

THE REPUBLIC OF SEYCHELLES
IN THE SUPREME COURT OF SEYCHELLES

(Holden At Victoria, Mahe Island)

THE REPUBLIC
VS.
ABDUKAR AHMED & FIVE (5) OTHERS

Criminal Side No. 21 of 2011

Mr. Michael Mulkerrins for the Republic

Mr. France Bonte for all 6 Accused persons

JUDGMENT

Gaswaga, J

[1] Charges have been brought against the six accused persons who are all of Somali nationality. The said charges are outlined as follows:

Count 1

Statement of offence

Piracy contrary to section 65 of the Penal Code read with section 23 of the Penal Code and punishable under section 65 of the Penal Code.

Particulars of Offence

Abdukar Ahmed (A1), Mohamed Mohamud (A2), Hussain Ahmed Mohamed (A3), Abdunur Haji Aden (A4), Abdulkadir Abdi Ali (A5) and Shafi Abdullahi Ali (A6) on the 19th April, 2011 on the high seas with

common intention, committed an illegal act of violence or detention or an act of depredation committed for private ends against persons on board another ship namely 'the *Gloria*' by unlawfully taking control of the said ship whilst armed with firearms.

Count 2

Statement of Offence

Piracy contrary to section 65 of the Penal Code read with section 23 of the Penal Code and punishable under section 65 of the Penal Code.

Particulars of Offence

Abdukar Ahmed (A1), Mohamed Mohamud (A2), Hussain Ahmed Mohamed (A3), Abdunur Haji Aden (A4), Adbulkadir Abdi Ali (A5) and Shafi Abdullahi Ali (A6) on the 20th April, 2011 on the high seas with common intention, committed an illegal act of violence committed for private ends against persons on board another ship namely the crew of 'La *Fleche*' by unlawfully discharging firearms against and towards 'La *Fleche*' and her crew.

Count 3

Statement of Offence

Piracy contrary to section 65 of the Penal Code read with Section 23 of the Penal Code and punishable under Section 65 of the Penal Code.

Particulars of Offence

Abdukar Ahmed (A1), Mohamed Mohamud (A2), Hussain Ahmed Mohamed (A3), Abdunur Haji Aden (A4), Adbulkadir Abdi Ali (A5) and Shafi Abdullahi Ali (A6) on the 20th November, 2011 on the high seas with common intention, committed an illegal act of violence committed for

private ends against persons on board another ship namely the crew of 'Andromache' by unlawfully discharging firearms against and towards 'Andromache' and her crew.

[2] I find it apposite, at the outset, to indicate some of the relevant provisions of the law on the crime of piracy in this jurisdiction before narrating the facts herein briefly. **Section 65(1) and (7) of the Penal Code, Cap 158 as amended by Act no. 2 of 2010** read as follows:

“65. (1) Any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offence and liable to imprisonment for 30 years and a fine of R1. Million.

(7) Members of the Police and Defence Forces of Seychelles shall on the high seas, or may in any other place outside the jurisdiction of any State, seize a pirate ship or a pirate aircraft, or a ship or an aircraft taken by piracy and in the control of pirates, and arrest the persons and seize the property on board. The Seychelles Court shall hear and determine the case against such persons and order the action to be taken as regards the ships, aircraft or property seized accordingly to the law.

[3] In addition, since no State can exercise its writ on the high seas, Article 100 of the United Nations Convention on the Law of the Sea, 1982

(UNCLOS) urges all individual countries to cooperate in trying and punishing the offenders of piracy regardless of their nationality because a pirate, in the international sense, is *hostis humani generis* (enemy of humanity). This means that any person apprehended for piracy has placed himself beyond the protection of any State and is justiciable by the State that arrests him. Like in this case, the Somali nationals shall be properly tried under the municipal law of the Republic of Seychelles. See In re Piracy Jure Gentium, 1934 page 586, Halsbury's Laws of England, fourth edition as revised in 1977 Vol. 18 at 787 -789, and Grotius (1583-1645) "De Jure Belli ac Pacis," Vol. 2, cap. 20,...40

[4]The charges herein have been brought specifically under **Section 65 of the Penal Code, Cap 158 as amended by Act no. 2 of 2010** which in part reads as follows:

(4) For the purposes of this section "piracy" includes -

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

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

***(ii) against a ship, an aircraft, a person or property
in a place outside the jurisdiction of any State;***

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

***(c) any act described in paragraph (a) or (b) which, except
for the fact that it was committed within a maritime
zone of Seychelles, would have been an act of piracy
under either of those paragraphs.***

***(5) A ship or aircraft shall be considered a pirate ship or a
pirate aircraft if -***

***(a) it has been used to commit any of the acts referred to
in subsection (4) and remains under the control of the
persons who committed those acts; or***

***(b) it is intended by the person in dominant control of it to
be used for the purpose of committing any of the acts
referred to in subsection (4).***

[5] It was the prosecution's case that on the 18th of April, 2011, four Seychellois fishermen from Praslin Island set out on a fishing trip in the waters of the Indian Ocean. Aboard the fishing vessel (the *Gloria*) was, Egbert Dorizo (PW5), Benard Reginald (PW3), Frank Orphee (PW4) and Jean Francois Souffe (PW1), the Captain. On the 19th of April, 2011 at about 08:30 am, while fishing at a position about 138 nautical miles (NM) north east of Praslin Island, the Captain noticed a fast approaching boat. No sooner had he become aware of it than it caught up with the *Gloria*. It is the evidence of all the fishermen that seven men, all armed with various types of weapons and bullets in plastic bags, immediately boarded, ordered them to raise their hands in the air, and took control of the *Gloria*. They also tied their long green boat (skiff) they had come in to the stern of the *Gloria*. Shafi Abdullaji Ali (A6), who was the leader of the group, ordered the Captain to maneuver the vessel towards Somalia. That all the men were shouting "*Somalia, Somalia, Somalia, go, go, go...*", while pointing in a certain direction. The Captain was also forced to switch off the communication gadgets and GPS and, on the following day at 02:00 am, all the lights too.

[6] Unknown to the assailants, the Captain had already made a distress call to which the *Andromache* and the *La Fleche*, vessels belonging to the Seychelles coast guard, promptly responded. The Captain of the *La Fleche*, Tom Estico (PW2) arrived at the place of interest at about 07:00 pm and he kept surveillance over the movement of the *Gloria*, which

was towing a green skiff, until 02:00 am the next day when it stopped and switched off the lights. In a bid to avoid an attack while it was still dark, Captain Estico made radio contact with the *Gloria* and spoke to Francois Souffe in kreol. Although their captors had instructed him to tell the *La Fleche* to go away, Francois Souffe managed also to inform Captain Estico in *kreol* that “*I annan set pirate e bann Seselwa I deryer dan bato*” (There are seven pirates and all the Seychellois are at the back of the boat).

[7] Since Captain Estico could hear in the background some people shouting in English and threatening to kill the fishermen if the coast guard did not go away and keep a distance of 5 nautical miles, he decided to back off. Again at 06:00 am he contacted the *Gloria* and negotiated for the release of the fishermen in vain. By this time, the *Andromache* had also arrived in the vicinity and both vessels were closely following and monitoring the *Gloria*. Despite repeated requests by the *La Fleche* to stop, the *Gloria* did not heed. They were surrounded. In line with the rules of engagement at sea, three warning shots were fired in the air, then at the front above the bow and at the back of the *Gloria* which just continued moving. All this was in an effort to stop the *Gloria* peacefully. The assailants started opening fire at the two coast guard vessels. The *Andromache* and *La Fleche* also returned fire with their 12.7 mm caliber guns. Ferdinand Laporte (PW6), the Captain of the *Andromache* deposed that using the binoculars they had been able to see the assailants and

the weapons they were using. They were using the 7.6 SMG (AK47) and the fire could not get to the two vessels which maintained a safe distance of 0.4 NM. The exchange of fire went on for almost 1 hour and 30 minutes as the *Gloria* continued to move in a zig zag manner in front of the two coast guard vessels.

[8] Francois Souffe had stated that he was asleep when the fire exchange started and Shaffi Abdullahi (A6) woke him up and ordered all the fishermen, save for Benard Reginald (PW3) who was at the time steering the *Gloria*, to sit on the ice box next the assailants. Here, they were quite exposed to the fire. That Abudkar Ahmed (A1) put his gun on Fracois Souffe's head and then started firing in the air. Abudnnur Haji Aden (A4) was holding the Rocket Propelled Grenade (RPG) on his shoulder while standing next to the ice box but was on various occasions stopped from firing it by Mohamed Mohamud (A2) and Shaffi Abdullahi (A6). Benard Reginald stated that the seven men were aggressive. It was the testimony of Frank Orphee (PW4) that after forcing him to cook, the assailants ate their food, and then Mohamed Mohamud (PW2) placed a gun on his head with the barrel pointing skywards and fired it. The old man felt so confused for some time. Egbert Dorizo (PW5) said that the spent cartridges fell on them as the men fired their rifles which they sometimes pointed at them and also forced them into the cabin.

[9] That due to persistent fire, three of the assailants got injured and dropped on the deck. Francois Souffe was ordered to remove his white shirt and wave it in the air. On seeing the white 'flag' through the binoculars on the *Andromache*, the shooting by the *La Fleche* and *Andromache* stopped. One of the fishermen, Benard Reginald, got shot in the left shoulder while in the cabin. His life was saved by the coast guard officers who swiftly transferred him to the *Andromache* to administer first aid to his wounds before rushing him to Victoria hospital aboard a much faster vessel, the *La Fleche*.

[10]The *Andromache's* Zodiac team (boarding party) consisting of four special forces officers approached the *Gloria* and arrested the seven men who, by that time, had thrown some of the weapons into the sea. However, given the intense fire, they did not have time to get rid of all the weapons. All the three injured men were also carried away by the *La Fleche* to Mahe Island and one of them, Farahan, died upon arrival at Victoria Hospital. Abudkar Ahmed (A1) and Mohamed Mohamud (A2) are still nursing wounds on the arm and on the leg respectively. In the course of the fire exchange, damage was sustained to the *Gloria* and the skiff.

[11] The surviving men were formerly arrested on arrival in Port Victoria by Sub Inspector Belle with the assistance of a Somali/English interpreter

and subsequently, together with the two injured colleagues, charged before this court as indicated hereinabove.

[12]The skiff was photographed by Lt Ivel Ernesta (PW7) and later left to sink since it had been damaged and was taking in a lot of water as it was being towed by the Gloria. See photos 60-63. Several items found on the skiff were loaded onto the *Andromache* in the presence of the fishermen by Lt Alex Serret (PW8), the designated exhibit officer on the *Andromache*. He then handed them over to Sub Inspector Ronnie Malvina (PW9) for safe custody until they were exhibited in court. They included two outboard Yamaha engines, a ten-metre-long ladder with hooks, 78 big plastic barrels of fuel, 47 of which were still full. There were also four blue small plastic gallons of engine oil (PE2).

[13]The court visited the armoury to view the bombs (PE4) which Sergeant Magnam (PW10), the armourer had stated that were delicate and dangerous because of having already been hit on the head, and if shaken could explode any time. As a ballistics expert, Sergeant Magnam had examined the bombs and found them to be serviceable while the AK 47 rifles were functional and had been recently fired, save for one. He also concluded that the magazines carried in the chest belt contained live ammunition as did the black plastic bag (PE2). The RPG launcher too was functional. This court is satisfied with the chain of custody of the said

exhibits from the point at which they were impounded until the time of being tendered in court.

[14]After evaluating this evidence, the court called upon all the accused to put up a defence pursuant to **section 184 of the Criminal Procedure Code, Cap 54**. Save for Abdunur Haji Aden (A4), all the other accused chose to remain silent and the court draws no adverse inference in the circumstances. **See Article 19 (2) (h) of the Constitution**. The accused also stated that they had no witnesses to testify on their behalf. Instead, they left the whole matter to the defence counsel to consider their statements to the police and also make submissions on their behalf.

[15]In his unsworn statement, Abdunur Haji (A4) stated that the weapons and other items seen and tendered in court were not his. Further, that if he was not allowed to speak on behalf of the other accused persons then he would rather sit down because he was not the only one in the boat. In their statements to the police, all the accused stated that they were Somali fishermen who had gone out at sea to fish and their boat run out of fuel. That having spotted the *Gloria*, the accused went to ask the crew to take them to Somalia and thereafter release them with enough fuel to return home. That this was not an attack. Regarding the use of weapons against the Seychellois fishermen, Abudkar (A1) said they did not want them to run away while Abdunur Haji (A4) stated that they wanted to put them in fear. Further admissions in the statements,

which statements were never contested, are to the effect that the accused boarded the *Gloria* with rifles and RPG's, and later at the police station, all of them, save for Mohamad Mohamud (A2) and Abdunur Haji (A4), recognized the said weapons as being the ones they carried on that occasion.

[16] Mohamad Mohamud's assertion that he only recognized the four blue gallons cannot be accepted by this court given the overwhelming evidence available. In the same vein, it cannot be true that they had run out of fuel yet on their boat 47 barrels were found still full of fuel. The accused also could not agree on how long they had been at sea, the discrepancies ranging from periods of 1 week to 6 weeks. Although the accused try at some point to heap all the blame on Farhan, the deceased colleague, there is independent and credible evidence to prove that all the accused participated in making a decision to attack the *Gloria*, some of which being admissions by the accused themselves. It should be noted that there is no reason why a court should not accept and act upon admission made by an accused as against himself, though rejecting as untrue the part of the statement sought to implicate other persons or exonerate himself. **See Pool Vs R (1974) SLR.**

[17] From this evidence, I am fully satisfied that the accused are the men who forcefully boarded the *Gloria*, took control of it, and commandeered it in the North West direction towards Somalia. Wielding

their weapons, they employed force, threats and intimidation to achieve this, all against the will and cooperation of the fishermen. They were violent and detained the fishermen who were not allowed to move on their own unless directed. The accused were found and arrested on the *Gloria* and some of their weapons recovered therefrom. These facts are not disputed by the defence. Indeed, the defence evidence corroborates most of the prosecution case.

[18] Having interacted with the accused for some time on the same vessel, the fishermen were also able to make a positive identification, without any difficulty, of each one of the accused persons and the role they played while on the *Gloria*. It also became clear that they did not only arrive together in the same boat but also acted and worked together during the material time, following orders from their leader, Shaffi Abdullaji Ali (A6). Moreover, all of them stated in their interview with the police that *"it was our decision to attack, we discussed and we all took part"*. This evidence fulfills the required element of 'common intention' as provided for by **section 23 of the Penal Code, Cap 158** that the accused planned and executed the crime collectively all through this joint enterprise aiming at a common goal. With such a joint decision made, it is immaterial to point out exactly whose hand did what.

[19] Learned defence counsel, Mr. France Bonte, submitted that the prosecution had failed to prove all the essential elements of the offence

of piracy to the standard required in criminal law. His contention is that the prosecution did not prove that there was a **'second boat' (ship)**, apart from the *Gloria*, in this case as required by section 65 (which defines piracy) otherwise it would have been exhibited in court. In his further submission, learned counsel argues that the prosecution's failure to prove that the accused were acting for **'private ends'** was fatal to the case. It should be recalled that in criminal law, failure to prove a single essential ingredient of the offence beyond a reasonable doubt must automatically lead to an acquittal.

[20]When one considers the evidence of the fishermen, whom I found to be credible and reliable, it becomes apparent that the accused came in a long green boat which was then tied onto and towed by the *Gloria*. Officers on the *Andromache* removed all the items found on it including the two Yamaha (Enduro 40 and 60) engines exhibited in court as (PE3), and also photographed it (photos 60-63 of PE1). The fishermen had testified that due to the extensive damage caused on the skiff by the coast guard fire, the vessel had started taking in a lot of water while being towed to Mahe by the *Gloria*, and was therefore left to sink at a position about 20 miles from Denis Island. This is a plausible explanation which the court believes. Not every article used and recovered in or relevant to a case has to be physically produced and exhibited in court. Sometimes, even oral or photographic evidence of the item can suffice.

Accordingly, learned counsel's contention of '*lack of a second ship*' is rejected.

[21] On the second query of the element of '*private ends*', we should bear in mind that according to the definition provided in law, one will notice that piracy is a war-like act committed by non-state actors (private parties not affiliated with any government) against other parties at sea. So, in common parlance, piracy is generally understood as violence or depredation or detention on the seas for private ends without authorization by public authority. Therefore, such bands of sea brigands commit these atrocities at their own will and for their own ends. This could however be further distinguished from privateering which was common in the 17th and 18th Centuries, but lost international sanction under the Declaration of Paris in 1856. A privateer or corsair used similar methods to a pirate, but acted while in possession of a commission or letter of marque from a government or monarch authorizing the capture of merchant ships belonging to an enemy nation. For instance, the United States' Constitution of 1787 specifically authorized Congress to issue letters of marque and reprisal. The letter of marque was recognized by international convention and meant that a privateer could not technically be charged with piracy while attacking the targets named in his commission.

[22] Back to the case at hand, the evidence reveals that the accused were motoring an unregistered boat on the high seas. The boat was also flying no flag. In their own statements, the accused said it was their joint decision to attack the *Gloria*. And further, that some accused were recruited by one Ahmed Hussein and others by Hassan Ali. They also stated that the boat was owned by Farahan (deceased) who also supplied the group with the fuel, food, engines, weapons and other equipment. Generally, apart from names of individuals, there was no mention of any government or international organization or authority of some sort that was attributed to being responsible for this mission. Indeed, none has come forward to claim so. These factors can only confirm that the accused were acting on their own and for their own private ends. Again, this court rejects learned defence counsel's submission on this matter.

[23] Ferdinand Laporte (PW6), the Captain of the *Andromache* corroborated the evidence of the fishermen to the effect that the incident took place at a location 02 degrees 21 minutes south and 056 degrees 29 minutes east (about 150 nautical miles of Mahe) which falls within the Exclusive Economic Zone (EEZ) of Seychelles. The Exclusive Economic Zone (EEZ) - stretching for up to 200 nautical miles past the territorial seas- is essentially concerned with resources. The law of the coastal state does not apply in the EEZ, and it does not have general enforcement rights. Other than as regards resources, EEZ's are counted as the high seas.

[24] Apart from a tiny piece of net, there were no lines or hooks, no bait or fish, no any fishing gear to talk of or ice boxes to preserve the fish caught by the accused that was found on their boat. Their claim of being fishermen who had left their motherland a number of weeks before their arrest to go fishing cannot therefore stand. What actually stands, as borne out of evidence, is that they are a gang of armed seafaring pirates preying on innocent, unarmed and unprotected fishermen. All the paraphernalia recovered from their boat is akin to piratical activities and supports this finding.

[25] It will be recalled that although the accused fired at the *Andromache* and *La Fleche* thereby engaging in an exchange of fire for quite some time, none of the crew was injured. There was no damage caused to the said vessels. Neither did the accused manage to board these vessels. It has long been settled that "*an actual robbery is not an essential element of the crime. A frustrated attempt to commit a piratical robbery (as in the instant case in respect of the coast guard vessels) will constitute piracy jure gentium.*" See Re Piracy Jure Gentium [1934] A. C 586.

[26] In a nut shell, the prosecution has proved to the satisfaction of the court that all the above illegal acts of violence, detention and depredation were committed by the accused with common intention, upon the high

seas for private ends against the persons on board vessels Andromache, La Fleche and Gloria. Having proved all the essential elements of the offences herein beyond a reasonable doubt, the court finds each of the accused persons guilty as charged on all three counts and accordingly convicts them.



DUNCAN GASWAGA

JUDGE

Dated this 14th day of July, 2011.