



THE SALVAGE (WARSHIPS AND GOVERNMENT SHIPS) ACT

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DRAFTING INSTRUCTIONS

The Government has adopted a policy the aim of which is to enable the officers and crew of Navy and Government ships to recover remuneration for the provision of salvage services. The existing law as stipulated in the Merchant Shipping Act expressly prohibits the recovery of any form of payment by the officers and crew of such ships for services rendered to vessels and cargo exposed to danger at sea.

The Government's shift in policy was triggered by, inter alia, an oil tanker disaster off our coast. In April 1994, an oil tanker owned by Esso Petroleum Company ran aground off the coast of Mombasa. The Navy ships responded to the distress call and successfully managed to save the vessel and its oil cargo. Though other salvors joined in the salvage operation, the leading role was undertaken by officers and crew of the Navy ships. In spite of this, the other salvors recovered fully for the services rendered in the entire salvage operation.

It is noteworthy that the Commission of Inquiry set up to investigate the circumstances which led to the grounding of the tanker acknowledged the leading role played by the Navy ships in the salvage operation. The Commission was impressed by the good work performed by the Navy in saving life and property and further noted the professionalism and military precision with which they responded to the disaster. The Commission recommended, in light of the existing law, that the law be amended to make it possible for officers and crew to claim salvage remuneration where the services go beyond the ordinary scope of their duties.

The Ministers of Transport and Defence jointly presented the recommendations to the Cabinet and the same were unanimously adopted as a policy proposal. The Government now wishes, as a policy, to promulgate legislation taking full account of the recommendations of the Commission and specifically providing for the recovery of salvage reward not only by officers and crew of navy ships, but also by the crew of other Government ships.

The Government notes that the existing law in this area totally precludes officers and crew of Navy and Government ships from recovering salvage remuneration. Clearly, the principle duty of Navy ships is to protect the country from the onslaught of any enemy and to seek out and destroy the enemy. The position of the officers and crew as military personnel of the Navy does impose upon them certain duties of protection to Kenyan ships and to the lives and cargo aboard them. The Government recognises that Navy personnel should not be encouraged to go scouring the seas searching for derelicts and for the 'elusive salvage pot - of - gold'. The officers and crew should not be distracted from their primary duty of patrolling Kenyan waters.

However, aiding or salving distressed property at sea is not within the scope of the usual or expected duty of Navy personnel and for performing those functions they should now as a policy be entitled to a salvage award. It must be pointed out , however, that the ordinary service of rescuing Kenyan vessels in distress, requiring no great hardship or peril on the part of the officers and crew falls directly within the line of their general duty.

A clear distinction must be drawn between ordinary services and services that go beyond the ordinary scope of the Navy personnel's duty. The intention of the Government is that the personnel should only be entitled to recover a salvage reward for the latter services. Services that fall within the former category is the expected service of the Government for the protection and encouragement of its commercial shipping, and the right to impose this duty on Government vessels is too clear to be controverted.

In the case of great and extraordinary service, it is the view of the Government that such service should not only be the subject of reward but should also be the subject of encouragement. As a new policy, the rendering of such services should not be comprehended as a duty resulting from the public employment of the persons rendering them, or from the instructions of the

the Merchant Shipping Act which prohibits the officers and crew of warships from recovering salvage reward in any event. The law should be such that the officers and crew of warships and Government ships can recover a salvage reward where the services rendered exceed the ordinary scope of their duties. The new legislation should not equate the officers and crew with private salvors. The basic public duty, for which no salvage reward is recoverable, should be maintained.

It is noteworthy that the Court of Appeal in The SAILOR [1992] E.A 9 held that the Navy ship "KNS HARAMBEE" and its crew could not recover salvage reward for a successful rescue of *M.V sailor* since the services were within the ambit of their public duty. This is the leading case in this area and it is imperative that the new legislation be drafted in such a manner as to override the decision.

The Navy is a disciplined force. The element of command should thus be maintained in the new legislation. The Commanding Officer of a Navy ship, or a Government ship, which takes part in a salvage operation should ensure total control over his men. A duty should be imposed upon the Commanding Officer to ensure the application of military skill and dedication in the performance of the salvage operation. The Commanding Officer will be fully responsible for the conduct of the salvage operation.

Whenever a Navy or Government ship on patrol at sea is called upon to render assistance to a vessel in distress, the Commanding Officer will be duty bound to promptly inform the Department of Defence and the Naval Operations Command. The Commanding Officer must send full details on the vessel in distress and a report on the nature of services rendered and the circumstances under which the warship or Government ship was involved in the salvage operation. To maintain the chain of command, any intentions by the officers and crew to claim salvage reward should be communicated to the Department of Defence through the Commanding Officer. The Commanding Officer will be required to send a notification to that effect to the Department of Defence.

This strict report mechanism and monitoring system should be effectively established to avoid a departure from the military way of doing things. The officers and crew should be made to understand that the performance of salvage services and indeed the recovery of salvage reward will remain within the military framework. Discipline should be paramount.

The new legislation should establish a Tribunal which will have the responsibility of authenticating salvage services and determining whether the services rendered are beyond the ordinary scope of public duty. The Tribunal shall have the task of investigating the nature of the services rendered by Navy and Government ships. If the Tribunal is of the opinion that the services were beyond the ordinary scope of public duty, it will issue a certificate which will entitle the officers and crew institute a salvage claim either in court or through arbitration.

The reason for the establishment of the tribunal is to prevent claims for salvage in respect of any but important services. For reasons of public policy, no claim for salvage services by the officers and crew will be adjudicated upon, unless the tribunal determines that the services were beyond the ordinary scope of their duty and issues a certificate of authority to that effect. The court or the arbitrator will not hear salvage claims by the officers and crew unless the certificate of authority is produced. However, the Government should be exempted from the requirement to produce a certificate of authority. For the effective discharge of its functions, it will be important to empower the Tribunal to make its own rules of procedure.

Since the Government will be entitled under the new legislation to recover a salvage reward, it is advisable that a Fund be established to manage the monies so recovered. The monies in the Fund should be applied only for purposes connected with salvage operations by Naval and Government ships. The monies may be used to meet the costs of repairs to any damage caused to the ships during salvage operations, replacement of damaged, expended or lost gear and equipment. The monies may also be used to meet the necessary expenses of the

Tribunal to be established under the new legislation. The Minister of Defence should be empowered to make regulations for the management of the Fund.

The officers and crew of Naval and Government ships should have the power to institute salvage claims. However, they should be expressly barred from instituting claims in respect of services rendered in saving life from any vessel or services in the rescue of other Government ships and their cargo. As a matter of public policy, the officers and crew should be barred from instituting claims for services rendered in the prevention of damage to the environment. These may be said to be obligations imposed on the officers and crew as public servants.

The Government should have a right to institute a salvage claim alone where naval or Government ships have rendered salvage services. In so doing, the Government ought to be empowered to withhold permission for officers and crew to claim for salvage reward separately. The Government may in any event, consider granting the officers and crew a share of any salvage reward received.

In cases where the Government institutes a salvage claim jointly with the officers and crew, the court should be empowered to give a lump sum reward without necessarily apportioning the reward between the government and the crew. The duty of apportioning such a reward should be left to the Government. In keeping with military discipline, the Government's apportionment of the reward should be accepted without question by the officers and crew.

Any salvage reward recovered by the officers and crew either through the judgement of the court, the settlement of the arbitrator or in any other manner should be distributed in the manner provided by the Armed Forces Act. To avoid a deviation of the apportionment criteria laid down in the Armed Forces Act, the Court should make the reward payable to the Commanding Officer or the Officer who was in charge of the salvage operation. To maintain the military discipline necessary, the distribution of the reward between the officers and crew should strictly be proportional to the rank and seniority.

Since the substance of the International Convention on Salvage, 1989 is incorporated in the Merchant Shipping Act, the new legislation should as much as possible reflect that position. The court, for instance, in determining the salvage reward due to a warship or any other Government ship should apply the criteria obtaining in the Convention. In addition, the court should focus on the degree with which the services rendered exceeded the ordinary scope of the ship's duties. It must be stressed that the officers and crew of a warship or Government ship will only recover a reward for those services that go beyond the scope of their ordinary duties.

Though the new piece of legislation is intended to amend existing salvage law on warships, the legislation should not deviate from the general principles of law applicable in this area. Similarly, the legislation should fit and work effectively in the existing legal framework and should not be inconsistent with provisions in other statutes. As in all statutes of this nature, a suitable limitation period should be built into the legislation.

Whereas the legislation should not re - enact existing salvage law, it is desirable to make it clear that private salvors shall not be allowed to take advantage of joint salvage operations with either warships or other Government ships. In many cases in the past, private salvors have recovered full reward for the services rendered jointly with naval ships. Whether or not officers and crew of warships institute salvage claims where services are rendered jointly with private salvors, the latter should not, in any event, recover a reward exceeding their fair contribution to the salvage operation.

Salvage falls within the Admiralty jurisdiction of the High Court. Therefore the High Court should be empowered to determine salvage claims and disputes instituted either by the Government or officers and crew. However, the parties to a salvage dispute should be granted the option to submit their dispute to arbitration. The legislation should also recognise any other acceptable means of resolving

disputes, for instance out of court settlements.

Issues that may not be conveniently included in the primary legislation should be made the subject of subordinate legislation. The Minister of Defence should be expressly empowered to make regulations. The Minister should, for instance, be able to make regulations on the administration of the Fund, set out the terms and conditions of the members of the tribunal and generally make regulations for the proper carrying out of the purposes of the legislation.

In general, therefore, the intention of the Government is to have an administrative and legal framework that will adequately cover the provision of salvage services by warships and Government ships and the subsequent recovery of salvage reward by the officers and crew of these vessels. The legislation should provide a clear mechanism for drawing the line between salvage services that fall within the ordinary scope of the crew's public duty (for which no salvage reward is recoverable) and salvage services that fall outside the domain of public duty (for which reward is recoverable). It is noteworthy that the legislation is intended to cover basically military personnel. For this reason, the element of discipline should not only be reflected in the spirit of the legislation, but should also underlie the administrative framework envisaged in the new legislation.

CAP 491 Salvage (Warships and Government ships)

CHAPTER 491

THE SALVAGE (WARSHIPS AND GOVERNMENT SHIPS) ACT

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CHAPTER 491

THE SALVAGE (WARSHIPS AND GOVERNMENT SHIPS) ACT

Commencement: 1st July ,1995

An Act of Parliament to make provision for recovery of salvage reward by officers and crew of warships and government ships, and to provide for matters incidental thereto and connected therewith

PART I - PRELIMINARY

Short title.

1. This Act may be cited as the Salvage (Warships and Government Ships) Act.

Interpretation.

2. In this Act, except where the context otherwise requires:

“Commanding Officer” means a duly commissioned officer in command of a warship;

“court” means the High Court of Kenya exercising its admiralty jurisdiction;

“Fund” means the Fund established under Section 26;

“Government ship” means a ship of the Kenya Police Force, the Coast Guard or any ship operated by the Government for non-commercial purposes;

“Minister” means the Minister for the time being in charge of Defence;

“property” means any property not permanently and intentionally attached to the shoreline and includes freight at risk;

“salvor” means any person rendering salvage services;

“salvage operation” means any act or activity undertaken to assist a vessel or any other property in danger at sea;

“salvage services” means services rendered in direct connection with salvage operations;

“salvage reward” means any payment, remuneration or compensation paid under this Act for salvage services;

“ship” includes every description of vessel used in navigation not propelled by oars;

“tribunal” means the Tribunal established under section 13;

“vessel” includes any ship or boat, or any other description of vessel used or designed to be used in navigation;

“warship” means any ship belonging to the Kenya Navy or the Armed Forces, and includes any Government ship operated for non - commercial activities;

Application.

3. (1) This Act shall apply to:

- (a) military aircraft ; and
- (b) merchant ships and aircraft for the time being requisitioned by the Government and operated for non - commercial purposes.

(2) This Act shall not apply to ships owned or operated by the Government and used, for the time being, for commercial purposes.

PART II - PROVISION OF SALVAGE SERVICES

Duty of warships.

4. (1) All warships shall render assistance to any ship, persons on board or other property in danger in navigable waters or in any other waters.

(2) Such assistance shall be rendered where, in the opinion of the Commanding Officer, it is within the reasonable power of the warship.

Duty of crew.

5. (1) The officers and crew of a warship shall, as public servants, protect ships flying the flag of Kenya, their cargo and persons on board.

(2) The officers and crew shall, in the course of patrolling the Kenyan waters, prevent or minimise damage to the environment.

Right to salvage reward.

6. (1) The officers and crew of a warship shall be entitled to a salvage reward where they render services beyond the ordinary scope of their duties.

(2) The right of the officers and crew to claim a salvage reward shall be subject to the findings of the Tribunal.

(3) The claim for a salvage reward shall not include the performance of services that fall under the provisions of section 5.

Government's right to reward.

7. (1) The Government shall be entitled to claim a salvage reward where salvage services are rendered by or with the assistance of any warship.

(2) The Government shall have the same rights and remedies in respect of these services as any other salvor.

(3) The right of the Government to claim a salvage reward shall be subject to the findings of the Tribunal.

(4) The claim for a salvage reward shall not include services rendered by the warship under the provisions of section 4.

Duty of Commanding officer.

8. (1) The Commanding Officer or the officer in charge of the salvage operation shall owe a duty to the owner of the vessel or other property in danger to:

(a) carry out the operation with due care;

(b) exercise due care to prevent or minimise damage to the environment in performing the salvage operation;

(c) seek assistance from other salvors whenever the circumstances reasonably so require; and

(d) accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger.

(2) Notwithstanding the provisions of paragraph (d), the reward payable for salvage services rendered by a warship shall not be prejudiced by any intervention where it is proved that a request for such intervention was unreasonable.

Duty of owner and master.

9 . The owner and master of the vessel or the owner of other property in danger shall owe a duty to the Commanding officer or the officer in charge of the salvage operations:

(a) to cooperate fully with him during the course of the salvage operations;

(b) to exercise due care to prevent or minimise damage to the environment; and

(c) to accept redelivery when reasonably requested to do so, where the vessel or other property has been brought to a place of safety.

Report to Department of Defence.

10 . (1) The Commanding officer shall send a report by signal to the Department of Defence whenever the warship is engaged in a salvage operation.

(2) The signal shall include the following information:

(a) name of the ship in danger and her port of registration;

- (b) name and principal place of business of owner;
 - (c) nature of the cargo on board the ship;
 - (d) the ship's position; and
 - (e) a description of the services which have been rendered or are being rendered.
- Notification of intention to claim.
- 11.** (1) Where officers and crew of a warship intend claim a salvage reward, the Commanding Officer shall, at the end of the salvage operation, notify the Department of Defence.
- (2) The notification shall include a full report of the circumstances under which the salvage operation was carried out.
- Authority for institution of claims.
- 12.** No claim for salvage services shall be instituted or adjudicated upon without the express and written authority of the Tribunal.
- Establishment of salvage Tribunal.
- 13.** (1) There is hereby established a tribunal to be known as the Salvage Tribunal.
- (2) The Tribunal shall be composed of three members to be appointed by the Minister.
- (3) The members shall be:
- (a) an officer from the Department of Defence;
 - (b) an officer from the Naval Operations Command ; and
 - (c) a senior officer from the Kenya Maritime Authority.
- Functions of Tribunal.
- 14.** (1) The Tribunal shall consider all cases where officers and crew of a warship have expressed the intention to claim a salvage reward.
- (2) The Department of Defence shall submit to the Tribunal the report and notification received under sections 10 and 11.

(3) The Tribunal shall determine whether the services rendered by officers and crew of the warship were beyond the ordinary scope of their duties.

(4) The Tribunal may, for the purposes of its proceedings, summon any officer or crew member to appear before it for questioning.

(5) The Tribunal shall lay down its rules of procedure.

Certificate of authority.

15. (1) Where, in the opinion of the Tribunal, the services rendered by officers and crew of a warship were beyond the ordinary scope of their duties, the Tribunal shall issue a certificate of authority entitling the officers and crew to institute a claim for a salvage reward.

(2) The certificate of authority shall contain the details of the services rendered and an express authority to the officers and crew to institute the salvage claim.

(3) The finding of the Tribunal shall be final.

Exemption for the Government.

16. Notwithstanding the provisions of section 15, the right of the Government to institute a salvage claim shall not be subject to the production of a certificate of authority.

PART III - DETERMINATION OF SALVAGE CLAIMS

Bar to institution of certain claims.

17. (1) The officers and crew of a warship shall not institute any claims for services rendered:

(a) to government ships, their cargo or other property;

(b) to save life from any vessel; and

(c) to prevent or minimise damage to the environment.

(2) Under no circumstances shall a salvage reward be due from a person whose life has been saved.

Institution of joint suit.

18. (1) Where the Government, officers and crew institute a suit jointly, the court shall, in its judgement, give the reward in lump sum.

(2) The Government shall apportion the lump sum reward between itself and the officers and crew, and such apportionment shall be accepted by the officers and crew without question.

(3) The share of the reward due to the officers and crew under subsection (2) shall be distributed in accordance with the provisions of section 25.

(4) The provisions of this section shall apply, *mutatis mutandis*, to joint arbitration.

Right of Government to institute suit alone.

19. (1) The Government shall have a right to institute a claim in respect of salvage services rendered by warships in its name alone and to withhold permission for officers and crew to claim separately.

(2) When this right is exercised, the Government may consider granting the officers and crew a share of any reward received.

Joint salvage services.

20. (1) Where salvage services are rendered jointly by a warship and other salvors, the court shall, subject to section 23, determine the salvage reward in proportion to each salvor's contribution to the salvage operation.

(2) The other salvors shall not, in any event, recover a salvage reward exceeding their contribution.

Jurisdiction.

21. (1) The court shall have jurisdiction to determine salvage claims instituted by the Government or officers and crew of any warship.

(2) Subject to the provisions of section 16, the court shall not commence the hearing of such a claim without the production of a certificate of authority issued under section 15.

(3) Where a claim is instituted without a certificate of authority, the court shall dismiss the suit with costs.

(4) The certificate of authority shall be conclusive proof that the institution of the suit has received approval of the Tribunal.

Arbitration.

22. (1) The parties may, by consent in writing, refer the salvage dispute to arbitration.

Cap 137.

(2) The arbitrator shall be appointed in compliance with the provisions of the Arbitration Act.

(3) The provisions of section 21 shall apply, *mutatis mutandis*, to the arbitration proceedings.

Criteria for fixing reward.

23. (1) The court or arbitrator, in fixing the reward, shall take into account the following criteria:

(a) the salvaged value of the vessel and other property;

(b) the measure of success obtained by officers and crew;

(c) the nature and degree of the danger;

(d) the skill and efforts of the officers and crew in salvaging the vessel and other property;

(e) the promptness of the services rendered;

(f) the extent to which the services rendered by the officers and crew exceed the ordinary scope of their duties; and

(g) any other matter that may be deemed fit.

(2) The court or arbitrator, in fixing a reward for the Government, shall take into account the following criteria:

(a) the time used and expenses and losses incurred by the officers and crew;

(b) the risk of liability and other risks run by the warship or officers and crew;

(c) the damage caused to the warship or other equipment during the salvage operation;

(d) the extent to which the services rendered by or with the assistance of the warship exceed the ordinary scope of the warship's duties; and

(e) any other matter that may be deemed fit.

(3) Where a suit is instituted under section 19, the court or arbitrator, in fixing a reward, shall take into account the criteria in subsections (1) and (2).

(4) Payment of a reward fixed in accordance with subsections (1) and (2) shall be made by the vessel and other property interests in proportion to their respective salvaged values.

(5) The reward, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salvaged value of the vessel and other property.

Condition for reward.

24. No reward shall be due under this Act if the salvage operation was not successful.

Distribution of reward.

25. (1) Any salvage reward which results from:

(a) a decision of the court;

(b) a decision of the arbitrator;

(c) a settlement out of court; or

(d) a voluntary gift of the owners of the salvaged property,

shall be made payable to the Commanding Officer or the officer who was in charge of the salvage operation.

(2) The reward so recovered shall be distributed and paid to the officers and crew proportionally on the basis of rank and seniority in the manner provided under the Armed Forces Act.

Cap 199.

(3) The reward recovered by the Government under subsection (1) shall be deposited in the Fund.

Salvage fund.

26. (1) There is hereby established a Salvage Fund.

(2) Any reward recovered by the Government under this Act shall be deposited in the Fund.

(3) The monies in the Fund shall be applied for the following purposes:

(a) repair of damage to warships caused during salvage operations;

(b) repair or replacement of stores or gear, damaged, lost or expended during the salvage operation;

(c) purchase of fuel, lubricants and other consumable stores for future salvage operations;

(d) to meet any expenses necessary for future salvage operations; and

(e) to meet expenses necessary for carrying out the work of the Tribunal.

Limitation of Actions.
Cap 22.

27. (1) Subject to the provisions of the Limitation of Actions Act, an action in respect of salvage services shall be time - barred after a period of two years.

(2) The limitation period shall commence on the day on which the salvage operations are terminated.

Cap 10.

(3) Notwithstanding the provisions of subsection (1), the limitation period with respect to the Government shall be subject to the provisions of the Government Proceedings Act.

(4) The court may extend the limitation period to such extent and on such conditions as it thinks fit.

(5) Notwithstanding the provisions of subsections (1), (2), (3) and (4), the limitation period may be extended , in writing, by the parties.

PART IV - SUPPLEMENTAL

Regulations.

28. The Minister may make regulations for giving effect to and for the better carrying out of the purposes of this Act.

Repeal.
Cap 389.

29. The provisions of section 262 of the Merchant Shipping Act are hereby repealed.

Modification of laws.

30. Any reference occurring in any written law to salvage services by warships shall be construed subject to the provisions of this Act.
