accused persons before giving evidence cannot be lightly faulted. The accused persons' journey to South Africa in search of a better living due to drought and starvation in Somalia, as they testified, could in no way turn into a piracy charge. It, therefore, follows that the defence of going to South Africa was an after thought following the failing of the piracy attack and arrest.

The defence side have disputed chain of custody in the course of tracing link between the referred firearms and the whole piracy offence. In compliment to the cited case laws, in criminal cases, Search Warrants and Seizure Certificates are crucial documents which have to be considered in terms of *Sections 38 and 45 of the Criminal Procedure Act, CAP. 20*. For instance, in *Makoye Samwel @ Kashinje & 4 Others v. the Republic,*[20] the Court of Appeal observed that:

> … In more than one occasion, this Court has underscored the dire need, at the level of investigations, to abide by the provisions of Section 38(3) of the Criminal Procedure Act, which stipulates:
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> > Where anything is seized in pursuance of the powers conferred by subSection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or

[20] Court of Appeal of Tanzania, Criminal Appeal No. 32 of 2014, (Tabora Registry) (Unreported).

> occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.

If this requirement is complied with, a full proof "chain of custody" would have, therefore, be set in motion. As was succinctly laid down in the unreported Criminal Appeal No. 110 of 2007 – *Paul Maduka & Others v. Republic*[21]:

> By "chain of custody" we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain custody, it is stressed, is to establish the alleged evidence is in fact related to the alleged crime-rather than, for instance, having been planted fraudulently to make someone appear guilty.

Regarding importance of exhibits; the Court of Appeal in *Mashaka Pastory Paulo Mahengi @ Uhuru v. The Republic*,[22] observed that:

> *Police General Order 229* underscores that exhibits are vital evidence, and it specifically provides:

[21] Court of Appeal of Tanzania, Criminal Appeal No. 110 of 2007, (Unreported).

[22] Court of Appeal of Tanzania, Criminal Appeal No. 61 of 2016.

"Classification of Exhibits

1. Exhibits for the purposes of this order include:

(a) Stolen property and any property the possession of which may be the subject of a criminal prosecution;

(b) Objects which may connect a person with offence or incident, such as articles bearing fingerprints, foot prints, particles of dust blood stained clothing, hairs and fibers;

(c) Instruments with which an offence is committed, such as guns, knives, cartridges; …

2(a) The police are responsible for each exhibit from the time it comes into the possession of the police, until such time as it is admitted by the Court in evidence, or returned to its owner, or otherwise disposed of according to instructions;

(b) The proper identification and safe custody of an exhibit is initially the responsibility of the officer-in-charge of the investigation*. The chain of evidence as to its discovery and subsequent custody will be reduced to as few persons as possible and the police officer who first obtained possession of the exhibit will produce it in Court: ...*

3. Exhibits on which there may be fingerprints shall be handled with the greatest care. (Emphasis added).

As to the contested seizure and handling of exhibits, the Court of Appeal of Tanzania had opportunity to account for the necessities in conducting search. In the case of *Onesmo Mlwilo v. The Republic,* [23] underscored that:

> In the absence of proper explanation of the custody of those exhibits, we find that there was no cogent evidence to prove the authenticity of such evidence. In the case of *Iluminatus Mkoka v. Republic*,[24] this Court emphasized at some point of custody of exhibits and a trial court should know in whose custody those exhibits were kept. (Also See *DPP v. Shirazi Mohammed Sharif* [25] and *Maliki Hassan Suleiman v. SMZ*.[26] In view of those Msing links in the instant case, we are of considered opinion that the improper or absence of a proper account of the chain of custody of Exhibits P3 and P4 leaves open the possibility of those exhibits being concocted or planted in the house of the appellant.

As to the evidence on record, it is clear that; circumstances of the case necessitated conduct of search without the known or customary Search Warrant and Certificate of Seizure. For instance, it was the testimony by PW1 and PW8 that after overpowering the pirates, they had to inspect the pirates' boat for safety reasons to see to it whether or not there were no other pirates hiding and for the sake of seizing anything linked with the offence.

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[23] Criminal Appeal No. 213 of 2010 (Iringa Registry) (Unreported).

[24] [2003] T.L.R. 245.

[25] [2000] T.L.R. 427.

[26] [2005] T.L.R. 236.

Under the circumstances and in an incident that took place in the night in the water and which lasted for about two hours involving shot of firearms in exchange, it is obvious that embarking into such exercise was a resultant security concern and evidentiary measure. Furthermore, in the inspection conducted by PW8 and other army officers, they managed to seize a magazine cover, 16 ammunitions green in colour, a torch and pain killers.

Furthermore, in the light of the decision of the Court of Appeal in *Mashaka Pastory Paulo Mahengi @ Uhuru v. The Republic* (*supra*), *Police General Order 229* concerns with police officers only. It does not cover or regulate ceisure done by TPDF officers. Indeed, there is no law, to my knowledge, which mandates TPDF officers to prepare ceisure note of objects found after exchange of fire shot with attackers. In that regard, I hold that the ceisure note is not a preliquisite condition in proving comMsion of piracy offence. What matters is strong evidence that remains unshakened to the effect that the objects were gathered at the piratical scene.

Essentially; the defence side has argued as to why the prosecution did not tender some of the seized properties. In that regard, it is a well-established principle in law that the prosecution has discretion of choice as to whom and what kind of exhibit he or she should tender provided it worth establishing his/her case for the sought remedies. In other words, considering the nature of the leveled charges, it was unnecessary for the prosecution to tender the alleged pain killers, bucter or the like in establishing the charges of piracy. It is from the above it is unworthy to argue that the prosecution had ill motive to have such items tendered in Court in evidence against the accused persons.

Following the said search, whatever was seized was handled over to the responsible officers for further necessary actions. This for instance is through Exhibit "P3" which is a handing over letter establishing *chain of custody* and handling of exhibits. Besides; according to PW8, the seized items in the conducted search were handled over to the military intelligence which as said earlier and considering the roles and nature of the case, were properly handled and channed accordingly.

Regarding the argument by the defence that the statement by Michael Vicent Mountford given at Police was that no pirate entered into *Sams-All good* and there was no exchange of fire between Tanzania armed forces in the fateful incident thus contradicting with the testimonies by PW1, PW2, PW3, PW4 & PW8, I find such allegation to have no weight because contradiction by any particular witness or among witnesses cannot be escaped or avoided in any case. It must be recalled from the prosecution evidences that Michael Vicent who alleged to have not heard any gun fire he was at the engine room rescuing his life after he heard alarm of distress from the ship master Christopher Roy Lamb and Steven Stockton offshore manager who were at the position to see the pirates boarding the ship and there was gun shots. In the case of *Mathias Bundala v. Republic*[27] the Court held that:

> Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence or the evidence has been materially contradicted by a witness or witnesses.

[27] Court of Appeal, Criminal Appeal No. 62 of 2004 (Unreported).

As evidenced, Michael Vincent was in the engine room. In that aspect, there was no any possibility for him to hear gun fire. Therefore, any inconsistency or contradiction by Michael Vincent was not material. Furthermore, it was held in the case of *Elia Nshamba Shapwata and another v. Republic*,[28] and in the case of *Edson Simon Mwombeki v. Republic,*[29] thus when the contradiction is minor the Court has to disregard it. I therefore find the contradiction of the statement of Michael Vincent with the prosecution whole evidence to be minor because the defence side considered such statement in isolation of the entire prosecution evidences.

Apart from the afore findings, on myriad dates of this proceedings, the Defence Counsels and the Prosecution Attorneys raised a number of *plea in limine litis.* The same were overruled and upheld respectively.

It suffices at this juncture to record the reserved reasoning of the Court. At the heart of the legal objections there are *inter alia* seven legal issues; -

1. Whether a Ballistic expert (PW6) is a competent witness to tender bullets and catridges ceased in the High seas by TPDF officers without ceisure note;

2. Whether proof of death is only limited to Death Certificate;

3. Whether the electronic Transaction Act, 2015 applies retrospectively;

[28] Criminal Appeal No. 92 of 2007.

[29] Criminal Appeal No. 94 of 2016.

4. Whether admissionof statement of one Christopher Royland dated 10th day of October, 2011 complied with the provisions of Section 293 (3) of the Criminal Procedure Act, Cap 20 (R.E. 2002);

5. Whether interpreters are recognized under the Tanzanian Laws;

6. Whether there is a law which bars investigation officers to record statement of a witness;

7. Whether there is a distinction between a "notice to produce" and a "notice to tender" an additional document.

As regards the first issue; *whether a Ballistic expert (PW6) is a competent witness to tender bullets and catridges ceased in the High Seas by TPDF officers without seizure note.* On 18th February, 2019 while PW6 (ASP John Sangija Mayunga) was testifying in Court, all defence Counsel raised an objection against PW6 in tendering exhibits "P1" and "P2". Both Mr. Komba and Mr. Rupia submitted that, under the governing principles regarding chain of custody, the witness ceased to have control of the catridges, spent bullets and the ammunitions thus an improper witness to tender the said exhibits. They rather argued that, the proper person was the one who collected the objects from the scene of crime unlike PW6.

On their part, Mr. Nkwera, Msemo, Mr. Dennis, Mr. Benedict and Mr. Kulita argued that; letters dated 23/11/2011 and 23/3/2012 do not form part of exhibits in the proceedings and that the accused were not served with the same contrary to Section 249 of the Criminal Procedure Act, CAP. 20.

With regard to the exhibit P1, Mr. Nkwera, Msemo, Mr. Dennis, Mr. Benedict and Mr. Kulita argued that, there was no seizure note contrary to Section 38

(3) of Criminal Procedure Act, CAP. 20 hence fatal as held by the Court of Appeal in the case of *Makoye Samwel @ Kashinje & 4 Others v. the Republic* (*supra*). Mr. Nkwera further objected the Ballistic Report arguing that the Chain of custody has not been complied with. The learned advocate added that, there is lack of seizure note as per the Court of Appeal in *Paul Maduka and Others v. Republic* (*supra*) hence, unworth to be admitted as evidence in law.

In response, Ms. Mshanga learned Senior State Attorney submitted that; they complied with the provisions of Section 249 of Criminal Procedure Act, 1985 for the same was communicated to the defence side adding that, their argument has never been that the witness seized the objects, rather, as among competent persons to tender the same in evidence for the witness was as such the maker of the investigation report.

Ms. Mshanga buttressed her subMsion that there is no existent law barring the witness (PW6) from tendering the exhibits under Sections 62 (1) (a) and (c) of Evidence Act, CAP. 6 is to the effect that evidence can be tendered directly by a person who have seen, trust and who perceived the same.

In this regard, PW6 is the one who received, seen and made analysis thus competent to tender the same. With regard to chain of custody, Ms. Mshanga argued that, the surfaced objection is premature for the prosecution has not closed her prosecution case. She argued that, admissibility of evidence differs from relevancy of a piece of evidence, hence, inapplicable.

In the matter at hand, PW6 received the exhibits, authored the report and has knowledge of the investigated objects. Furthermore; as the possessor, he has the capacity to tender the exhibits as underscored by the Court of

Appeal in the case of *DPP v. Mirzai Pirdakhshi @ Hadji and 3 Others.*[30] In rejoinder; Mr. Nkwera insisted that the objection centred on the fact that the two letters are not part of the Committal Proceedings. He stressed that, the letters should not be admitted in furtherance of the charged offences.

Having gone through the respective submissions by the learned friends as well as the position of the law, the following are the findings of this Court in disposal of the raised objection against admissionof some documents forming part of the collective exhibits "P1" and "P2". As correctly submitted by the learned Senior State Attorney, in terms of *Sections 62 (1) (a) and (c) of Evidence Act, 1967* evidence is worth to be tendered by a person who has directly seen, or has trust and or who perceived the same.

In the matter at hand, PW6 received the objected pieces of evidence, authored the report and had direct knowledge of the same. From the above context, PW6 is a competent witness in law to tender the said documents. Besides; it has been a long-standing position of the law that, essentially; there is no hard and fast rule as to who and only one who should tender a piece of evidence as exhibit in Court. Such stance was made by the Court of Appeal in the case of *Majid John Vicent & Others v. R.,*[31] where the Court observed that:

> There is no hard and fast rule as to who should produce exhibit in a trial. Each case should be treated in its own circumstances.

[30] Court of Appeal of Tanzania, Criminal Appeal No 493 of 2016 (Dar es Salaam Registry) (Unreported).

[31] Court of Appeal of Tanzania, Criminal Appeal No. 264/2006 (Mwanza Registry) (Unreported).

Importantly, since among the areas of determination includes though not limited to the Ballistic Report, the same tendered by PW6 who as such received the exhibits, did the investigation and authored the report is a fit witness without much ado to tender the same. This is a witness knowledgeable and capable of responding to crucial questions with regard to the ballistic report.

This is in line with what was reiterated by the same Court of Appeal in *Majid John Vicent* (*supra*) where apart from stating that there is no hard and fast rule as to who should produce an exhibit in Court, the Court went further that:

> If PW4 had produced it in evidence we think he would have been better placed to tell the court whether this was the same pistol seized from the appellants on 16/3/2006. Indeed, that would help in allaying any fears about the "chain of custody" in handling the exhibit before its production in evidence at the trial.

Furthermore, the letters are just auxiliary matters, not core in final determination of the issue under scrutiny. What is essential, is the ballistic report that proves the leveled charges against the accused persons. In that regard, since the said letters are auxiliary to the ballistic report core to the contested charges, the same could to be admitted notwithstanding that the same were not listed in the Committal proceedings.

Above all, expert evidence is evidence differing from other pieces of evidence for it is not solely based on facts, rather; on facts and expertise. In the case

of *Zefelinus Kumb. @ Philimon v. the Republic,*[32] the Court of Appeal had the following in arriving at its findings in deliberation:

> It is settled law that the duty of all experts is to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusion so as to enable the court to form its own independent judgment by the application of these criteria to the facts proven in evidence: see, *C.D. de Souza v. B.R. Sharma*,[33] *Davie v. Edinburgh Magistrates*,[34] *R. v. Kerstin Cameron*[35] etc. It is not within the expert's competence to imagine facts to fit his desired conclusions. As was held by the Supreme Court of India in *Malay Kumar Ganguly v. Dr. Sukumar Murkherjee & Others*:[36]
>
> The scientific opinion evidence, if intelligible, convincing and *tested becomes a factor for consideration along with other evidence of the case. [Emphasis is ours].*

Notably, it is an implied understanding that whatever is associated with the core listed expected piece of evidence will be tendered even if the same was not listed in the committal proceedings. The situation could be different had the prosecution listed the least weighty piece of evidence leaving the core one unlisted. Furthermore; even if the same was not read for during

[32] Court of Appeal of Tanzania, Criminal Appeal No. 243 of 2013, (Unreported), (Mbeya Registry).

[33] [1953] K.L.R.

[34] 1953 S.C. 34.

[35] [2003] T.L.R., 84.

[36] AIR 2010 SCC 1007.

committal proceedings, the same is curable upon reasonable notice in terms of Section 289 of the Criminal Procedure Act which as underscored to that effect by the Court of Appeal in the case of *Asael Mwanga v. the Republic*.[37]

The above found, I will now turn to the second issue on; *whether proof of death is only limited to Death Certificate*. On the same date, that is on 18th February, 2019 while PW6 (ASP John Sangija Mayunga) was testifying in Court, Ms. Mshanga, Senior State Attorney prayed to the Court to adduce evidence in terms of *Section 34B of Evidence Act, CAP 6* with further prayer to issue notice to that effect as the intended witness appears to have passed away as per the summons affirmed on 24th January, 2019.

Ms. Mshanga added that; the said witness was an interpreter whereas the same was killed by thugs with burial services held at Kisutu Cementry Dar es Salaam. The learned State Attorney further prayed for leave under *Section 289 of Criminal Procedure Act, CAP. 20* to add Commissioner Ahmed Msangi as witness.

On their part, the defence side resisted the prayers. In addressing the Court, Mr. Komba, Mr. Benedict and Mr. Kulita learned advocates submitted that; they don't essentially object the prayer for additional witnesses but on the issue of the interpreter, he argued that there must be further proof on the death of the interpreter.

On their part in complement, learned advocates Nkwera, Rupia and Msemo argued that, the law requires under *Section 34B (e) of the Evidence Act* to

[37] Court of Appeal of Tanzania, Criminal Appeal No. 218 of 2007, (Arusha Registry) (Unreported).

comply with the requirement of ten days notice from the service of the copy of the statement to the objecting party. Furthermore; death is proved by a Death Certificate and burial permit whereas "*Serikali ya Mtaa Chairman*" has no power to prove death. In terms of *Section 289 of Criminal Procedure Act, CAP. 20*, qualifications are given to form grounds for the death allegations and that the said notice must be reasonable and in writing. On his part, Mr. Dennis submitted that; the law requires under *Section 110 of the Evidence Act* for whoever alleges to prove existence of such assertions.

In reply; Ms. Shelly, Senior State Attorney and Mr. Barasa, State Attorney argued that; it is under *Section 289(1) of Criminal Procedure Act* that the witness will substantiate on how they were received at Navy. Thus, considering the objection to have been prematurely raised adding that death Certificate is not the only evidence to prove death. Ms Mkunde Mshanga added; it is the Court that issues summons and it is such summons which suffices to be a proof of the death.

In determining the above objection, this Court shall start with the argument raised by Ms. Mshanga that since it is the Court that issues summons, hence; issuance of the same suffices proof. Essentially, though summonses are issued by the Court, the same should not be regarded as proof for the Court just by relying on information supplied to it by parties. Otherwise; the Court knows neither the whereabouts of the witnesses nor has personal interest to serve other than the interest of justice to the parties and to the general public.

In other words, it is awkward to argue the Court being aware of the whereabouts of the parties or their witnesses in reliance to the fact that it is the Court that issued summons parading the said witnesses in Court.

Regarding proof of death of the interpreter, this Court agrees with the learned advocates for the defence that the prosecution side is duty bound to prove death of the interpreter but is also in agreement with the learned Senior State Attorney that the same can be substantiated by either Death Certificate of the alleged deceased person or bring a witness to prove the alleged death under oath/affirmation. Indeed, in this case the defence side has not shown any shadow of doubts as regards the death of the interpreter. The accused ended up asking for the proof of death. The mere questioning of death certificate in itself is equated to admissionthat the interpreter died. The Court of Appeal of Tanzania in the case of *Tabu Nyanda @ Katwiga v. The Republic*,[38] underscores the point that cause of death may be proved by other evidence. It is from such premises this Court is of the considered view that the first prayer lack merits in its disposition.

With regard to the second prayer in terms of *Section 289 of Criminal Procedure Act,* the law does not bar additional witnesses to be brought for the prosecution and the notice can either be in writing or oral. Such position was explicitly derived by the Court of Appeal in *Asael Mwanga v. the Republic* (*supra*) to that effect. Notably, this Court fully subscribes to the immediate above cited decision.

[38] Court of Appeal, Criminal Appeal No. 220 of 2004.

It is on that footing that this Court finds the notice given in advance to be reasonable and there is no good reason to deny grant of the prayer.

The afore findings takes me to the third issue on; *whether admissionof statement of one Christopher Royland dated 10th October, 2011 complied with the provisions of Section 293 (3) of the Criminal Procedure Act, Cap 20 (R.E. 2002).*

On 22nd February, 2019 while PW 10 ASP Shagihilu Rufulondama Nteminyanda was giving his testimony in Court, Ms. Mshanga, Senior State Attorney craved leave of the Court to show the witness the statement of Antony and the report. PW10 further prayed for the same to be tendered in Court in evidence. That prayer as to the report was objected by Mr. Komba advocate (for the 1st accused) under *Section 18 of the Electronic Transaction Act, 2015* particularly part IV on ground that the same covered electronic evidence.

On his part, Mr. Nkwera advocate (for the 2nd accused) based his objection under *Section 249 of the Criminal Procedure Act, CAP. 20* on the same basis that the said piece of evidence is an electronic document, hence, not a competent person to tender the said evidence. Reference was made to a High Court decision (Mwanza Registry) made in Criminal Appeal No. 349/2017 (anonymous). The above submissions were seconded by Mr. Mr. Rupia, Mr. Msemo, Mr. Tumaini, Mr. Pius and Mr. Kulita for the 3rd, 4th, 5th, 6th and 7th accused persons respectively.

In reply, Ms. Mshanga, learned Senior State Attorney prayed for the provisions of *Section 34B of the Evidence Act, 1967* to be complied with. She added that, the same is not new evidence as the same has been stated in

preliminary hearing as well as in the Committal proceedings. Ms. Shelly added that though the incident occurred in 2011, there is no bar to applicability of the provisions under the *Electronic Transaction Act, 2015*.

Furthermore, under the provisions of *Section 40A of the Evidence Act, CAP. 6,* the same allows admissionof electronic evidence. Besides, the issue before the Court is on admissibility of exhibit and not relevancy of the document. Hence, the witness is a proper and competent witness to tender the same. The defence advocates had nothing to rejoin.

Having gone through the respective submissions by the learned friends, the following marks the reserved reasoning of the Court in disposal of the afore third legal issue. As correctly submitted by Ms. Shelly learned Senior State Attorney, there is no law which says procedural law have retrospective application for no law that bars procedural laws from been applied retrospectively.

Furthermore, even assuming the same to fall under substantive law thus barred under non applicability of the principle of retrospective operation of laws, yet; considering that the incident occurred in 2011, the *Evidence Act under Section 40A* as argued by Ms. Shelly learned State Attorney was full fledged operational in 2007. History of electronic evidence can be traced vide amendments to the Evidence Act, [CAP. 6 R.E, 2002] by virtue of the *Written Laws (Miscellaneous Amendments) Act, No. 2 of 2007* for provisions for the reception of electronic evidence in Courts in criminal matters.

Significantly, amendments were effected to *Section 40 of the Evidence Act* (*supra*) by introducing *sub-sections including Section 40A*. Other amended Sections of the *Evidence Act* (*supra*) include *Sections 76 and 78* amongst to

mention but a few. Development vide amendments to the law did not end there as through *Written Laws (Miscellaneous Amendments) Act No 3 of 2011 Section 3 of the Evidence Act* (*supra*) was amended to allow presentation of evidence to courts through video conference and teleconference. To date, the long journey has taken us to the enactment of the *Electronic Transactions Act, 2015* as we will see later.

Section 64A of the Evidence Act (*supra*) as amended by *Section 46 of the Electronic Transactions Act* (*supra*) has the following regarding admissionof electronic evidence that:

> 64A (1) In any proceedings, electronic evidence shall be adMsible.
>
> (2) The admissibility and weight of electronic evidence shall be determined in the manner prescribed under *Section 18 of the Electronic Transactions Act, 2015.*
>
> (3) For the purpose of this Section, *electronic evidence* means any data or information stored in electronic form or electronic media or retrieved from a computer system, which can be presented as evidence. [Emphasis supplied]

Section 18 of the Electronic Transactions Act (supra) provides that:

> (1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message.
>
> (2) In determining admissibility and evidential weight of a data message, the following shall be considered-

(a) The reliability of the manner in which the data message was generated, stored or communicated;

(b) The reliability of the manner in which the integrity of the data message was maintained;

(c) The manner in which its originator was identified; and

(d) Any other factor that may be relevant in assessing the weight of evidence.

(3) The authenticity of an electronic records system in which an electronic record is recorded or stored shall, in the absence of evidence to the contrary, be presumed where-

(a) –(c) N/A

(4) N/A

Besides, "data", "Data message" and "electronic record" are defined under *Section 3 of the Electronic Transactions Act (supra*) that:

Data "means any information presented in an electronic form."

Data message "means data generated, communicated, received or stored by electronic, magnetic optical or other means in a computer system or for transMsion from one computer system to another".

Electronic record "means a record stored in an electronic form"

Regarding "electronic communication", *Section 3 of the Electronic Transactions Act* (*supra*) provides that:

> Electronic communication" means any transfer of sign, signal, or computer data of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic, photo optical or in any other similar form.

Regarding "record" in general, bearing in mind "electronic record" *Black Law Dictionary* (8th Edition) at p. 1301 defines it as:

> 1. A documentary account of past event designed to memorialize those events; 2. Information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable from; 3. Minutes; 4. The official report of the proceedings in a case…

In view of the foregoing, it follows that, electronic evidence through computer innovations is admissible at different levels. Most important, the *Electronic Evidence Act of 2015* has no retrospective effect to the incident that happened in 2011.

From the above in a nutshell, the disputed electronic evidence is admissible in evidence. The remaining second limb on credibility of the said evidence coupled by argument that the same has been tempered with. It is unfortunate that Stephen Antony Stockton, the offshore Manager who prepared the report could not be traced. However, PW10 reliably testified before the Court that he was given such report by Stephen Antony Stockton. The report comprises of various photographs taken by the ship system with some statements therein. In my found view such report is like an expert evidence in which Stephen Antony Stockton as an offshore Manager who controlled *inter alia, Sams-All good* was not barred to add his analysis

therein. As stated earlier on, expert evidence is based both on on facts and expertise.[39]

Above all, there is no fixed position in Court as to who should produce exhibit in a trial. Each case should be treated in its own circumstances. In this case, PW10 a duly comMsioned Police Officer who recorded the statement of the Stephen Antony Stockton told the court that the report was given by Stephen Antony himself to form part of his statement. So, there is no good reason for this Court to deny admissionof the same on the ground that it must be tendered by electronic expert.[40] It is from that findings I will now turn to give reasoning on the admissionissue of statement of Christopher Roy Lamb.

The fourth issue is on; *whether admissionof statement of one Christopher Roy Lamb dated 10th day of October, 2011 complied with the provisions of Section 293 (3) of the Criminal Procedure Act, Cap 20 (R.E. 2002).* On 8th March, 2019 while PW 11 one Inspector Omary Wawa was testifying in Court, the defence advocates objected admission of a statement made by one Christopher Roy Lamb dated 10th October, 2011 upon argument that the same was not part of the proceedings contrary to *Section 249(3) of Criminal Procedure Act, CAP. 20.*

Advancing their ground of objection, all the defence advocates centred their subMsion to the effect that; admissionof the document offends the provisions of *Section 34B of the Evidence Act, CAP. 6* for not being part of the committal proceedings contray to *Section 249(3) of the Criminal*

[39] See *Zefelinus Kumb. @ Philimon v. The Republic (supra).*

[40] See *Majid John Vicent & Others v. R. (supra).*

Procedure Act. They added that, need to have such documents stated in the committal proceedings regulates any possibility of falsified evidence.

In response, Ms. Mshanga submitted that; on 30/11/2015 of the committal proceedings reveals that *Section 249 (3) of Criminal Procedure Act* was full complied with with the statement read over though the said statement by Christopher Roy Lamb marked number 7 was not given at the committal proceedings. She thus urged for the raised objection to be overruled with the statement admitted and form part of the prosecution evidence.

In rejoinder, the defence counsel (Nkwera, Rupia, Msemo, Dennis, Kulita) stressed that there is no justification as to why the witness could not be traced hence, calling for reliance to *Section 34B of the Evidence Act*. They stressed that the objection centres on the report which is not on record unlike the statement which is on record.

As earlier pointed out, the objection centres on the fact that the report sought to be tendered in Court in evidence do not form part of the committal proceedings. All the defence counsel went further to argue that there is serious need for the same to have formed part of the record so as to negate any possibility of falsifying the evidence through intrusion of false evidence.

Essentially; it is a cardinal principle of law that has been enshrined in the Constitution for fair hearing in terms of *Article 13(6)(a) of the Constitution of the United Republic of Tanzania,* CAP. 2. Understandably, there are circumstances which can be accommodated upon reasonable issuance of notice despite the same having not captured in the committal proceedings.

This takes us to the provisions of *Section 289 of Criminal Procedure Act;* the law does not bar additional witnesses to be brought for the prosecution and the notice can either be in writing or oral. Such position was explicitly derived by the Court of Appeal in *Asael Mwanga v. the Republic* (*supra*) to that effect. Notably; this Court fully subscribes to the immediate above cited decision.

I will then proceed to analyse the fifth issue on *whether interpreters are recognized under the Tanzanian Laws.* On 8th March, 2019 when PW14 one Antony Mwita was giving his testimony, prayed to tender a statement he recorded on 10/10/2011 for an interpreter named Abdul Ally Mursali on grounds that the statement has already been given notice under *Section 34B of the Evidence Act, 1967.*

Admissionof the statement was objected by the accused persons. To buttress their objection, Mr. Komba submitted that; the interpreter was forced to do that work by a team from Zonal Crime Office adding that the 1st accused did not consent as the interpreter belongs to a clan that is an enemy to his clan. Secondly, the witness admitted to be part of investigation thus unfit to record the same. The argument was supported by Mr. Rupia, Mr. Msemo, Mr. Dennis, Mr. Benedict & Mr. Kulita, advocates.

On his part, Mr. Nkwera learned advocate submitted that; the contested statement of Abdul Ally Mursal does not show if he as such interpreted the accused's statement. Under the circumstances, it is undoubtedly clear that the provisions under *Section 249 (3) of Criminal Procedure Act, CAP. 20* requires for the defence to be supplied with the copy. Likewise; the provisions of *Section 34B of the Evidence Act*, were not complied with.

Mr. Dennis learned advocate added that; the provisions of Section 34B (2) of the *Evidence Act, 1967* are applicable to a witness unlike in the case of interpreters. He added that, the role of an interpreter is not different from that of an advocate adding that interpreters are not recognized under the Tanzanian laws. The learned advocate cited *Tuwamoi v. Uganda*[41] where the defunct Court of Appeal for Eastern Africa enjoined trial Courts of their duty to be satisfied if true the confessions were made and revolved danger. In the alternative, the declaration is incomplete.

The learned advocate added that; the constested statement does not mention the number of pages of the statement arguing that lack of pages as required by law requires stands an avenue for loophole in adding or reducing statement. It was the duty of the one who recorded the statement acting under ill will, negligence or ill motive, the interpreter did not do so.

In reply, the Ms. Mshanga submitted that; the defence counsel have misconceived basis of their subMsion by submitting on contents of the document instead of admissibility of the same. She stressed that the interpreter is dead adding that even the law allows adducing of evidence under the sought provisions whereas the provisions of Section 127 of the Evidence Act do not bar an interpreter from giving testimony. The learned State Attorney added that; the provisions of *Section 131 of Criminal Procedure Act* provide for the persons who should caution the suspect.

On her part, Ms. Shelly, Senior State Attorney, argued that; there is no law which bars a Police Officer or detective officer to record statement of a

[41] [1967] 1 E.A 84.

witness adding that the constested statement is not a new fact as the same was read in the Committal Proceedings as features at Page 7. Besides; the accused ought to have told the Police Officers that they had enemity with the interpreter.

In rejoinder, all the defence advocates just reiterated their earlier stance to have the said statement be rejected as evidence basing on argument that the same was recorded in contravention of the governing laws.

Having gone through the respective submissions by the learned friends as well as the position of the law, the following are the findings of this Court in disposal of the raised objection against admissionof exhibit "P6".

To start with, it is worthwhile to state here that two avenues revolves around admissionof the statement by Abdul Ally Mursal. *One*; that the same should be admitted under *Section 34B of the Evidence Act, CAP. 6* considering that the said Abdul Ally Mursal cannot be called to appear in Court and testify and *two*; that, the said statement was not given under "free will" that is, voluntarily by the 1st accused person.

As to the second avenue, this avenue cannot stand considering that the very maker of the same that is, Abdul Ally Mursal is beyond reach of this Court. Furthermore; the referred statement under contest is not that of the 1st accused of which its volunterariness could have been put to test under *Section 27 of the Evidence Act, CAP 6* through test of the alleged confession, unlikely; it is that of someone else hence unfit for the Court to have conducted trial within trial to establish its voluntariness.

As to the first limb, the argument centres on adMsibily of the statement under *Section 34B of the Evidence Act* of which the same covers both witnesses and interpreters unlike as argued by the defence advocates. Importantly, an interpreter is a person who interpretes a statement from one language to another. As to the contested statement under scrutiny, the said Abdul Ally Mursal is expected to state on his role in interpreting the said statements/testimony given by the 1st accused person or else. In the circumstances, it makes him not different from any other witness anyway.

In the first place; at page 7 of the Committal Proceedings, the same is clear that the constested statement was read and formed part of those proceedings. That alone suffices consideration during trial thus rendering the raised objection unworthy to be raised and or tabled for determination.

In any aspect, *Section 211 of the Criminal Procedure Act* (*supra*) carters for right of interpretation in Court whenever any evidence is given in a language not understood by the accused. The same right is enshrined under *Article 13(1) and (6) of the Constitution of the United Republic of Tanzania*, 1977.[42]

The right to have an interpreter during proceedings, where necessary, was emphasised by the Court of Appeal of Tanzania in the case o *Qaiti Hawai & Kilimanjaro Heria v. The Republic*.[43] The Court said:

> In our view, it is probably true, as earlier initimated by Mr. Lukosi, that the second appellant is conversant with a bit of Swahili and that was why he defended himself on the above

[42] See *Julius Ishengoma Francis Ndyanabo v. Attorney General* [2004] TLR 14.

[43] Court of Appeal of Tanzania at Arusha, Civil Appeal No. 292 of 2008.

date. However, that will be far from saying that he was fully conversant with language as to be able to understand and appreciate everything that was going on at the trial … ordinarily it is the duty of the Court to look for an interpreter. Section 128 of the Evidence Act, 1967 provides:

> 128(1) A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, such as by writing or signs but such writing must be written, and the signs made in an open Court.
>
> (2) Evidence given in accordance with sub-section (1) shall be deemed to be oral evidence.

Also, in *Mpemba Mponeja v. The Republic*,[44] the Court of Appeal of Tanzania emphasised the importance of an interpreter for the person who does not have a good command of the court language and held:

> We start by considering the issue of denial of a fair hearing. This claim originates from claims that the appellant, who did not understand Kiswahili or could not speak it well, was at times during the trial, not provided with an interpreter from Kisukuma to Kiswahili and vice versa. We have perused the record and noted with concern that at times an interprester was provided and at times not. We consider this to be a fundamental breach of the appellant's rights to understand and

[44] Court of Appeal of Tanzania at Mwanza, Criminal Appeal No. 256 of 2009.

> follow up proceedings of the case against him. It was fatal oMsion.

As a rule, the Court of Appeal of Tanzania in *Salum Nhumbili v. The Republic*[45] underlined that "An interpreter must be sworn."

From the above, it is clear from both the law and jurisprudence of our country that the presence of an interprester during court proceedings where the accused or any of the witnesses do not posses knowledge of the court language is fundamental.

In case of use of interpreters during police interrogation or interview with the accused person the relevant authority is Tanzania General Police Orders whose Order 236(6)(b) provides *inter alia*, that:

> Where an interpreter has been used, his signature will be appended to the end of the statement immediately below that of the person making it together with a note of the language or dialect used.

Therefore, the law is not silent on this issue which is central to a rule of law and fair trial.[46]

The sixth issue is on*; whether there is a law which bars investigation officers to record statement of a witness.* This court in *Criminal Session case No. 22 of 2015 in the case of Republic v. Dhoulkefly Awadhi Abdallah @ Dully*

[45] Court of Appeal of Tanzania at Mwanza, Criminal Appeal No. 120 of 2009.

[46] On practice elsewhere on this issue see Wakefield, Shelle, *Police Use of Interpreters: Understanding Police Perception, Recognising Current Practice and Informing Best Practices*, Ph.D Thesis, Griffith University, Queensland, Australia, December, 2014.

Awadhi,[47] my brother Hon. Arufani, J. quoted the decision of *Njuguna s/o Kimani and Three Others v. Reginam*[48] in which the court held:

> It is inadvisable if not improper, for the Police Officer who is conducting the investigation of a case to charge and record the cautioned statement of a suspect.

In that case, my brother Arufan, J. went further to refuse the caution statement because the investigator was the one who recorded statement. However, the current position is that the Police Officer investigating an offence may, record the statement of that person. This is well provided for under *Section 15 (4) of Misc. Amendment Act No. 3 of 2011 which amended S. 58 of Criminal Procedure Act, 1985.*

On the other lineage of reasoning, in terms of *Section 289 of Criminal Procedure Act,1985* the law does not bar additional witnesses to be brought for the prosecution and the notice can either be in writing or oral. Such position was underscored by the Court of Appeal in *Asael Mwanga v. the Republic* (*supra*). Notably; this Court fully subscribes to the above cited position of the law.

It is on the above reasoning that this Court finds the notice given in advance to be reasonable and there is no good reason to deny grant of the prayer.

The above findings take me to the seventh issue on; *wether there is a distinction between a "notice to produce" and a "notice to tender" an*

[47] High Court of Tanzania (Dar es Salaam District Registry), Criminal Sessions No. 22 of 2015.

[48] (1954) EACA 316, at page 14.

additional document. On 15th February, 2019 the prosecution side (Ms. Mshanga, Senior State Attorney) raised an objection in the course of DW2 giving his testimony. The basis of the objection was with regard to the admissionof statements made by Michael Vicent Mountfort and PW4 Captain Hamad Juma Kipango.

In her objection, the Senior State Attorney argued that, during committal proceedings, the defence did not state that the said statements will be used as exhibits. Furthermore; DW2 is not the proper witness for he is not the maker of the same thus in contravention of the governing laws.

In reply, Mr. Nkwera resisted the objection arguing that; after closure of the prosecution case, Mr. Komba, advocate informed the Court that they will have seven witnesses and exhibits. He insisted that, it has been a practice during committal proceedings that an accused is not bound to speak everything.

In furthering his argument, Mr. Nkwera referred the case of *DPP v. Mirza Pirkakhishi @ Hadji and 3 Others (supra)* in which the Republic tendered a document on basis that the witness was knowledgeable of. He thus stressed that DW2 is a proper witness to tender the document as he is knowledgeable of the same. He added that, they issued notice to produce in terms of *Section 68 of the Evidence Act, CAP. 6.*

In rejoinder, Ms Mkunde reiterated her earlier subMsion adding that, "Notice to produce" is not synonymous to "Notice to tender". She vigorously argued that, if the defence wanted to contrast the prosecution document, they ought to have done so during cross examination in purview of *Section 154 of the Evidence Act, 1967*. Ms Mkunde distinguished the cited *Criminal Appeal No.*

493 of 2016 on the basis that the same did not refer to a document. In the said case, one Mayunga saw the exhibit, touched, possessed, examined and wrote the report unlike in the present case where the witness did nothing on the said documents warranting him knowledge of the same. Besides; the witness is not the custodian of the documents.

Having gone through the respective submissions by the learned friends as well as the position of the law, the following are the findings of this Court in disposal of the raised objection against admissionof statements made by the said Michael Vicent Mountfort and of Ahmad Juma Kipango.

As rightly submitted by Ms. Mshanga, there is a remarkable distinction between "*Notice to Produce*" and "*Notice to tender an additional document*" in law. Among the differences is that "Notice to Produce" is provided for under *Section 68 of the Evidence Act, CAP. 6* catering for situations where the referred document is under power or control of the opponent amongst.

On the other hand, "Notice to tender an additional document" is governed by *Section 289 of the Criminal Procedure Act, CAP. 20* catering for situations where statements or substance of evidence was/were not read over during committal proceedings upon communication of a reasonable notice. It is upon such situations one may seek refuge under the law in redress.

In the matter under scrutiny therefore, the defence avered to have produced a notice to produce and not that for additional witness or document worth to be accommodated under *Section 289 of the Criminal Procedure Act* in purview of what was observed by the Court of Appeal in *Asael Mwanga v. the Republic* (*supra*).

The above marks reasoning of the Court in disposition of raised objection against admissionof statements made by Michael Vicent Mountfort and of Ahmad Juma Kipango in evidence.

Needless reserved reasons of the court, the main lingering issue is; *whether or not, the accused persons took part in the charged piracy.* Essentially, it is undisputed fact that all the accused persons have testified to have been rescued from the Indian Ocean through a small boat on the fateful date. Though the prosecution could essentially be unable to see the assailants while in the invaded boat, that alone does not suffice disassociation of the accused persons from the charged piracy.

The testimony by PW1 was clear that he saw the 1st accused person jumping from the skiff to *Sams - All good*. The accused persons failed to cast shadow of doubt on the testimonies by PW2 and PW8 regarding shifting of pirates from from *Sams-All good* to *Frobsher*. Importantly, there was no contradiction as alleged as to shifting of pirates from *Sams-All good* to *Frobisher*.

Notably; the only difference in the asserted contradiction is that PW2 testified to have seen all the seven been shifted (without grouping them) whith PW8 accounting for the same by putting them into groups. Thus, that on the face of it cannot be a contradiction, rather; a difference which though cannot be argued to have caused any miscarriage of justice on the accused.

It is unworthy or rather unacceptable for one to expect the army officers who were sent to the ocean to guard the ship undertaking exploration of oil activities in the Exclusive Economic Zone of Coastal State to carry with them search and seizure Certificates for that sake. Additionally, army forces are

not responsible for such business of search and seizure which customarily, are duly vested to the Police Force.

Regarding identification of the accused persons, both the defence counsel during subMsion and DW7 during testimony in defence raised an issue that PW1 manged to identify DW7 for instance due to the fact that his leg had been amputated hence, easily to be identified. With due respect, the evidence by PW1 (among other prosecution witnesses) was clear and managed to identify DW2, DW3, DW4 and DW7. If at all amputation of DW7's leg was the sole reason one could not have expected PW1 and or the rest been able to identify the accused persons at the dock despite lapse of about 7½ years.

Importantly, though the defence side had introduced the issue of identification in their respective final submissions, the said issue is demeritous in law considering circumtsnaces of the case at hand with the reasons not hard to grasp. Strictly speaking, according to the evidence on record, the prosecution witnesses had the opportunity to engage into direct shootings with the pirates whereas at last, they overpowered them leading them to surrender to the Tanzania Army Officers. After surrendering, they were led into the crew and taken to the Mainland under strict surveillance and security. In what the Court called a lake Pirate case of *Shamir s/o John v. The Republic*,[49] the Court of Appeal of Tanzania disMsed the appeal basing on the quality of identification. At page 14 the Court observed; -

[49] Court of Appeal of Tanzania, Criminal Appeal No. 166 of 2004 (Unreported).

> the quality of the identification was impeccable and remained so at the close of the appellant's case.

Remarkably, there was no point that the said pirates escaped and later rearrested or rather that they were arrested later after escaping from the battle field regarding the incidents happening in the Indian Ocean on the fateful date. In other words, there was no break of chain of events between invasion, fighting, arrest, seizure and handling the pirates to the respective authorities including the Court which ultimately, they are facing their trial.

Most importantly, the evidence of all accused persons indicate that they coached each other on what to say before the Court. They all asserted that they were on the way to South Africa on search of better living opportunities. But all the accused persons never mentioned the name and the registration number of the vessel they were using. They all asserted that they were about 100 people on board. They all asserted further that their boat lost balance and threw some of them into the ocean. All accused persons allege that after being rescued by good Samaritans they were blindfolded. This leaves much to be desired. How can a good Samaritan who rescues them blindfold them? In general, the whole evidence of the accused reflects to be coached evidence. In the case of *Manju Salum Msambya v. The Attorney General and Kifu Gulamhussein Kifu* (*supra*), the Court of Appeal of Tanzania observed:

> ... whereas exact replication of evidence could suggest coaching ...

It is from the afore accused persons' evidence, I find the accused persons have used well their remand custody period and the Court attendances dates in coaching themselves about the evidence to give in Court. The couching

solidifies the prosecution evidence that it is the accused persons who jointly committed the charged offence of piracy.

Furthermore, the allegations by all the accused persons that they were travelling to South Africa impliedly means the defence of the international acknowledged right of innocent passage in the territorial sea and international waters in general. However, the accused person failed to cast doubt on the prosecution evidence for the skiff navigating through the Tanzania Exclusive Economic Zone within 175 Neutical Miles area. There was no shadow of doubt on the distance in which the skiff boat cruised.

Indeed, according to the evidence adduced by PW1, PW2, PW3, PW4, PW5 and PW8 as well as the coaching evidence of the accused persons, it follows very clearly that the accused persons had common intention, they acted under common design to commit the offence of piracy. The common intention here means a sharing of similar intention before the offence was committed and thereafter.

The accused persons though coming from different parts of Somalia, planned together in a concerted manner while at Raskamboni, travelled together in a piratical ship whose name and number was concealed by all the accused persons, exchanged fire with the Tanzania navy forces despite of hearing warning announcement and shots, and couched themselves on the evidence to adduce after they were apprehended. All these overt acts show that all the accused persons had common intention to commit piracy. The provision

of *Section 23 of the Penal Code* was applied by the Court of Appeal in the case of *Ally Mohamed Mwaya v. Republic,*[50] where it was held that:

> It is settled that when two or more persons form an intention to prosecute an unlawful purpose or jointly, and in the prosecution of such purpose or jointly and in the prosecution of which an offence is committed of such a nature that its comMsion was probable consequence, each of them is deemed to have committed the offence.

The Court of Appeal of the Seychelles in the case of *Mohamed Shire and 6 Others v. The Republic*[51] when analyzing *Section 65 (4) (b) and 65 (5) (b) of the Penal Code of the Seychelles* which are *in pari materia* to *Section 66(1)(b) and (c) of the Penal Code of Tanzania*, underscored the importance of establishing voluntary participation in the operation of the piratical ship. At page 3 Para 7 of the typed judgment the Court observed:

> Even if it could be assumed that a person had knowledge that the ship had been or was to be used for the purpose of committing acts of piracy, if he had not voluntarily participated in the operation of the ship such person could not be liable.
>
> Also, even if the person had voluntarily participated in the operation of the ship but without knowledge that the ship had

[50] Court of Appeal of Tanzania, Criminal Appeal No. 214 of 2011 (Unreported).

[51] The Supreme Court of the Seychelles, Criminal Appeal SCA 31 – 37/2014 (A. Fernando, J.A.; M. Twomey, J.A.; and J. Msoffe J.A.)

> been or was to be used for the purpose of committing acts of piracy, he cannot be made liable.

At paragraph 8, my Lords went on to observe as to when one becomes knowledgeable of the Pirate ship and they stated:

> In cases of Piracy a Court must also bear in mind as to when a person became aware of facts making it a pirate ship, was it before or at the time he joined the ship or only in the middle of the ocean when possibly he had no other option but to continue remaining in the ship ... There should be direct or circumstantial evidence to establish voluntary participation and knowledge.

In the instant case the direct and circumstantial evidence is very clear that all the Accused person had intention of committing a piratical act. The presence of exhibits P1 and P2 collectively in *Sams-All good* shows were suitable piratical implements used by all accused persons, lack of legal travel documents to South Africa, the couched similar evidence clearly demostrates that all the accused persons had common knowledge of the skiff being a vessel with a purpose of committing piratical act. All the accused persons voluntarily participated in the operation of the destroyed skiff and all the accused persons were aware from Raskamboni the vessel they boarded was a pirate ship.

Further, all the accused person's intention to commit the piratical act can be established through the fire exchange with the navy forces despite of the warning shots fired, by the *Frobisher*.

In the light of Section 65 of the Penal Code, Article 101 of the UNCLOS and Article 3 (1) and (2) of the SUA Convention, it is apparent from the prosecution witnesses notably PW1, PW2, PW3, PW4, PW5 and PW8 the intention of all the accused persons was likely to endanger the safe navigation of the *Sams – All good* ship. The overt act of the accused persons to board into *Sams – All good* ship with firearms gunshot (AK47) caused the crew to hide themselves in the engine room, thereby making *Sams-All good* ship to lose direction. The exchange of fire with navy armed forces cannot be in any way be regarded a legal act or act of nonviolence. It was an attempt to intercept board and take control of Sams-All good ship.

In whatever the case, the items found in the Sams-All good which did not belong to that ship namely *inter alia* the magazine, spent bullet and the live ammunitions implicate all the accused persons to the charged piracy offence. To that effect, the prosecution has proved their case beyond reasonable doubt. In *R. v. Houssein Mohamed Osman and 10 Others*[52] my brother Gaswaga, J., of the Supreme Court of Seychelles faced almost a similar case, statated the following about the accused persons:

> ... They are Somali immigrants who had paid a sum of money between 400 USD and 800 USD to the boat owner to transport them to South Africa where they were going to look for a work. They denied having been in possession of any weapons or having fired at the Draco and that they never threw any weapons into the water ...

[52] 2011 SLR 345.

In dismissing the evidence of the accused persons in that case, my brother Gaswaga, J. underscored the importance of the prosecution case to prove their case beyond reasonable doubt and that the conviction cannot be based on the strength or weakness of the defence case. To be precise, I will quote his findings:

> Be that as it may be, it is a cardinal obligation for the prosecution to prove beyond reasonable doubt that each one of the accused persons committed the offence charged. It must be stressed that this burden of proof is in respect of every issue and in respect of every element of crime. The Court is not bothered by the strength or weakness of the defence case. The defendant is entitled to be acquitted even though the court is not satisfied that his story is true, so long as the court is of the view that his story might reasonably be true ...

From those findings of Gaswaga, J. when I take the accused's evidence in this case in conjunction with the evidence of the prosecution evidence in particular of PW1 to PW14, the evidence of all accused persons becomes an improbability and falsehood. In that regard, the prosecution case remains proved beyond reasonable doubt.

Before reaching decision, two lay members out of three who presided over this matter throughout namely; Mr. Hassan Juma and Ms. Mwanahawa Selemani unanimously discharged their duties laid under *Section 265 of the Criminal Procedure Act* (*supra*) and were of divided opinion. Mr. Hassan Juma opinied for the accused. In his reasoning, all the accused person admitted to had illegally passed in the Tanzanian's Ocean water but they

never committed piracy offence. Ms. Mwanahawa Selemani on her part opined for the Republic. She was of the view that all the accused person are guilty of piracy offence as charged for two reasons; *first*, they illegally entered into Tanzanians' Ocean water; *second*, the prosecution witnesses gave strong evidence that they were invaded by the pirates using fire guns. Upon being defeated the accused persons were arrested and charged of the piracy offence.

The third lay member one Jane Veila Lema was bereaved of her grandmother on the day summing up was read to the assessors. That being a sufficient reason, in terms of Section 286 of the *Criminal Procedure Act* (*supra*), the quorum was complete with two assesors.

From the above evidence and reasoning in unison, I agree with the opinion of the wise assessor Ms. Mwanahawa Selemani that the republic proved its case beyond reasonable doubt. As such, this Court finds the charges against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th accused persons in light of the adduced evidence to have been proved beyond reasonable doubts to be criminally responsible for the charged count of piracy contrary to *Section 66(1)(a)(i) and (2) of the Penal Code, CAP. 16 as amended by the Written Laws (Miscellaneous Amendment) (No. 2) Act No. 11 of 2010.*

Consequetnly, all the seven (7) accused persons i.e. 1st, 2nd, 3rd, 4th, 5th, 6th and 7th are all hereby convicted of piracy contrary to the provisions of *Section 66(1)(a)(i) and (2) of the Penal Code, CAP. 16 as amended by the Written Laws (Miscellaneous Amendment) (No. 2) Act No. 11 of 2010.*

Before I pen off, let me note that this is a very dynamic area of the law where municipal law meets and harmoniously works with international law.

Therefore, the interests of justice in piracy cases would be best served if the *Penal Code of the United Republic of Tanzania Cap 16 (R.E 2002)* would be amended to catch up with the developments at international level and particularly Article 3 of the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988* which Tanzania is a Party.

Y.J. MLYAMBINA

JUDGE

18/04/2019

Judgment delivered in Open Court this 18th day of April, 2019 in the presence by Ms. Mshanga and Ms. Shelly, all Senior State Attorneys, Mr. Barasa, State Attorney and Ms Celina Shuma, State Attorney trainee while Mr. Benson Ngowi representing Mr. Komba for 1st accused; Mr. Dennis for 5th accused; Mr. Nkwera also represeting Mr. Rupia, Mr. Msemo, Mr. Tumaini, Mr. Pius; and Mr. Kulita represented the 2nd, 3rd, 4th, 6th and 7th accused persons respectively. Also, in the presence of Mr. Hassan Juma and Ms Mwanahawa Seleman, Court Assessors.

Y.J. MLYAMBINA

JUDGE

18/04/2019

MITIGATION

Mr. DOMINICUS NKWERA, ADVOCATE (On behalf of all accused persons)

My Lord, the offence which all the accused persons are convicted is their first offence as per the instructions I got.

My Lord, all the accused persons are dependable to their families in Somalia.

To add, in practice the object of mitigation is to lessen the sentence to the accused.

My Lord, due to the weakness of the charged provision, the sentence is life imprisonment. We pray for an amendment of the law. *Section 66 (1) (a) (1) and (2) of the Penal Code, Cap 16 as amended by the Written Laws (Misc. Amendment) (No. 2) Act. No. 11 of 2010* to lessen the sentence.

MS. MSHANGA, SENIOR STATE ATTORNEY

My Lord, we pray for a strong sentence be issued as per the law so that it becomes a lesson to others contemplating committing piracy offence. We have the following reasons:

1. The act of piracy jeopardized the security and economy of the Country;
2. The life of people was jeopardized by that piratic act;
3. Piracy breached relation with other Countries; and
4. Piracy jeopardizes peace.

My Lord, we pray this Court to note that piracy cannot be condoned by any peace-loving State. It is dangerous to all human beings. We therefore pray that sentence be issued as per the law.

My Lord, the act done by the pirates should be deterred by all States. If Tanzania could not take action, other Countries could do so. Piracy calls for universal jurisdiction. That is all.

SENTENCE

I have considered the submissions made by Mr. Dominicus Nkwera, Advocate on behalf of all accused person and of Ms. Mshanga Mkunde on behalf of the prosecution.

I have also examined the municipal law, international law, security concerns, diplomatic and social circumstances around this piracy case. Piracy is lucrative and dangerous to all nations' security, economy and politics.

As correctly submitted by both Mr. Nkwera and Ms. Mshanga, Counsels, life imprisonment is the only sentence for piracy. I therefore, sentence you the said:

1. Mohamed Nuru Adam;
2. Bashir Yusuph Rooble;
3. Muhsini Shehe Haji;
4. Abdulwaidi Abdalahamani;

5. Farahani Ali Abdul;

6. Ally Nur Ally; and

7. Omar Mohamed@ Mudhee

For life imprisonment.

Y.J. MLYAMBINA

JUDGE

18/04/2019

COURT:

Right of Appeal to the Court of Appeal explained.

Y.J. MLYAMBINA

JUDGE

18/04/2019