

Fear and Loathing on the High Seas: Affective Dimensions of Justice in Kenya's Piracy Trials

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Abstract

Piracy off the coast of Somalia captured international attention in the early 2010s. The regional approach to prosecuting piracy in East Africa required multi-state participation and involved an array of local and international actors that ultimately reshaped criminal justice systems and understandings of maritime crime. Kenya was the first country in the region to agree to try suspected pirates as part of the UN regional model for prosecuting pirates. As they updated their piracy laws with the assistance of international legal advisors, many of the details concerning who could be tried in Kenyan courts, what constitutes evidence, and the rights that should be afforded to suspected pirates were continuously modified as court proceedings unfolded. Employing an iterative thematic content analysis of piracy trial transcripts obtained from the High Court of Mombasa in Kenya, this study explores how weapons and fear became central components of establishing guilt in piracy prosecutions. Accordingly, it highlights the dynamic relationship between fear, relative plausibility, and maritime justice that constitute the affective dimensions of justice at work in East Africa's regional piracy prosecution model.

Keywords

East Africa; Kenya; maritime justice; piracy prosecution; piracy trials

1. Introduction

Despite the world's fascination with piracy, little details are known about how contemporary piracy trials unfolded in East Africa. This study analyzes piracy trial transcripts from the High Court of Mombasa, Kenya to understand the evidentiary complexities of prosecuting a sea-based criminal event fraught with investigative challenges. As judges attempted to deliver justice with minimal physical evidence, they relied

heavily on testimony and relative plausibility. Tasked with making sense of a series of events that took place beyond the borders of their state on the high seas, they sifted through evidence collected using a myriad of investigative procedures and gauged witness credibility amidst a background of legal dualism and global moral panic.

Pirates have long been labeled *hostis humani generis* (enemies of all mankind) to mobilize global military and punitive responses that simultaneously gloss over underlying structural causes and exploitation while productively transforming maritime spaces. Beginning in late 2008, piracy off the coast of Somalia caught the attention of the world. The country was reeling from decades of civil war and attempting to reestablish stability through a transitional federal government. By 2009, there were nearly 200 piracy attacks, disrupting maritime trade and terrorizing seafarers, prompting an international response. As a coalition of naval forces descended upon the Gulf of Aden and the Indian Ocean, what to do with apprehended piracy suspects became the central question. After a brief period of “catch and release,” apprehending suspects, destroying their weapons, and then returning them to their boats or the Somali shoreline, the international community settled on the long-term solution of providing support to prosecute pirates in the East Africa region. Kenya, the Seychelles, and Mauritius eventually signed memorandums of understandings (MOUs) with the apprehending states agreeing to accept the transfer of, prosecute, and incarcerate pirates until they could be repatriated to Somalia. The UN Office on Drugs and Crime facilitated this regional approach by assisting the states with codifying piracy laws, training law enforcement and judicial personnel, and refurbishing and constructing prisons to ensure pirates were detained in humane facilities.

Media headlines and stories covering the issue of piracy off the coast of Somalia progressively increased from 1992 to 2010 creating a moral panic defining pirates as a serious threat and frequently linking it to terrorism. Media, politicians, and the shipping industry reinforced depictions of pirates as “bad” and “evil” stressing the danger, violence, and potential for death posed by pirates (Collins, 2012). Much like Scheingold’s (1995) compelling analysis of the creation of “public anxieties” around street crime, piracy coverage created a “public of feeling spectators” remotely exposed to the fear and anxiety of the criminal events. What followed was a public and state-driven “collective yearning” for punitive measures to address piracy off the coast of Somalia (Feldman, 2012).

Affect is a term with a psychoanalytic theory pedigree used in relation to emotions, instincts, and impulses. Although many scholars continue to debate the relationship between affect and emotions (Ahmed, 2010; Cvetkovich, 2012; Tomlinson, 2010), Thein (2005) argues that affect is the *how* of emotion, i.e., how emotion *moves*. Affect theory or the critical study of feelings, argues that social problems stem more from social structures and cultural assumptions than from individuals. This theoretical approach enables the academic examination of emotional responses to real-world occurrences and structures that affect people (Cvetkovich, 2012). Research on affective transfer in psychiatric clinics reveals the ability of individuals to borrow or share states of mind. The emotions and energies of one person or group can be absorbed by or can enter directly into another (Brennan, 2004). They are socially, culturally, and contextually specific and grounded in a complex web of power relations. Affective studies help illuminate how emotional expressions are not only performative but also productive. Accordingly, affect is characterized as situating “the individual in a circuit of feeling and response” (Hemmings, 2005, pp. 551–552) that can modulate and direct the governance of social interactions (Dewey et al., 2019).

Fear, anger, and resentment associated with crime, and in this case, piracy, energizes punitive policies (Feldman, 2012). There is a large body of literature that studies piracy from the perspective of security and international law attributing the emergence of piracy off the coast of Somalia to various factors such as weak governance, weak law enforcement, economic turmoil, maritime insecurity, geography, and cultural acceptability. In 2008, the EU launched a Combined Naval Force named ATALANTA to monitor the Gulf of Aden. In 2009 it was assisted by the US Naval Force Combined Task Force 151. Subsequently, other countries provided naval support to help protect the World Food Program aid deliveries, protect vulnerable vessels, and deter, prevent, and oppress acts of piracy off the coast of Somalia (Chalk, 2010). Patrolling the vast expanse of the Gulf of Aden and the Indian Ocean proved to be a daunting task. Naval forces were eventually forced to make tactical adaptations from disrupting pirates during an attack to disrupting *potential* pirates (Sörenson & Widen, 2013).

The limits of military interventions resulted in a paradigm shift to more regional informal and cooperative law enforcement collaborations. This shift was informed by internationally guided best practices established by the Contact Group for Piracy off the Coast of Somalia and the Shared Awareness and Deconfliction process to help direct Gulf of Aden missions (Guilfoyle, 2012). The Contact Group for Piracy off the Coast of Somalia lacked any direct regulatory power, yet was praised for its flexible, revisable guidelines that could be adapted into law at the national level (Guilfoyle, 2013). As regional states began adopting the UNCLOS definition of piracy and codifying piracy laws to enable prosecution, legal scholars and human rights groups began to raise concerns regarding the definition and ontological foundations (Bueger, 2013; Nyman, 2011), use of force (Treves, 2009), the treatment of suspected pirates on board naval vessels and concerning trial and incarceration (Guilfoyle, 2010; Osiro, 2011), and jurisdictional applicability (Sterio, 2011). This was further compounded by the general challenges of investigating and prosecuting crimes committed in international waters and on ships more broadly, such as processing the crime scene, securing physical evidence, recovering forensic material, and locating and interviewing witnesses at the crime scene (Fouche & Meyer, 2012). In the case of piracy off the coast of Somalia, evidence was intentionally or inadvertently sunk due to sea conditions and damage to vessels, investigative teams often took hours to arrive if at all, and language barriers inhibited interviews from witnesses until interpreters could be located, sometimes days after the event.

Despite the breadth of studies from the perspective of international law and criminal law addressing these issues, very few scholars have studied piracy trials (Gathii, 2010; Geiss & Petrig, 2011; Larsen, 2023; Muller, 2013). This study employs an iterative thematic content analysis of over 1,000 pages of trial transcripts from eight piracy trials conducted in Kenya between 2008–2012 to contribute empirical findings of an aspect of piracy that have thus far eluded researchers, the affective dimensions of justice at work in the regional prosecution model. We begin by providing an overview of the jurisdictional challenges of piracy trials in East Africa, and Kenya in particular. Then, we discuss the concepts of judicial proof and fear as an evidentiary factor, explain data collection and methods, and present selected piracy trial case studies. We conclude with a discussion of the relationship between fear, relative plausibility, and maritime justice as evidenced by Kenya's guilty verdicts.

2. Kenya's Jurisdictional Quagmire

The prosecution and imprisonment of over 300 pirates in East Africa through third-party MOUs caught the attention of human rights organizations and legal scholars alike. Kenya, the first country in the region to begin

accepting piracy transfers, entered into agreements with the UK, the US, the EU, and Denmark (Gathii, 2010). Accordingly, Kenya was the primary destination for prosecuting suspected pirates during 2008 and 2009. Until 2009, Kenya's piracy laws were outlined under Section 69(1) of the Penal Code that "any person who, in territorial waters or upon the high seas, commits any act of *piracy jure gentium* is guilty of the offence of Piracy" (The National Council for Law Reporting, 1930, Section 69(1)). The relatively broad language of Section 69 did not expressly establish the jurisdiction of Kenyan courts over nonnational piracy suspects captured on the high seas by other states.

The very first piracy trial in Kenya, *Republic v. Hasan Mohamud Ahmed* (2006), raised the issue of whether Kenya had jurisdiction to try suspected pirates when none were Kenyan citizens or captured by Kenyan forces. Initial court rulings found in favor of the prosecution arguing that piracy is a crime against mankind, which lies beyond the protection of any state. However, in 2009 after several appeals to the High Court, Kenya adopted the Merchant Shipping Act of 2008. Section 370(4) of the 2008 Act provides a more explicit grant of jurisdiction, providing that the piracy provisions of the 2008 Act shall apply "whether the ship...is in Kenya or elsewhere," whether the offenses were "committed in Kenya or elsewhere," and "whatever the nationality of the person committing the act" (Republic of Kenya, 2012, Section 370(4)).

Based on the UNCLOS 101 definition of piracy, Section 369(1) of Kenya's Merchant Shipping Act (Republic of Kenya, 2012) defines piracy as:

1. Any 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 a private aircraft, and directed against (a) another ship or aircraft, or against persons or property on board such ship or aircraft; or against (b) a ship, aircraft, persons or property in a place outside the jurisdiction of any state.
2. Any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.
3. Any act of inciting or intentionally facilitating an act described in points 1 or 2.

With the passage of the Merchant Shipping Act seemingly clarifying Kenya's right to prosecute, two other jurisdictional issues surfaced during subsequent piracy trials relating to the use of video evidence and the location of the crime scene. First, the issue of video evidence was first raised in *Republic v. Kheyre* (2009) by the defense counsel for the accused. The argument was that at the time of the trial Kenya's Evidence Act allowed for the use of electronic recording media to record a confession, but the accused person had to be notified of such recording. However, the Evidence Act did not expressly discuss the admissibility in court of electronic recording media used as surveillance without the consent of the accused. Ultimately, the magistrate ruled that even though the investigation took place beyond Kenyan jurisdiction, and that parliament had not provided/legislated parameters for the acceptance of such evidence, the video evidence was admissible.

The second issue, prompted by the overwhelming reliance upon third-party testimonials and evidence during piracy trials, was whether a court could have jurisdiction over a crime in which there was no option to visit the crime scene. The defense counsel in *Kenya v. Haji* (2009) argued that Kenyan law requires the option for the defense, witnesses, and the jury to visit the crime scene to verify the existence of the location where the

crime took place, the existence of evidence, and demonstrate investigative procedures. The judge ruled that visiting the scene of the crime would not help, that it is known that the Gulf of Aden exists and suffers from piracy and that witnesses can attest to the fact that the ships exist, thereby, the court has jurisdiction over the case.

These jurisdictional challenges highlight the centrality of witness testimony and third-party video and photography as evidence in Kenya's piracy trials. Without physical confirmation of damage to shipping vessels, injury to crewmembers, or standardized arrest and evidence collection procedures, the judges put considerable trust in witness qualifications and credibility. Fear and urgency loomed over these trials as the Horn of Africa was experiencing an unprecedented amount of piracy attacks, seafarers were afraid to travel along regular maritime routes, and regional states like Kenya were asked to receive and bring to justice presumably dangerous foreigners. Uncertainty surrounded the investigative and legal processes (police did not have experience with maritime evidence and laws were being modified to establish jurisdiction and prevent acquittals), the identities and nationalities of the accused were unverifiable (most did not have identification documents and provided false names), and understanding what transpired at sea was pieced together by witnesses trying to make sense of what happened and naval personnel whose sole mission was to find pirates.

3. Judicial Proof and Fear of Crime

The Kenyan judiciary is based on the British court system but does not have a jury system. The three-tiered system consists of lower courts presided over by magistrates, the High Court presided over by judges, and a Court of Appeals (Kuria & Vazquez, 1991). The piracy trials were tried in the High Court of Mombasa giving the judge sole discretion over the verdict. Judicial discretion has long been critiqued as giving judges too much freedom as the sole decision-makers not completely bound by the standards established by another authority (Etcheverry, 2018). Judicial discretion also raises questions about whether judges "make" or "declare" law as they are invested with the power to uphold or overrule precedence and oversee the judicial proof process (Baude, 2020). The judicial proof process, the evaluation of evidence, is one of the most important aspects of judicial discretion. Judges evaluate the evidence under legislative instructions to determine its relevance and admissibility. The burden of proof underlies the evidentiary proof process and typically falls on the prosecution. According to Kenyan legal codes, the burden of proof in criminal cases falls on the state and the standards of proof are "beyond a reasonable doubt."

Socio-legal scholars have identified a shift in the process of establishing juridical proof through evidence from probabilism to plausibility. Conventional probability theory defines standards of proof as a threshold on a scale between certain truths and certain falsity. Numbers are assigned to the evidence to compare it with the standard of proof to determine admissibility. Critics of this theory argue that it is inconsistent with how judges (and juries) evaluate evidence and fails to account for how proof proceeds at trial (Allen & Pardo, 2019). Others have staunchly stated that there is no basis for and one cannot allocate mathematical probability to events (Anderson et al., 2005; Tribe, 1971).

The plausibility theory of evidence evaluation underscores the comparative aspect of the proof process by evaluating the relative plausibility of contrasting explanations of evidence. According to Allen and Pardo (2019), the explanatory proof process has two thresholds: the potential explanations of the evidence and

events and a comparison of these in light of applicable standards of proof. Thus, the judge must decide whether the explanation of the party with the burden of proof is at least slightly better, or more plausible than the explanation of the other party—plausibility serves as a yes/no criterion (Kolflaath, 2019). Relative plausibility better accounts for the reality that “facts” in evidence cannot be facts, as they are filtered through memory and credibility. Rather, they are products of drawing inferences and processing evidence, processes that are a measure of plausibility instead of certainty (Zhang & Cao, 2017).

The Kenya piracy trials, like subsequent piracy trials in the region, struggled to produce material evidence. Many of the ships that were the target of the piracy attack proceeded along their shipping routes, unable to be examined as evidence in court. Similarly, the pirate skiffs were either sunk or too damaged to pull into port. Thus, the state’s evidence relied heavily upon video and photographic evidence provided by foreign navies and the testimony of witnesses who spoke of fearing for their lives as pirates approached and boarded their vessels. Kenya’s only acquittal came on 5. November 2010, when 17 Somali men were found not guilty of allegedly attacking the MV Amira due to insufficient evidence to prove guilt beyond a reasonable doubt. The magistrate blamed the loss of the case on the US Navy neglecting to provide video and photographic evidence (Glenn, 2010). Witness testimony was often essential to substantiate video and photographic evidence that was too vague to provide clear identification of the men on a skiff. As witnesses recounted seeing skiffs of heavily armed men racing towards their vessels, they described their fear of assault and possible death.

Fear of crime is a well-studied phenomenon that is yet to be expanded to the context of maritime spaces and the crime of piracy. Geographers have explored fear of crime as it relates to place and space (Pain, 1997; Smith, 1987; Solymosi et al., 2021), sociologists have engaged with media, social problems, and measuring fear of crime (Callanan, 2012; Ferraro & Grange, 1987; Lewis, 2017), and criminologists have analyzed and theorized the role of victimization, risk perception, and neighborhood disorder in relation to fear of crime (Brunton-Smith & Sturgis, 2011; Jackson & Farrall, 2009). Three of the most widely employed theoretical models of fear of crime are vulnerability, disorder, and social integration. Each of these models provides a starting point for assessing the seafarer testimonials. The vulnerability model predicts that those who are unable to defend themselves will be more fearful. The disorder model states that neighborhood incivilities increase feelings of fear. Lastly, the social integration model focuses on the role of social capital, cohesion, and collective efficacy in inhibiting fear. A comparative study of the three models concerning different types of crimes found that the social integration model was the strongest predictor of fear of violent crime (Alper & Chappell, 2012).

Scholars have also studied the impact of collective efficacy on fear of crime. Similar to the disorder and social integration models, the existence of collective efficacy in communities serves as a protective factor against fear of crime (Camacho et al., 2022). Vulnerability is a key part of understanding why some people are more fearful of others becoming victims of crime. Perceptions of the likelihood of victimization, lower levels of perceived self-efficacy (control), and a higher perceived negative impact (consequence) increase the processes of fearing crime (Jackson, 2009).

Fear of crime is complicated and multi-dimensional. Ferraro and Grange (1987) were among the first to move beyond the situational aspects of fear of crime and explore the cognitive and emotional components. They argue that populations experience fear of crime differently, thus, perceived risk, and avoidance, as well as measures of emotional reactions to crime should be measured to inform programs that seek to remedy these problems. In a similar vein, psychological approaches to the study of fear of crime focus on a person’s

perception of an event. Gabriel and Greve (2003) argue that for a state to be labeled as fear, one must consider affect, cognition, and motive. Not all indicators of fear are triggered by an acute fear situation. Rather, fear of crime may be dispositional. A study conducted by Hinkle (2015) teasing out emotional fear from perceived safety and risk revealed that there is a small subset of people who live in a constant state of fear.

4. Data and Methods

In the summer of 2022, the first author traveled to the High Court in Mombasa, Kenya to obtain copies of the piracy trial transcripts. The chief magistrate granted her permission to digitize the case files to create an electronic database for use by the Court, scholars, and legal practitioners. The case files, which were scheduled to be destroyed at the end of the year, were collected from a basement storage area that had recently succumbed to water damage and insect infestation. The chief magistrate provided a list of 18 piracy cases tried at the High Court of Mombasa, however, only eight case files could be located. Of the eight case files, approximately half were missing multiple sections. All documents in the case files that were not damaged beyond legibility were scanned over a period of one week. After scanning all the case files, the first author collated the documents into individual case file PDFs and emailed the electronic copies to the chief magistrate as agreed upon.

This study employs an iterative thematic content analysis of over 1,000 pages of eight piracy trial transcripts. In the first step, authors read through the documents individually to familiarize themselves with the trials. The team then met to discuss and create initial codes for open coding. The team agreed upon the initial codes of violence, weapons, fear, human rights, and representation. Next, each author individually recoded the documents. The results of the initial codes were then grouped into themes according to their similarities: human rights, jurisdiction, and evidence. In the final step, the authors independently extracted all quotations that corresponded to a theme of the analysis. The following section focuses on the theme of evidence.

5. Select Piracy Trials

Judicial proof and witness testimony of fear of victimization coalesced to establish guilt in all but one of the piracy trials tried in the High Court of Mombasa. The following sections highlight excerpts from select piracy trials to explore how material evidence (weapons) and how the witnesses felt about those weapons (fear) became plausible explanations for convicting defendants of piracy. The statements are direct quotes from the transcripts made during the questioning and cross-examination stages or when judges were delivering the judgment.

5.1. *Republic of Kenya v. Said and Six Others (Criminal Case No. 1184, 2009)*

Seven suspected pirates allegedly attempted to attack the German naval supply ship (mistaking it for a cargo ship) on 29 March 2009 on the high seas. The German naval forces interdicted the piracy suspects and handed them over to Kenya for prosecution on 7 April 2009. The case was determined on 6 September 2010 and the accused were each sentenced to serve five years in jail. Like many of the piracy trials conducted at the High Court of Mombasa, the judge invoked *piracy jure gentium*, where actual robbery is not required—the accused do not necessarily board, capture, or take control of the piracy vessel. Rather, proving beyond a

reasonable doubt that an attempt or a frustrated attempt to commit piracy took place is sufficient grounds for conviction.

Testimony from Stephen Rohde, the chief engineer aboard the *Spessart*, and Jan Cordes, a private security personnel, describe the event as the piracy suspects approached the target vessel:

One was aiming at *Spessart* with a weapon. The weapon he was carrying was a weapon that is large[r] than a pistol. It was aimed at *Spessart*. Several shots were fired from the boat. Alert was raised in our ship that we get into the ship and get under cover. The shots were aimed at *Spessart*. (Stephen Rohde, chief engineer, *Spessart*)

It was approaching the *Spessart* and I had seen a person holding a long barrel weapon aimed at the *Spessart* and shortly shots were fired, the shots were fired by one of the person in the skiff. I can't say how. (Jan Cordes, private security personnel, German Naval Protection Forces)

Both men recount seeing at least one of the accused holding a weapon and hearing shots fired as the skiff approached the *Spessart*. The crewmembers aboard the *Spessart* took cover and resumed their position to pursue the suspected pirates, eventually apprehending them. In cross-examination, Mr. Magolo, the defense counsel for the accused, raised the issue with the witnesses' testimony for its lack of clarity and physical evidence:

There were shots he could not tell the direction they came from. They persuaded the boat and apprehended it. There was no evidence of an attack. The witnesses did not know what direction the shots came from and the *Spessart* was not hit. (Mr. Magolo, defense counsel for the accused)

The Court was not able to visit the *Spessart* to assess any damage, nor was there photographic evidence of damage caused by bullets. Photographic evidence presented during the trial did show the accused in their skiff with one holding a rocket-propelled grenade (RPG) pointed at the *Spessart*. Although the defense counsel argued that whether the accused fired at the *Spessart* was unverifiable due to a lack of physical evidence, the presiding judge disagreed.

Honorable R. Mutoka found that the testimonies from the six witnesses aboard the *Spessart* corroborated the photo evidence and the RPG recovered from the skiff. The judgment states:

As the *Spessart* moved towards it, it started moving at high speed towards the *Spessart* and Cordes who had his binoculars saw one of its occupants holding the rocket-propelled launcher on his shoulder and it was trained on the *Spessart* and at the same time, shots were fired at *Spessart*....There is no evidence to discount the photos (Exb. 1) taken by Cordes (PW7) as the skiff approached their boat showing clearly a person on the said skiff holding the RPG which RPG was recovered from the very same skiff...The evidence that I have considered above shows clearly that the firing at the *Spessart* caused the crew to fear and return fire at the same time sending an SOS to the other ships....Each one of them is found guilty as charged and is convicted accordingly. (R. Mutoka, High Court judge)

The judge's statement provides an example of a plausible explanation in action. The explanation of the event provided by the state's witnesses was deemed credible and plausible given the photographs of the men in the

skiff holding their weapons and the RPG recovered at the site. Given that there was no counter-evidence to support the defense's explanation that the accused were fishermen, the judge found the defendants guilty. Notably, the judge references the crew's "fear" as a central factor in the ruling. Whereas Kenya's legal definition of armed robbery includes "threats" as an identifiable component of the criminal act, the definition of piracy does not. The phrase "causing them to be in fear" continued to emerge in subsequent piracy trials despite this being identified in Kenya laws as an actionable offense.

5.2. Republic of Kenya v. Kheyre and Six Others (Criminal Case No. 791, 2009)

The offense was said to have been committed on 11 February 2009 at about 2.20 PM on the high seas of the Indian Ocean, when jointly being armed with offensive weapons, the accused attacked the MV Polaris and at the time of such act "put in fear the lives of the crewman" on said vessel. The MV Polaris, under attack, communicated with the US Navy who proceeded to intercept and take videos of the weapons and grappling hook. The accused's skiff was destroyed because it could not be airlifted by helicopter. The RPG was not test-fired. During the trial, the state presented 11 witnesses. Most were members of the US Navy who came to assist the MV Polaris during the attack, and one was Jojie Dugelia, a duty watchman of the MV Polaris. Dugelia recounted his interaction with the suspected pirates as they pulled alongside the vessel:

One was holding an automatic rifle AK 47. Two were standing others were sitting. The one with the rifle was standing pointing at me. The rifle had a magazine at the time. He pointed at me with the finger and he was signaling me to lower the ladder. The other was pointing the rifle at me. I got scared I ran to the accommodation side. (Jojie Dugelia, duty watchman, MV Polaris)

Dugelia describes being singled out by the accused who "pointed a finger" at him to lower the ladder so they could board and take control of the vessel. His proximity allowed him the ability to identify the gun as a rifle AK 47 loaded with a magazine, which was later collected as evidence. Despite his stated fear, Dugelia was able to run to the bridge house, take control of the wheel, and steer the ship away as the suspected pirates attempted to board the vessel. While this transpired, the US Navy answered the distress call and arrived on the scene. Getlemert Murtha, an officer with the US Navy, corroborated Dugelia's story stating:

I was on the bridge all along. I saw them pull out several AK 47's and a grappler hook. I see a photo of the grappler hook they removed other things but I was too far to ascertain what it was. I did see the RPG a grappler hook is used to climb up the side of a ship. (Getlemert Murtha, officer, US Navy)

Murtha not only confirmed seeing the accused in possession of the weapons, but he also provided testimony that he did not see any fishing equipment on the accused's skiff, refuting the defense's argument that the accused were fishermen. He later testified that by the time the US Navy arrived to record his statement, he was still in fear. Sebson Wandera, assistant commissioner of the Kenyan Police, also testified that he had been shown a video of what took place and described: "They [suspected pirates] were armed and they put the sailors in fear and they commanded hurried the ship from where it was going to another direction." The presiding judge, Honorable R. Odenyo found the State's explanation more plausible than that of the defense. In his judgment, he asserts:

I reject the position that the accused were out fishing as they say. I find that they were up to something else other than fishing and PW2 provided the answers as corroborated by PW1, 3, 4, 5, 7,

and 10....When the accused's account is weighed against the prosecution's I have no doubt in my mind that the prosecution's account is the correct one. I reject the position that the accused were out fishing as they say. Prosecution's witnesses recovered weapons. Ultimately, the prosecution has succeeded beyond a doubt in proving that the accused guilty of the offense of attempted piracy. They are all convicted. (R. Odenyo, High Court judge)

The judge finds the accused guilty of *piracy jure gentium* based on the recovery of weapons and testimony that the accused were seen brandishing the weapons. Together, this proof was more plausible than the defense's explanation that the accused were out fishing, particularly because a witness testified that no fishing gear was found on the skiff.

5.3. Republic of Kenya v. Ali and Ten Others (Criminal Case No. 1374, 2009)

The particulars of the charge were that on 14 April 2008, on the high seas of the Indian Ocean, the defendants, being armed with offensive weapons (AK 47 and RPG launcher), attempted to hijack the merchant ship Safmarine Asia thereby putting in fear the lives of the crewmen of the attacked vessel. After three attempts, the assailants abandoned their mission. The 11 suspected pirates were interdicted by the Spanish naval forces on 15 April 2009 and handed over to Kenya on 22 April 2009 for prosecution. The case was determined on 29 September 2010 and the accused were each sentenced to serve five years in prison.

The state's only witness of the purported attack was the captain of the Safmarine Asia, Myat Soe. Captain Soe recounts the pirates' second and third attempts to attack his vessel:

The pirates then tried to board our ship from the left side using a ladder. I turned to the right side and they failed again. Then they retreated again to their bigger boat. Thereafter they came again for the third time. Then they shot at us using AK 47 rifles. Then they shot at us using RPGs. They hit the main mast of our ship with the RPG. They damaged it a bit. (Myat Soe, captain, Safmarine Asia)

He later recalls that he did not see the shots being fired but heard them. There was no photographic evidence produced of the damage to the vessel nor was the vessel made available to the court as evidence. The state produced four AK 47 rifles, three knives, and 199 rounds of ammunition as evidence. The defense counsel criticized the state's lack of evidence in his closing remarks:

Only one witness was called by the prosecution to testify on the attack on Safmarine Asia. That was the captain of the vessel. He said this vessel was attacked with a RPG. He said he heard what appeared to be AK 47. He did not see anyone fire any AK 47. His evidence is that the mast of his ship was damaged. The accused are not accused of having offensive weapons like a RPG. (Mr. Muyundo, defense counsel for the accused)

As the defense counsel points out, the state's evidence did not include an RPG, which was purportedly the cause of the damage to the ship's mast. Nor did the state enter proof of damage to the mast. Rather, the only evidence of damage to the ship was the captain's testimony. Similarly, none of the weapons produced were shown to have been fired. Despite the defense's best efforts to discredit the evidence or lack thereof, the judge was not convinced. Referring to the consistent evidence and timeline, the fact that the assailants'

ship had been constantly monitored from the time of the attack until the time of the arrest, and the plausible testimony of the witnesses that they were in fear, the court found it proved beyond reasonable doubt that the defendants had committed an act of piracy contrary to Section 69(1) and 69(3) of the Penal Code.

6. Conclusion: Affective Dimensions of Justice

Affective governance was first introduced by Dewey et al. (2019) to explore how affect modulates the relationship between street-involved women and social service and healthcare providers. Their findings conceptualize how the state and institutional actors draw upon affect to construct particular subjectivities as desirable or deviant. In this study of Kenyan piracy trials, we see a convergence of actors (military, legal, media, and witnesses) create a circuitry of affect, a feedback loop, that has helped to institutionalize fear of pirates as strong supporting evidence of guilt within the maritime justice regime. The Kenya trials evidence affective dimensions of justice at work and situated in various affective nodes along this circuitry, namely in the media, on the ocean, of selfhood, and in the courtroom. The media's framing of pirates as violent criminals and the ocean as a dangerous space invoked fear among the public. This fear became a daily lived reality for seafarers who now felt afraid of crossing maritime routes suspected to be at high risk for piracy attacks. Seafarers who experienced the trauma of a piracy attack reported struggling with feelings of fear and vulnerability that they continued to carry with them long after the event. The courtroom becomes a space where these fears are institutionalized into legal processes. Fear is recounted and validated through testimony, tipping the scales of relative plausibility in favor of the state, and eventually becoming institutionalized in judicial rulings as evidence of piracy even in the absence of an attack.

Fear alone did not elicit a guilty verdict. However, admission of fear along with the presence of weapons and Somali men near ships, was enough to rule in the state's favor. For example, most piracy cases tried at the High Court of Mombasa demonstrate several things. First, the presence of weapons on board the accused's skiffs along with testimony from a witness that they saw the accused holding the weapons or a photograph of the accused holding the weapons constitutes *piracy jure gentium*. Piracy trials conducted in the Seychelles used a similar process for identifying someone as part of a Pirate Action Group, a non-legal term for markers commonly believed to be associated with piracy. Larsen (2023) describes how certain "piracy paraphernalia" served as markers such as weapons, hooked ladders, and large amounts of fuel and water. Unlike the Seychelles trials, the term Pirate Action Group was not explicitly used in the Kenya trials. Second, evidence of the accused firing or having fired the weapons is not necessary to prove guilt. There were no photos of the weapons being fired, no physical evidence of the target vessels being fired upon, and no tests conducted to verify if the weapons were fired. Third, affect, or more specifically the crew's fear, became a central factor during testimony and re-engaged during the judges' rulings.

The evidence allowed into the Kenya piracy trials was often challenged on grounds of authenticity (video surveillance and photos) or jurisdiction (whether Kenya has the authority to use evidence submitted by external states) but there was no evidence from the trial transcripts that any evidence was ruled inadmissible. Instead, the state and defense were tasked with providing plausible explanations for all evidence submitted during the trial phase. The defense, unable to visit the crime scene, was unable to produce evidence and struggled to counter the state's facts of the case. It is unsurprising then, that the judges continually found the state's explanation at least "slightly better," or more plausible, than the defense's. Accordingly, the evidence evaluation process in Kenya's piracy trials demonstrates relative plausibility in action and is useful

in understanding how judicial discretion works in trial contexts involving multiple jurisdictions, a myriad of investigatory practices, and evidentiary challenges. It also reveals the judicial power states possess in maintaining order at sea, regardless of geographic location, when they enter into MOUs to prosecute piracy.

The trials also reveal how fear reverberates across various affective nodes and seeps into the minutiae of maritime justice. As the court proceedings were taking place, the moral panic of piracy was infiltrating media outlets across the globe, motivating state navies to create coalition forces, the UN established its first office dedicated specifically to countering maritime piracy, seafarers once hardened to the labor-intensive life at sea now feared routes through the Gulf of Aden and the Indian Ocean. Fear of crime theory demands we inquire more deeply as to whether their fear was event-specific or perhaps generalizable to specific maritime spaces, whether those who had private security on board felt less vulnerable and fearful, or the possibility that they had come to conflate all Somalis with stories of violent, dangerous criminals. The high seas have long been associated with lawlessness and disorder, compounded by the inability to defend oneself can understandably increase a seafarer's fear of violent victimization. In the Mombasa trials, perhaps more so than the Seychelles trials, the presence of fear was the glue that held together hearsay testimony and circumstantial evidence to make the state's recounting of events more plausible than that of the defense. Considering Kenya (and the Seychelles) has received a lot of capacity-building support and funding to ensure that the piracy trials satisfy the highest human rights and international legal standards, it is imperative for scholars to study these trials and better understand their broader socio-legal implications.

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Conflict of Interests

The authors declare no conflict of interests.

Data Availability

Piracy trial transcripts are available at <http://bvandeberg.people.ua.edu> and made publicly available with the permission of Chief Magistrate Honorable Martha Mutuku.

References

- Ahmed, S. (2010). *The promise of happiness*. Duke University Press.
- Allen, R., & Pardo, M. (2019). Relative plausibility and its critics. *The International Journal of Evidence & Proof*, 23(1/2), 5–59.
- Alper, M., & Chappell, A. T. (2012). Untangling fear of crime: A multi-theoretical approach to examining the causes of crime-specific fear. *Sociological Spectrum*, 32(4), 346–363.
- Anderson, T., Shum, D., & Twining, W. (2005). *Analysis of evidence: Text, problems, and cases* (5th ed.). Wolters Kluwer Law & Business.
- Baude, W. (2020). Precedent and discretion. *The Supreme Court Review*, 2019(1), 313–334.
- Brennan, T. (2004). *The transmission of affect*. Cornell University Press.
- Brunton-Smith, I., & Sturgis, P. (2011). Do neighborhoods generate fear of crime? An empirical test using the British crime survey. *Criminology*, 49(2), 331–369.

- Bueger, C. (2013). Orchestrating the response: Somali piracy and ontological complexity. *Global Policy*, 4(1), 86–93.
- Callanan, V. J. (2012). Media consumption, perceptions of crime risk and fear of crime: Examining race/ethnic differences. *Sociological Perspectives*, 55(1), 93–115.
- Camacho, M. D., Gerrell, M., & Andershed, H. (2022). Perceived unsafety and fear of crime: The role of violent and property crime, neighborhood characteristics, and prior perceived unsafety and fear of crime. *Deviant Behavior*, 43(11), 1347–1365.
- Chalk, P. (2010). Piracy off the Horn of Africa: Scope, dimensions, causes and responses. *The Brown Journal of World Affairs*, 16(2), 89–108.
- Collins, V. (2012). Dangerous seas: Moral panic and the Somali pirate. *Australian & New Zealand Journal of Criminology*, 45(1), 106–132.
- Cvetkovich, A. (2012). *Depression: A public feeling*. Duke University Press.
- Dewey, S., Hankel, J., & Brown, K. (2019). Affective governance among street-involved women and their service providers. *Journal of Political Power*, 12(3), 390–408.
- Etcheverry, J. B. (2018). Rule of law and judicial discretion: Their compatibility and reciprocal limitation. *Archiv für Rechts-und Sozialphilosophie*, 104(1), 121–134. <https://doi.org/10.25162/arsp-2018-0007>
- Feldman, L. (2012). Political criminology, the plural state, and the politics of affect. In A. Sarat (Ed.), *The legacy of Stuart Scheingold* (pp. 81–98). Emerald Publishing.
- Ferraro, K. F., & Grange, R. L. (1987). The measurement of fear of crime. *Sociological Inquiry*, 57(1), 70–91. <https://doi.org/10.1111/j.1475-682X.1987.tb01181.x>
- Fouche, H., & Meyer, J. (2012). Investigating sea piracy: Crime scene challenges. *WMU Journal of Maritime Affairs*, 11, 33–50.
- Gabriel, U., & Greve, W. (2003). The psychology of fear of crime: Conceptual and methodological perspectives. *The British Journal of Criminology*, 43(3), 600–614. <https://doi.org/10.1093/bjc/43.3.600>
- Gathii, J. T. (2010). Kenya's piracy prosecutions. *American Journal of International Law*, 104(3), 416–436.
- Geiss, R., & Petrig, A. (2011). *Piracy and armed robbery at sea: The legal framework for counter-piracy operations in Somalia and the Gulf of Aden*. Oxford University Press.
- Glenn, M. (2010, November 5). Kenya court acquits 17 on piracy charges. *Juristnews*. <https://www.jurist.org/news/2010/11/kenya-court-acquits-17-on-piracy-charges>
- Guilfoyle, D. (2010). Counter-piracy law enforcement and human rights. *International & Comparative Law Quarterly*, 59(1), 141–169.
- Guilfoyle, D. (2012). Somali pirates as agents of change in international law-making and organisation. *Cambridge Journal of International and Comparative Law*, 1(3), 81–106. <https://ssrn.com/abstract=2253273>
- Guilfoyle, D. (2013). Prosecuting pirates: The contact group on piracy off the coast of Somalia, governance and international law. *Global Policy*, 4(1), 73–79.
- Hemmings, C. (2005). Invoking affect: Cultural theory and the ontological turn. *Cultural Studies*, 19(5), 548–567.
- Hinkle, J. (2015). Emotional fear of crime vs. perceived safety and risk: Implications for measuring “fear” and testing the broken wings theory. *American Journal of Criminal Justice*, 40, 147–168.
- Jackson, J. (2009). A psychological perspective on vulnerability in the fear of crime. *Psychology, Crime and Law*, 4(15), 365–390.
- Kolflaath, E. (2019). Relative plausibility and prescriptive theory of evidence assessment. *The International Journal of Evidence and Proof*, 23(1/2), 121–127.
- Kuria, G. K., & Vazquez, A. M. (1991). Judges and human rights: The Kenyan experience. *Journal of African Law*, 35(1/2), 142–173.

- Larsen, J. (2023). *Counter-piracy law in practice: An ethnography of international security governance*. Routledge.
- Lewis, D. A. (2017). *Fear of crime: Incivility and the production of a social problem*. Routledge.
- Muller, J. (2013). The Hamburg piracy trial: A contribution to the international aim of combating piracy. In K. Odendahl, N. Matz-Lück, & A. von Arnould (Eds.), *German yearbook of international law* (Vol. 56, pp. 585–594. Duncker and Humblot.
- Nyman, E. (2011). Modern piracy and international law: Definitional issues with the Law of the Sea. *Geography Compass*, 5(11), 863–874.
- Osiro, D. (2011). *Somali pirates have rights too: Judicial consequences and human rights concerns* (Working Paper No. 224). Institute for Security Studies. <https://issafrica.org/research/papers/somali-pirates-have-rights-too-judicial-consequences-and-human-rights-concerns>
- Pain, R. H. (1997). Social geographies of women's fear of crime. *Transactions of the Institute of British Geographers*, 22, 231–244.
- Republic of Kenya. (2012). *Merchant shipping act*. <https://faolex.fao.org/docs/pdf/ken94222.pdf>
- Scheingold, S. (1995). Politics, public policy, and street crime. *The Annals of the American Academy of Political and Social Science*, 539(1), 155–168. <https://doi.org/10.1177/0002716295539001012>
- Smith, S. J. (1987). Fear of crime: Beyond a geography of deviance. *Progress in Human Geography*, 11(1), 1–23.
- Solymosi, R., Buil-Gil, D., Vozmediano, L., & Guedes, I. S. (2021). Towards a place-based measure of fear of crime: A systematic review of app-based and crowdsourcing approaches. *Environment and Behavior*, 53(9), 1013–1044.
- Sörenson, K., & Widen, J. J. (2013). Irregular warfare and tactical changes: The case of Somali piracy. *Terrorism and Political Violence*, 26(3), 399–418. <https://doi.org/10.1080/09546553.2012.725681>
- Sterio, M. (2011). International law in crisis: Piracy off the coast of Somalia. *Case Western Reserve International Journal of Law*, 44(1), 291–301. <https://scholarlycommons.law.case.edu/jil/vol44/iss1/16>
- The National Council for Law Reporting. (1930). *Kenya penal code*. <http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2063>
- Thein, D. (2005). After or beyond feeling? A consideration of affect and emotion in geography. *Area*, 37(4), 450–454.
- Tomlinson, B. (2010). *Feminism and affect at the scene of argument: Beyond the trope of the angry feminist*. Temple University Press.
- Treves, T. (2009). Piracy, law of the sea, and use of force: Developments off the coast of Somalia. *European Journal of International Law*, 20(2), 399–414.
- Tribe, L. (1971). Trial by mathematics: Precision and ritual in the legal process. *Harvard Law Review*, 84(6), 1329–1393. <https://doi.org/10.2307/1339610>
- Zhang, B., & Cao, J. (2017). The “mirror of evidence” and the plausibility of judicial proof. *The International Journal of Evidence & Proof*, 21(1/2), 119–132.

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