

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA AT DAR ES-SALAAM CRIMINAL SESSION CASE NO. 38 OF 2009 REPUBLIC VERSUS HSU CHIN TAI & 4 OTHERS Date of last Order · 20/12/2011 Date of Judgment 23/2/2012

JUDGMENT

Mwarija, I. In this case, there are five accused persons against whom the prosecution has preferred three counts. In the first count, the accused persons stand charged jointly with the offence of carrying out fishing activity in the Exclusive Economic Zone (EEZ) of the United Republic of Tanzania contrary to section 18 (1) of the Deep Sea Fishing Authority Act, Cap. 388 [R.E. 2002] (hereinafter to be referred to shortly as "the Act") as amended by Act No. 4 of 2007 read together with regulation 67 of the Deep Sea Fishing Authority Regulations, 2009, GN No. 48 of 2009 (hereinafter to be referred to shortly as "the Regulations"). It has been alleged that on divers dates between 10th January, 2009 and 8th March, 2009 while on board a Motor Vessel named No. 68 BUYGUNG @ TAWARIQ I @ TAWARIQ 2 (hereinafter referred to as "the ship"), the accused persons did jointly and together carry out fishing activity in the EEZ of the United Republic of Tanzania without licence. In the second count, the accused persons stand charged with the offence of causing water Pollution and Degradation of Marine Environment contrary to regulations 25 (1) and (2) and 70 of the Regulations. It is alleged that between the dates mentioned in the first count, the accused persons did jointly and together pollute the waters and degraded the marine environment of the Tanzanian EEZ by throwing offal and other fish wastes and also by flowing oil in the water. In the third count, which is an alternative to the two counts above, the 7th and 9th accused persons have been charged with the offence of being Accessory After the Fact contrary to sections 387 (1) and 388 of the Penal Code, Cap. 15 [R.E. 2002]. The prosecution alleges that the two accused persons, knowing that their co-accused persons have committed the offences named in the 1st and 2nd counts, did assist to enable them to escape prosecution and punishment. Initially the five accused persons were jointly charged with other 32 persons. At the close of the prosecution, 31 accused persons were found to have no case to answer and were therefore acquitted. One other person who was the 18th accused person, Juma Juma Kumbu passed away and the case against him abated. The trial in this case involved the services of interpreters because of different 2 nationalities of the 37 accused persons who faced the charges as stated above. Mr. Xavier Ndalawa interpreted Kiswahili into English and vice versa. Capt. Meccar, Kiswahili into Indonesian and vice versa, Mr. Ernest mateza Kiswahili

into Chinese and vice versa and Ms. Gorelia Dimatera English into Filipino and vice versa. I thank them very much for their time and for their commendable work. They have greatly assisted the court in performing its duty of dispensing justice. The prosecution was led by Mr. Mganga learned Principal State Attorney who was assisted at different stages of the trial by a total of five learned State Attorneys; Mr. Nangela, Principal State Attorney, Mr. Mwangamila and Mr. Maugo, Senior State Attorneys, and Mr. Mwanga and Mr. Sekwao, State Attorneys. The 1st and 7th accused persons were represented by Capt. Bendera learned counsel while the 9th, 33rd and 34th accused persons were represented by Mr. Mapinduzi, learned counsel. Evidence for the prosecution was adduced by 13 witnesses. PW3 Ernest Bupamba participated in the arrest of the ship in the ocean at the location where the prosecution alleged that the accused persons carried out illegal fishing. The witness was until the material time an employee of the Ministry of -- Livestock and Fisheries Development and was an authorized officer charged with inter alia, the duty of enforcing fisheries laws. He testified that on 22/2/2009 he joined a team of inspectors formed by Southern African Development Cooperation Countries (SADC) to undertake operation 3, ... in the countries' EEZ with a view of checking out some illegal acts committed against fisheries resources and marine products. The joint operation team which started operation in South African EEZ was formed by South Africa, Mozambique, Tanzania and Kenya. It carried out the operation by using a South African Patrol Boat known as Sarah Baartman (henceforth "the Patrol Boat") under the leadership of Captain Keith Govinder. The team arrived in the Tanzanian EEZ and started patrol on 7/3/2009. PW3 evidence about the result of the patrol is that while the patrol was going on that date (7/3/2009) and when it had started to be dark, the Captain of the Patrol Boat saw, through the Boat's radar, an object. The team then searched for the object by use of binoculars. They managed to see a flash light which shortly thereafter disappeared. Coincidentally, the spot on the Patrol Boat also disappeared. On 8/3/2009 in the morning at 6.33 hrs. the Captain saw a ship at a distance of 7 nautical miles from the patrol Boat, located at latitude 6° .00 minutes 7 South and Longitude 0.042° minutes 20 East. According the device known as Automatic Radar Plotting Aid (ARPA), the object was moving at a speed of 10 nautical miles. He (PW3) took some photographs of the display on the Patrol Boat's radar screen. The witness who is a captain of fishing vessels by profession went on to state how the sighted ship was pursued and finally arrested. The Patrol Commander, the Captain of the Patrol Boat called the ship by radio through its call sign HLWI which was 4 . -- identified through binoculars, and by the name TAWARQ I which was displayed on the ship's bow but no response was received from the ship. By use of small rubber boat, PW3 and other inspectors including one Shomari Haji then pursued the ship which had increased its speed to 11 nautical miles per hour. On seeing that PW3 and his team who were in the rubber boat were armed, the ship's captain stopped. PW3 went on to state that he then entered into the ship with his team. In the ship, one of the members of crew who speaks English took the team to the Captain. PW3's evidence as regards the result of the inspection is to the following effect: The number of the members of the crew in the ship were 35. The GPS showed that the position of the ship in the ocean was latitude 6° 04 minutes 8 South and Longitude 042° minutes 15.0 East. The tracks showed that the ship made movements to the east, north and west directions several times in the area. He took the photographs of the GPS plotter and the tracks which were displayed on the ship's radar screen. He interrogated the Captain of

the ship (the 1st accused person) who admitted that he was carrying out fishing activity and that he had 70 tons of fish in the ship. He also told PW3 that he had a valid fishing licence for carrying out fishing activity in the Tanzanian EEZ. He tendered to PW3 a faxed copy of licence No. 000035909 issued on 2/1/2008 to TAWARIQ 2 by Zanzibar Fishing Authority. The licence had expired on 1/4/2008. PW3 said further that his inspection showed that the crew list was that of TAWARIQ 2 and that the ship did not hoist the flag of the ship's country of origin. Furthermore, he said, it had other names - No. 68 BUYOUNG and No. 11. INSUNG. The name No. 68 BUYOUNG at the monkey's deck was hidden by mattresses. The certificate of registration showed that the ship was registered in South Korea with the port of registration being SEO-G-Busan, Korea and according to the explanation given to him by the 1st accused person, the ship was authorized to carry out fishing in the Atlantic Ocean. The witness added that in the course of questioning the 1st accused persons on the deck of the ship, it happened that the 1st accused person went twice in the Captain's Cabin. When he (PW3) later went into the cabin, he found out that the displays on the radar screen had been deleted. He required the 1st accused person to provide him with the ship's log book but at first, the response by the accused was that he did not maintain a log book. Later however he replied that he was recording the ship's movement and the quantity of the caught fish in a rough notebook. The witness said that he however saw two notebooks on the table, a yellow one and another green notebook with a name AKRON. He said that the Captain (the 1st accused person) then handed them to him. Though written in Chinese letters, upon his inspection, PW3 found that the green notebook which was tendered as Exh. P.8 contained the data of the ship's activities shown on different dates. His inspection of the lower deck enabled him to find that there was a large quantity of fish which was still fresh. He further found 6

- I that the deck was wet apart from low sea waves on the material on deck. He also found the ship's hose pipe drawing water from the side of the ship's deck to the ocean. He again found fresh fish offal in a plastic bag (ID. No. B) and also found that the scuppers were closed. He further inspected the fish holds and found that the quick freezer was full of frozen fish. In the second freezer, he found freshly caught fish. He noticed that from the fact that blood was still oozing out from the fish. In the third freezer he found some of the fish was frozen and some which was not. He said that he realized so by touching the fish. He took photographs of the fish-holds and ordered their closure and then sealed them. He then informed the operation commander about his findings and that he was satisfied that the ship was carrying out illegal fishing. The commander agreed that the ship be arrested. It was escorted to Dar es Salaam Harbour and arrived there on 9/3/2009 in the morning. He then handed over the ship to the police. PW3 tendered the photographs which he took in the ship during his search and the CD rom of such pictures as Exhibit P. 11. He testified further that later while in Kenya in continuation of the patrol, he learnt from some officials of the Kenyan Ports Authority that a ship known as TAWARIQ I had made a booking to arrive at Mombasa Port on 13/3/2009; The call sign of the ship was described to be A4DH8. He obtained a copy of the relevant manifest and tendered it to the police upon his arrival back in Dar es Salaam. In cross-examination, the witness maintained almost all aspects of his

evidence. He however admitted that when observed through a 7., radar, it cannot be known whether a ship is moving or not. He said also that he had never been employed as a captain of a long line fishing vessel. He stated further that fishing licences are issued to owners of fishing vessels and that in a fishing activity, it is the captain who issues orders for setting long line and further that he is the person who is responsible for the activities of a ship. He stated further that when carrying out fishing, a long line fishing ship moves at the speed of 8-10 nautical miles. On the person who made interpretation in the ship when he was questioning the Captain (the 1st accused person) PW3 said that the interpreter who was called to do so by the Captain was Jhoan Belango (the 31 st accused person). On the location at which the ship was apprehended, he said that it was at 180 nautical miles from the Coast of Tanzania. He said further that at the time when it was arrested, the ship was not found Garrying out fishing activity. On the duty of engineers in a fishing ship, PW3 stated that their duty is to ensure that the ship engines and other machineries are functioning properly and in good mechanical conditions. He said also in re-examination that he found some fish fins, offal, gills, shark fin and pieces of fishing lines in the ship at the side deck. PW12 ASP Mkumbo was at material time of arrest of the ship the Dar es Salaam Zonal Crimes Officer. He testified that after the ship had been handed over to the Police, he was ordered by the Dar ee Salaam Zonal Police Commander to carry out investigation. He assigned the investigation duty to PW1 1, ASP Hussein Kashindi who 8 fQrr"ned a team of Police Officers for that purpose. The team co111prised of PW7 A/INSP. Ernest Emmanuel, PW8 A/INSP. Antony Mwita and PW13, A/INSP. Fatma Kigondo. In his evidence, PW11 testified that upon inspection of the ship, he found it to have a name of TAWARIQ1 but on further search he_ found it to have another name, No. 68 BUYOUNG. Having been satisfied that apart from containing fish, the ship did not cany any dangerous substance or weapons, he proceeded to make arrangements for unloading of the fish. He testified further that the unloading was done in his presence. Other persons who witnesses that exercise were PW10 Mwanaidi. Mndolwa, PW6 Godretry Nanyaro and one Fidelis, an official from the company which was contracted to provide cold storage facility for the fish, Bahari Foods Company. He added that the captain of the ship (the 1st accused person) and PW2 Rahma. Mohamed who translated Kis·Nahili into Chinese and vice versa in the process, were also present. PW11 's evidence was further to the effect that the unloaded fish weighed 296.3 tons and that such fish did not have heads, fins, offal and tails. Other things which were unloaded according to him were fishnets, fish hooks and buoys. Also two passports (Exh. P.19 and P.20) one belonging to the 1st accused person and another to the 27th accused person as well as a black bag (Exh. P. 21) containing various items including a rubber stamp and a copy of immigration regulations document, both of TAWARIQ1 were taken from the ship. He then prepared a seizure certificate which was signed by him, the 9 1st accused person, PW10 and PW2 who was doing translation. The witness added that apart from the documents which were for TAWARIQ 2, the other documents found in Exh. P2 (the black and brown bag) were for No. 68 BUYOUNG. Those documents include a bunker delivery note. He testified also in cross-examination that he found Exh. P. 21 in the Captain's cabin. As to Exhibits P. 8. and 7 (the yellow and green notebooks), he said that the same were given to him by PW3. he said

further that the 1st accused person admitted that Exh. P. 21 was found in the Caption's Cabin. Another witness who is also a police officer, PW7 A/INSP. Ernest Emmanuel who was among the investigation officers recorded the evidence of PW3 who handed him Exh. P.8 and the photographs taken in the ship after its arrest (Exh. P11). He also recorded the cautioned statement of the 7th accused person. According to his evidence, the 7th accused person stated in his statement that he was an agent of the ship. As to the particulars of the ship, he said that the same were contained in the licence (Exh. P. 3). Evidence was also tendered regarding the status of the seized fish. That evidence was given by PW10 Mwanaidi Mlowa, a Fisheries Officer from the Ministry of Livestock and Fisheries Development holding the position of an Assistant Director of Fisheries. She testified - that she witnessed the unloading of the fish at the harbour. In her evidence, she said that the fish did not have tails, heads and offal. Being an expert in food quality, control and marketing, she explained the process required in keeping a caught fish in accepted and hygienic condition. She stated that after being caught, the fish is supposed to be processed by removing the offal, the process which can be done in ships or market places at port areas. According to her evidence when the processing is done in a ship, the wastes must be kept in the ship and later be disposed at the port. On the unloading of the ship, the witness said that the same started to be unloaded on 10/3/2009 and the exercise was completed on 18/3/2009. On his part, PW8, A/INSP. Anthony Mwita testified that he wrote the statement of the 19th accused person, Siriya Toya who admitted in his statement that the ship had finished carrying out fishing in the Tanzanian EEZ and that it was sailing to Mombasa when it was arrested. He added that in the statement (Exh. P15), the 19th accused person stated that the last date of carrying out fishing was on 7/3/2009. The witness testifies also that he recorded the statement of the 1st accused person. He did so through interpretation made by one Mr. Feng who translated English into Chinese and vice versa. According to PW8, the 1st accused person admitted that he was carrying out fishing activity in the Tanzania EEZ from the time when he started working in the ship in January, 2009. Testifying further, the witness stated that on 29/7/2009 he went to Keko prison where the 1st accused person was remanded and interrogated him through interpretation made by PW4, Ernest Masasi. The 1st accused person allegedly admitted that he was recording the activities of the ship in Exh. P.8. The witness said further that he went to Mombasa, Kenya and obtained a record of the ship's booking which shows that the ship was booked to arrive at Mombasa on 12/3/2009 with 187 tons of fish. The ship's call sign was shown to be A4DH8 while the one appearing on the ship is HLWI, As stated above, A/INSP. Fatuma Kigondo was one of the Police Officers who participate in the investigation of the case. She testified as PW13. She told the court that on 10/3/2009 she recorded a cautioned statement of the 17th accused person, Ali Mkota. According to her, the said accused person admitted in his cautioned statement (Exh. P.25) that the ship was carrying out fishing activity near Dar es Salaam. She also recorded a cautioned statement of Ma Zang Min who was the 4th accused person. She recorded the statement by aid of an interpreter, one Mr. Tu who translated Chinese into English and vice versa. She told the court that the said accused person admitted that when the ship was arrested a fishing activity was being carried out by him and other accused persons. The witness also recorded

the statements of the 2nd and 33rd accused persons. According to her, while the 2nd accused person admitted that in the course of carrying out fishing, the accused persons were throwing fish wastes in the ocean, the 33rd accused person admitted that when the ship was arrested on 8/3/2009, it was carrying out fishing activity. She added that in taking the statement of the 2nd accused person, she used the services of interpretation from Mr. Feng while as to the 33rd accused person, the interpretation was made by Ms. Rahma Mohamed who translated Kiswahili into Chinese and vice versa. 12 The said Rahma Mohamed testified as PW2. On her knowledge of Chinese language, she stated that she learnt that language in China where she had gone to study Chinese medicine. She said that it was one of the requirements of the course that a student must understand Chinese language. She said further that at the material time of her evidence, she had an experience of 8 years of doing interpretation for her Chinese employer who carries out business in Tanzania. In her testimony, she stated that on 16/3/2009 she was an interpreter during the investigation process conducted by police officers after the arrest of the ship. She interpreted the conversation and questioning of the 1st and 33rd accused persons as made by the police. According to her, the 33rd accused persons told the Police that the ship was carrying out fishing activity between Mombasa and Zanzibar at the time of its arrest. Her evidence was also to the effect that she made interpretation again on 17/3/2009 during the search of the ship and that she witnessed some items being taken out from the ship. The properties included a black and brown bag found in the captain's cabin. At the end of the search a document was prepared and signed by the Police Officer who was supervised the search, the 1st accused person and herself. When cross-examined, PW2 stated that after the 1st and 33rd accused persons had given their statements, the same were read over by her to them and they were satisfied of correctness of the statements. She added that it was the 13th accused person who stated that the ship was arrested between Mombasa and Zanzibar. Other witnesses who testified for the prosecution were PW1, Noel Alex Kalekezi and PW4 Ernest Masasi. Both of them are employees of the Baraza la Kiswahili la Taifa (BAKITA) (the National Kiswahili Council). PW4 was until the material time the Executive Secretary of BAKITA. His evidence was to the effect that on 1/7/2009, one Police Officer took to him the green notebook (Exh. PS) with a request that the contents therein be translated. According to the witness, BAKITA has three officials including himself who are authorized to certify documents which have been translated by recognized language experts into Kiswahili from other languages. He referred the Police Officer to PW4 who is recognized by BAKITA as an expert able to translate Chinese language. After it had been translated into English, the notebook was returned to him. He certified it after he had been satisfied that the translation was done by PW4 and thereupon handed it to police. On his part PW4, Ernest Masasi supported the evidence of PW1 that he translated the contents of Exh. PS after it had been referred to him. As to his knowledge of Chinese language, he stated in his evidence that he learnt the language in China where he had gone to study a Diploma course in Transport and Communication. He added that he is registered by BAKITA as a freelance translator. He translated the document which was tendered as Exh. P.13. When cross-examined, he admitted that the data in Exh. P.S did not contain 14 the year of entries. He said however that

the dates, months, temperature and degrees were shown in the entries. He stated also that he made translation of Exh. P.8 at Keko prison after having been asked to do so by PW12 who went to the prison to question the 1st accused person about the contents of that document. The prosecution also called Dr. Silas David Mayunga and Biseko Musiba who testified as PWS and PW4 respectively. PWS was until the material time of his testimony the Acting Director of Surveys and mapping. He testified that on 24/4/2009 the police took to him some data concerning coordinates and requested him to insert them in the map of Tanzania. He said that the Police Officer who took the data to him explained that the coordinates concerned the movement of a fishing vessel which was found fishing in the Tanzanian EEZ. It was his evidence further that he assigned PW9 the duty of fixing the coordinates on the map. PW9 prepared the map showing the coordinates and handed it to the Police. Supporting that evidence, PW9 who was at that time the Principal Land Surveyor in the Ministry of Lands, Housing and Settlements Development and who is specialized in cartography testified that upon receipt of the data on 24/4/2009 he entered the same on the map of Tanzania which shows the country's boundaries in the Indian Ocean covering the EEZ. He stated that the data which was meant to show the positions at which the ship was spotted carrying out fishing and the location at which it was arrested showed that the coordinates covered both the area in the Tanzanian EEZ and 15 outside it. As to location 6° 40' S and 43° 18.0 E, he said that the location is in the Tanzanian EEZ. When cross-examined, the witness said that it was not possible for him to know the exact dates shown in Exh. PB because the year in which the data was recorded was not shown. At the material time when the ship was arrested, one Godfrey Nanyaro was the Director of Fisheries Department. He was later promoted to the post of Director General of the Deep Sea Authority. Testify in this case as PW6, he said that upon an agreement made by SADC countries to form a joint patrol team to inspect and take action against illegal fishing within the countries' EEZ, his office sent its inspectors who included PW3 to Cape Town, South Africa to join the team. It was his evidence further that following the patrol, the ship was arrested in the Tanzania EEZ and brought to Dar es Salaam harbour where he later went to witness it. He also said that he was present when the fish which was found to have been illegally caught was being unloaded from the ship. The witness also gave in detail, the role of his office in the enforcement of laws and regulations concerning the protection of marine environment and preservation of marine resources in cooperation with other countries forming the Indian Ocean Tuna Commission (IOTC). He further explained the procedure which is applicable to the persons who want to carry out fishing in the Tanzanian EEZ. He said that any such person must apply for a fishing licence and in so doing, he must give information or details of the following: the type of fishing intended to be carried out, name of the company, name of the vessel, a copy of registration of the vessel, a crew list, photograph of the applicant and that of the vessel with its call sign shown on its side, registration number of the vessel and its port of registration and a certificate of the vessel's seaworthiness. As to the particulars and ownership of the ship, PW6 stated that he inquired for the same from the IOTC Headquarters through an e-mail which was attached with the photograph of the ship. He also inquired for the particulars of the ship from the South Korea and Oman authorities.

Whereas he did not receive any response from Oman, the South Korean authorities informed him that the ship which was until 31/5/2007 known as No. 68 BUYOUNG was sold to Philipines Company, Luminar Fishing Co. However, according to him, Philipines denied tq have bought the ship. PW6 said further in his evidence that according to IOTC which had written a letter to Oman authorities to inquire about the complaint by Japan that a ship known as TAWARIQ I was doing illegal fishing, the response by Oman authorities was that the ship which was previously known as ODINE MALAGASY was not carrying out fishing illegally. When cross-examined, the witness said that any ship which is merely passing enjoys the right of passage in the Tanzanian EEZ. He said also that a fishing licence can be applied for and issued to the owner of the fishing ship or its agent. He added that it is the captain of the ship who is responsible for compliance with requirements and 17 co_nditions of a fishing licence. On the nature of fishing by long line vessels, he said that it uses bait in fishing. In their defence the accused persons gave sworn statements of defence. They were the only witnesses for the defence. The 1st accused person who testified as DWS said that he became a captain in 1981 and worked in various ships until on 3/1/2009 when he was employed as the captain of the ship. He was handed over the ship with its essential accessories like GPS, Radar and wireless telephone by his predecessor, Capt. Hong Jin Ling. According to him (DWS) the ship had 150 tons of bait, 100 tons of fish which was for export and 12 tons which was for food. His predecessor captain informed him that the ship was registered in Oman, that it did not have a fishing licence and that therefore the fishing should only be done in the high seas. On the mode of fishing, he said that the ship is a long line fishing vessel using a fishing line measuring 30,000 metres long taking about 18 hours to spread them before throwing bait and later hauling the lines. His further evidence was to the effect that before the ship was arrested by the patrol inspectors, he was ordered to stop but failed to do so because not only that those who stopped him spoke English, but he also feared that the patrol boat carried some pirates, the fear which resulted from the fact that those who were in the patrol boat were armed. Otherwise it is his defence that he was arrested while sailing to Mombasa from the high seas. His evidence during cross-examination was to the effect that when he was being handed over the ship by the former captain, he 18 . was shown the interior of the ship only. He thus was not aware that ~he ship had another name of No. 68 BUYOUNG appearing on its side. He was however informed that the call sign was HLWI but although he was called by the Patrol Boat through that call sign, he could not respondent because the caller spoke English. It was after he had handed over the phone to one of the members of the crew who understands English that he stopped the ship. He handed over the ship's documents to PW3 who took other document from the cabin and also photographed the displays on the radar screen as well as the GPS. He communicated with PW3 through the crew who understands English, Jhoan Belango. As to fishing activity which he was involved in as from the date when he joined the ship, it was evidence that he was only recording the quantity of a daily catch of the fish but not the data as regards the movement of the ship. Although he admitted that on 29/1/2009, he re-fueled the ship and obtained a bunker delivery receipt, he did not keep that receipt in the ship because he was not used to doing so. As regards Exh P8 and the ship's rubber stamp, it was

his evidence that they were kept by the former captain somewhere in the ship and that is where PW3 found them. On 8/3/2009 when the ship was arrested, he immediately communicated with the 1st accused person. On the particulars of the ship, he said that he was told by the person who secured employment for him that it was known as TAWRIQ 1 adding that since the name is written in English, the language which he does not understand, he could not notice the difference of the ship's name as written in the bunker delivery note. He understands that as a captain, he is responsible for compliance with the laws and regulations governing fishing activities in the EEZ of different countries. He said however that he became a captain through experience and hence the reason why he was not using a log book to record the quantity of daily caught fish. The 7th accused person who owns a Company known as Sunflower Trading Company (SUNSA) having its office in Mombasa, Kenya testified that, as DW1. It was his evidence that he was the agent of the ship as from September, 2008. Through instructions sent to him by way of an e-mail by the owner of the ship, he processed and obtained a fishing licence from the Zanzibar fishing authority. The licence permitted the carrying out of fishing activity in the Tanzanian EEZ for three months as from 2/1/08 - 1/4/2008 (Exh.PS). He sent a copy of the licence through a fax to the captain who was in ship. In December, 2008 there was a change of the Captain and engineers. He arranged for their transport to the ship after his manager had received them at the Mombasa airport. The new captain was the 1st accused person and the engineers were the 33rd and 34th accused persons. On 4/3/2009 the Captain called him (DW1) and was asked to make a booking for refrigeration containers for 187 tons of fish as the ship was due to arrive at Mombasa Port on 9/3/2009 at 6.00am. He was further told that the ship contained other types of fish and bait weighing a total of 110 tons. Having made the requested booking, on 8/3/2009 he was informed by the Captain through a phone that the ship had been arrested. Being worried of the already made booking, DW1 decided to come to Dar es Salaam. He said that he came to inquire into the cause of the arrest of the ship. He came with his friend, the 9th accused person. When cross-examined by the prosecution, DW1 said that he applied and obtained the fishing licence after he had submitted the particulars of the ship as sent to him through e-mail by the owner of the ship, one Mohamed. On his part, the 9th accused person who testified as DW2 gave a brief statement of defence that he is a petty businessman based in Taiwan. He left Taiwan on 6/3/2009 and arrived in Kenya on 7/3/2009. That the 7th accused person is his friend and that he accompanied him in his visit to Dar es Salaam. While in Dar es Salaam, he was arrested together with his friend, the 7th accused person. He denied having had a knowledge that the 7th accused person came to Dar es Salaam to attend to the matters relating to the ship. The 33rd and 34th accused persons gave their defence as DVV3 and DW4 respectively. The defence by DW3 was that he started working in the ship on 3/1/2009 as a chief engineer charged with the duty of ensuring that the ship's engines were in proper working condition. He did not know whether the ship had a fishing licence or not and further that because he did not know how to read maps, he could not know whether the ship carried out fishing activity in the 21 Tanzanian EEZ. He only knew that the fishing was being done in the high seas. The defence by DW4 was similar to that of DW3. He testified that he was employed and

started to work in the ship on 3/1/2009 as an engineer having the duty of dealing with matters concerning the functioning of the ship's engines. Like DW3, the 34th accused person said that he knew nothing about a fishing licence or the position at which the ship was carrying out fishing activity in the ocean. At the close of the evidence by the prosecution and the defence, the learned Principal State Attorney and both learned counsel for the accused persons made final submissions. I shall consider their respective submissions in the cause of this judgment. Before I embark on that duty, it is important here to state the matters which were agreed upon by both sides during the preliminary hearing as being indisputable. The matters were, firstly, that the 1st accused person was until the material time of arrest the captain of the ship, the 33rd and 34th accused persons the engineers, and that the 1st accused person who is the owner of Sunflower Trading Company (SAUSA) was the agent of the ship. Secondly it is not disputed that the ship was arrested with 296.3 tons of fish. The above having been stated, I now turn to the counts with which the accused persons have been charged. To establish the offence in the first count, the following ingredients must be proved; that the accused persons carried out fishing activity and that the fishing activity was done in the Tanzanian EEZ. It must also be proved that the accused persons carried out fishing activity without licence. As has been outlined above, the evidence as regards the particular place in the ocean at which the ship was arrested is that of PW3. I have taken time to consider that evidence and I have found the witness to be credible. According to his evidence which is supported by the GPS reading as photographed from the display in the ship, I find it established that the ship was arrested in the Tanzanian EEZ at the distance of 180 nautical miles from the Coast of Tanzania, the particular place being 6°07 South and 0.042° 20 East. Under s. 7 (2) of the Territorial Sea and Exclusive Economic Zone Act, Cap. 238 [R.E. 2002], Tanzanian EEZ extends to the distance of 200 nautical miles from the baseline from which the breadth of the territorial water is measured. Under s. 5 of the same Act, the baseline from which the breadth of the territorial sea is measured is low-water line along the coast. The distance of 180 nautical miles from the Coast as stated by PW3 is therefore within the Tanzanian EEZ. In his defence, the 1st accused person did not dispute the location at which the ship was arrested. In actual fact, upon his arrest, he attempted to hide the truth by deleting the GPS displays but the same had been photographed by PW3 when he entered into the captain's room in the ship. The main defence by the 1st accused person is that the ship was sailing to Mombasa, Kenya after fishing in the High Seas. 23 The allegation that the ship did not have a fishing licence is also established. After the arrest in the ocean, at first the 1st accused person produced a fax copy of a licence (Exh. PS). That copy of licence was however for TAWARIQ and had expired on 1/4/2008. Later when the 7th accused person came to Dar es Salaam, he tendered to the Police another licence (Exh. P3). That licence had also expired on 21/12/2008. Obviously therefore the accused persons did not have a fishing licence permitting the ship to carry out fishing in the Tanzanian EEZ. Having found that the ship was arrested in the Tanzanian EEZ and that it did not have a fishing licence, the remaining crucial matter for consideration in the first count is thus the allegation that: the accused persons carried out fishing activity as charged. The prosecution relied on the evidence of PW3. That evidence, as stated earlier, is to the effect that he found

in the ship, fresh fish, fresh offal and bait. Another piece of evidence is his finding of hose pipes draining water from the side deck of the ship and the status of the scuppers; that they were found closed showing that they were purposely closed to prevent fish from dropping back into the water. PW3 also found tracks on the radar screen showing that the ship was making rectangular movements in the area. The prosecution relied also on the evidence of PWB who went to Keko prison to read the translated version of Exh. PB to the 1s: accused person who allegedly admitted that he was carrying out fishing in the Tanzanian EEZ and that he was keeping records in that 24 exhibit. Further evidence relied upon by the prosecution on that allegation was that of the cautioned statements of the 17th and 19th accused persons as well as the evidence of PW12. PW3's evidence was further to the effect that the 1st accused person admitted at the time of his arrest that the ship was carrying out fishing activity in the Tanzanian EEZ. In challenging that evidence, the learned counsel for the accused persons argued that since the ship was moving at a speed of 10 nautical miles when it was arrested, it is not possible that it could have been carrying out fishing activity bearing in consideration the fact that the type of fishing required a setting and hauling of long lines, the activities which were not evident at the time of arrest of the ship. On the evidence that some of the fish was found to be still fresh, it was argued for the accused persons that the extent at which a fish can be taken to be fresh so as to conclude that it was instantly caught was not established. Further, as to the evidence that when he was questioned by PW12, the 1st accused person admitted that he was carrying out fishing activity, it was argued for the defence that such evidence cannot be relied upon because the 1st accused person does not understand English. The learned counsel for the accused persons also urged the court to disbelieve the evidence of the tracks depicted on the ship's radar screen on the ground that PW3 did not testify on all the tracks as found on the screen but only some of them. As to notebook (Exh. PS), it was argued by the learned counsel that since the particular place at which that notebook was found in the ship was not made clear, the same should not be relied upon because the owner of the notebook has not been specified. The contents of the notebook were also challenged on the ground that the document was not sent to handwriting expert and on further ground that in some parts the contents referred to acts of throwing fishnets in the water while the ship used long lines in fishing. As can be gathered from the above rival arguments, the available evidence which is relied upon by the prosecution is both direct and circumstantial. The direct evidence is that of the witnesses who interrogated the accused persons and the witnesses who conducted investigation after the arrest of the ship. On the circumstantial evidence, the scope of that evidence as regards the act of fishing is as per the detailed testimony of PW3. The position of the law as regards the use of circumstantial evidence in a case is that facts based solely on circumstantial evidence may be relied upon to prove a case and an accused person can be convicted solely on that evidence. In the case of *Miswahili Mulugala v. R.* [1977] LRT n. 25, it was held as follows: "In a case where facts are based solely on circumstantial evidence corroborating each other a conviction is possible if the circumstantial evidence leads irresistibly to an inference of guilt and should be incapable of any other reasonable explanation." . 26 That principle was approved by the Court of Appeal

in the case of Shaban Mpunzu @ Elisha Mpunzu v. R., Cr. App. No. 12 of 2002 (CA-MZA) (unreported). In that case, the court stated as follows: II It is a settled trite principle of law that in a criminal case which the evidence is based purely on circumstantial evidence it must be satisfied that the evidence irresistibly points to the guilt of the accused ... to the exclusion of any other person. ,✓ In the case at hand, after having considered the evidence and the arguments made by the learned Principal State Attorney and the learned counsel for the accused persons, I am of the settled mind that the allegation that the ship carried out fishing in the Tanzania EEZ has been established through both direct and circumstantial evidence tendered by the prosecution. The evidence of PW3 was consisted and reliable. Such evidence together with that of PW8 and PW12 shows that at all material times when he was being interrogated, the 1st accused person admitted that he was carrying out fishing activity in the Tanzanian EEZ and that he kept records of inter alia the fishing activity, the position of the ship in the ocean and water temperature in Exh. PS. The admission was being made in the presence interpreters, including PW2 and PW4 who testified to that effect. It is true that the 1st accused person does not understand English but that cannot be the reason for disbelieving the evidence of all these witnesses as urged 27 by the learned counsel for the 1st accused person. The witnesses communicated with the 1st accused person through interpreters a has all along been in the proceedings. Nothing has been suggested as to why should all the witnesses and the interpreters lie against the 1st accused person. Under the circumstances and upon consideration of the evidence, I believe that the witnesses spoke the truth. Apart from the evidence of PW3, PW8, P12 and PW2 there is evidence of the 11th and 19th accused persons who stated in their cautioned statement (Exh. P.25 and P. 15) that the ship was carrying out fishing although they did not know the location in the ocean where the fishing was being carried out. That evidence however is supportive of the fact that the ship was carrying out fishing activity on the day of its arrest. On the other hand there is a sufficient circumstantial evidence showing that the ship was carrying out fishing activity in the Tanzania EEZ. As stated above, the 1st accused person admitted that he was keeping data in Exh. P8. In his defence however, he said that he was keeping the data in a rough notebook. There was a dispute that the notebook (Exh. P8) was found in the Captain's room. It had data entered showing inter alia, dates and months. The argument that because the year was not shown and that the book was not referred to a hand writing expert is, in my view, of no weight as to raise doubt on the evidential value of the notebook. The 1st accused person joined the ship on 3/1/2009. The ship was arrested on 7/3/2009 in the morning. The dates shown in the notebook 28 . corresponds to that rage of time. In my considered view, that is not a mere coincidence. Those facts are corroborative and supportive of the 1st accused person's admission that he was carrying out fishing in the Tanzania EEZ. Another piece of circumstantial evidence, the tracks showing that the ship made rectangular movements proves that the ship was not passing on its way to Mombasa as alleged by the defence, Further, the finding by PW3 of fresh fish in the ship, some of which still having blood oozing out shows how recent was the fish caught and processed. That fact does not require expert evidence to prove that the fish was caught shortly before the ship was arrested. The presence of bait and the circumstances showing that there was a cleaning

of the ship's deck or draining of water by use of hose pipes and the closure of the ship's scuppers are also facts establishing that fishing activity was being carried out. The facts having shown that the ship was carrying out fishing activity, then the defence that such an activity could not have been done because the ship was arrested while moving at the speed of 10 nautical miles, cannot again cast doubt on the prosecution's case. It is obvious that the ship was carrying out fishing activity shortly before its arrest. Similarly, the argument that PW3 gave evidence of some of the tracks while omitting to testify on other tracks on other locations of the sea does not, in my view, have any effect on the weight of the prosecution evidence. This is because the prosecution has a right to decide on the nature of evidence which it can tender in proving its case. 29 Having found it established that the ship was carrying out fishing activity in the Tanzania EEZ shortly before its arrest, the next matter for consideration is about criminal liability of the accused persons. The lady and gentleman assessors were of the opinion that the offence in this count has been established against the 1st and 7th accused persons. As to the rest of the accused persons, the opinion of the lady and gentleman assessors is that the accused persons are not guilty. I respectfully agree with their opinion. Under regulation 11 (1) of the Regulations, a fishing licence is issued upon application by a person who wishes to conduct fishing activity in the Tanzania EEZ. Under regulation 11 (2) (b) the applicant must avail for inspection the particulars of the vessel which he intends to use. This means therefore that a fishing licence can only be issued to a person who owns a ship, hence as argued by Capt. Bendera, learned counsel, it is the owner or agent of a ship who in law, has to be issued with a fishing licence, not an individual crew member of a fishing vessel. Further as stated by PW6 and conceded by the 1st accused person in his defence, a captain of a fishing vessel is the person who is responsible for compliance with fisheries laws and regulations in any country's EEZ. He is therefore responsible to ensure that his ship possesses a fishing licence before carrying out fishing activity. Given the position as stated above, there can be no basis upon which the 33rd and 34th accused persons can be held criminally liable for the offence in the first count. As to the 7th and 9th accused persons, it has been established that while the 7th accused person was until the material time the agent of the ship, the 9th accused person was not. The only evidence which implicates the 9th accused person is that he accompanied the 7th accused person who had come to Dar es Salaam to make a follow-up about the cause of arrest of the ship. In the absence of any other piece of evidence, it goes without saying that the 9th accused person was joined in this case on a mere suspicion which in law, however grave, cannot found conviction. On the basis of these reasons, like the lady and gentlemen assessors, I find the 9th, 33rd and 34th accused persons not guilty of the 1st count. They are hereby accordingly acquitted of that count. On the part of the 1st accused person, as stated above, there is no dispute that the ship did not have a valid fishing licence. When arrested, the 1st accused person produced an expired licence No. 000035909 which was issued to a different ship known as Tawariq 2 by Zanzibar Fishing Authority. It transpired that the name Tawariq 2 was found written on the ship (Tawariq 1). The invalid licence was sent to the 1st accused person through a fax by the 7th accused person. As to the 7th accused person, he admitted that he was the agent of the ship and that he faxed the licence to the 1st accused

person. Further, after the arrest of the ship, in making a follow-up, the 7th accused person came to Dar es Salaam. At first he told the police that the ship was merely on its way to Mombasa. Upon being informed of the offence which the accused persons were suspected to have committed, that of carrying out fishing in the Tanzania EEZ without licence, the 7th accused person produced another expired licence (Exh. P3) which was issued to Tawariq 1 on 22/9/2008 and which had expired on 21/12/2008. From that evidence, it is clear that the 7th accused person was responsible for the operation of the ship and was aware that it was carrying out fishing activity without licence in its proper or concealed name, given the multiple names found on it. The two expired licences also show that the ship was using the names of Tawariq 1 and Tawariq 2 interchangeably in applying for and obtaining fishing licences. On the basis of the above stated reasons, I find that the 1st and 7th accused persons are jointly liable. I therefore hereby accordingly find them guilty and convict them as charged in the first count. . Turning now to the 2nd count, the offence as stated , under regulation 25 (1) and (2) is committed when an accused person does the following: (i) causes or willingly does flow or pass into marine waters of the United Republic of Tanzania any solid or gaseous material, or (ii) fails to take back to the port for disposal any waste generated on the ship in the cause of fish processing, human activities and unused bait. It was the prosecution's case that since the fish which was found in the ship did not have heads, tails and offal, the logical conclusion is that those wastes were thrown in the ocean. Capt. Bendera for the defence on the other hand argued that because there was no scientific evidence to the effect that there was pollution of the sea waters, the offence has not been proved. With respect, I think the argument by the learned counsel is not tenable. In my considered view, to prove an offence under regulation 25 of the regulations, a scientific proof of water pollution is not a necessary requirement. The wording of the provisions shows that the law is intended to protect the acts which the law has considered to amount to pollution of ocean waters. As stated above, regulation 25 (1) and (2) of the regulations make the act of throwing into the ocean waters the wastes generate from fish processing in the ship an offence. It is also an offence to fail to take those waste parts of the fish to the port for disposal. The requirement to comply with that provision of the law was insisted by PW10 who stated that such a requirement must, as a matter of law be complied with by those who carry out fishing in the ocean. When the ship was arrested and inspected, it was found with 293.6 tons of processed fish. As to the fish wastes which, under the above provisions of the law, were to be taken for disposal at the port, only a shark fin, 3 kgs of bait and only a small quantity of offal (ID No. B) was found in the ship. There was no reasonable explanation given on how was the rest of the wastes disposed. The irresistible inference therefore, is that the waste parts of the 293.6 tons of fish was thrown in the ocean. It cannot be held otherwise than that conclusion which is from the available unshaken circumstantial evidence. 33 As to criminal liability, the person who was responsible to take the wastes to the port is none other than the Captain of the ship, the 1st accused person because as found in the first count, he was responsible for compliance with the relevant laws and regulations on the fisheries resources and protection of marine environment of the respective countries' EEZ. The 7th and 9th accused persons were not in the actual act of carrying out fishing and were

neither in the ship nor responsible with compliance with the fishing regulations in the ocean as stated above. Again as to the 33rd and 34th accused persons they cannot as well be held responsible because as held in the first count, they had different functions in the ship, that of only dealing with matters relating to the proper functioning of the ship's engines. For these reasons, like the lady and gentleman assessors, I find the 33rd and 34th accused persons not guilty of the 2nd count and thus hereby acquit them of that count. The third count against the 7th and 9th accused persons was an alternative charge. Since the 7th accused person has been convicted of the 1st count and because the 9th accused person has been found to have been wrongly implicated in the offence and hence acquitted, the two accused persons are found not guilty of the alternative count . . and are therefore hereby acquitted. A.G. Mwarija JUDGE 23/2/2012 34 23/2/2012 Coram A.G. Mwarija, J. For the Republic M. Mganga, Principal State Attorney, Mr. Nangela, PSA, Mr. Mwanga S/A and Mr. Mwangamila, SSA For the Defence } Capt. Bendera, mr. Mapinduzi. Accused: 1st } 7th } 9th } All Present 33rd } 34th } ASSESSORS: 1. Omary Sufi

2. Margreth Masi
3. Bernard Ntumba INERPETER Mateza CC. Banza Court: Judgment delivered. A. G. Mwarija JUDGE 23/2/2012 Mr. Mganga: My Lord, the prosecution has no record of previous conviction as regards the convicted accused persons. Despite that fact however, I pray that a severe sentence be imposed on them 35 ' . , . because of the nature and seriousness of the offence. The law also provides for forfeiture of any property used in the commission of an offence. The court is so empowered by S. 351 of the CPA. I pray therefore that the ship be forfeited. In the case of the DPP v. Mikula Madungu, Cr. App. No. 47 of 1985, the Court of Appeal stated that a forfeiture order serves to deter commission of offences. That is all. Capt. Bendera: My Lord, this is the first time that a case of this nature is heard and decided. The accused persons are first offenders. They have cooperated with the prosecution by giving their statements. The two accused persons are foreigners and have stayed in prison for 3 years. They are the citizens of our friendly country, China. The 1st accused person is now aged 63 years. The accused persons have families which depend on them. There have further been no damages caused. The accused persons have suffered psychologically due to much publication made in the Newspapers. As to forfeiture, the court has since withdrawn itself from doing economic businesses. I thus pray that the ship be valued and its owner who is one Mohamed be given priority to buy it. Court: Interpretation proceeded. SENTENCE In sentencing the accused persons, I have taken into consideration the submissions made by the learned Principal State Attorney and Capt. Bendera, learned counsel for the accused 36 persons. The offences committed by the accused persons have a statutory minimum punishment prescribed by law and therefore despite the mitigatory factors by the defence, the -court cannot award a lesser sentence. I accordingly therefore hereby sentence the accused persons as follows: 1 st Count: The accused persons to pay a fine of Tshs. One billion or twenty years' imprisonment. 2 nd Count: The 1st accused person to pay a fine of Tshs. Twenty billion or ten years' imprisonment. The imprisonment sentences to run concurrently. A.G. Mwarija JUDGE 23/2/2012 ORDER AS TO FORFEITURE Section 18 (1) of

the Deep Sea Fishing Act, Cap. 383 empowers the court to forfeit any ship used in carrying out illegal fishing. I have heard Mr. Mganga, learned Principal State Attorney and . Capt. Bendera, learned counsel for the accused persons on the matter. It is an established fact that the ship was used in the . ' commission of the offence. It was being used under multiple names and without disclosure of its call sign and nationality. 37 -'J...i._ / f I The official inquiry made by PW6 revealed that the ship is not \ recognized by OITC as one of the - fishing vessels registered to carry out fishing activity in the Organization's jurisdiction: It is also a n established fact (tb.rpugh expired fishing licences which were \ \ tendered) that the accused persons applied and obtained fishing \ licences in alternative names for the ship. All the above factors show undoubtedly that the accused persons perpetrated the planned offence of carrying out fishing illegally in the Tanzanian EEZ. Given the nature and circumstances under which the offence was committed as stated above, there is a compelling need to deter further commission of the offence. I hereby therefore order that the ship (Exh. P.12) be forfeited to the Government of the United Republic of Tanzania As to the seized 296.3.tons of fish, since the same was distributed free of charge to public institutions and societies, I make no order as regards compliance by the prosecution with the order of depositing in court the value of the fish as ordered on 11/12/2009. , I A.G. Mwarija JUDGE 23/2/2012 38 {

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