

**IN THE HIGH COURT OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**MISCELLANEOUS CRIMINAL APPLICATION No.19 OF 2020**

**DIRECTOR OF PUBLIC PROSECUTIONS .....APPLICANT**

**VS**

**ABDI SHARIF HASSAN @ MSOMALI.....1<sup>ST</sup> RESPONDENT**

**MOHAMED IBRAHIM JUMA @ LULANGE .....2<sup>ND</sup> RESPONDENT**

**RULING**

24<sup>th</sup> April & 19<sup>th</sup> May, 2020

**TIGANGA, J**

Under the Certificate of Urgency certified by Mr. **Faraja Nchimbi** Assistant Director of Public Prosecutions, the applicant in this application, the Director of Public Prosecutions, filed this application exparte by the chamber summons made under sections 188(1)(a)(b)(c)(d), 188(2) and 392A(1) of the Criminal Procedure Act [Cap 20 RE.2002] as amended. The same was supported by a 25 paragraphs affidavit sworn by **Mr. Constatine Kakula**, learned State Attorney and another affidavit of 24 paragraphs sworn by Inspector **Alijua Amulike Simeon** the police officer and investigator of the criminal case facing the respondents.

In the chamber summons a total of five substantive orders are sought which are as follows:

- (i) That this court be pleased to order none disclosure of identity and whereabouts of the witnesses,
- (ii) That this honourable Court be pleased to order none disclosure of the statement and documents likely to lead to the identification of witnesses,
- (iii) That some witnesses to give their testimony through video conferencing,
- (iv) That this honourable court be pleased to order trial proceedings to be conducted in camera,
- (v) That this honourable court be pleased to order any other protection measures as the court may consider appropriate for the security of the witnesses.

The affidavits filed in support of the application, advance the reasons for the application and the ground upon which the applicant ask for the orders in the chamber summons.

It is deposed in the affidavit that, the respondents stand charged before the Resident Magistrates' Court of Mwanza in PI No. 103 of 2015 for offences of conspiracy to commit terrorism and financing terrorism. The offence is alleged to have been committed on diverse dates between 1<sup>st</sup> January 2012 and 6<sup>th</sup> September 2014 by entering in illegal agreement and forming a criminal syndicates with other person not part of this application with the purpose of committing terrorism. The main intention was to seriously destroy fundamental political, constitutional, economic and social structure of the United Republic of Tanzania.

In so doing they raised funds and obtained weapons from within and outside Tanzania. They planned and actually executed the plan by invading some police stations in Tanzania to obtain weapons, one of the invaded station being Ushirombo police station. Before executing their plan, they convened several meetings at various places in the cities and regions of Mwanza and Dar Es Salaam.

That the 1<sup>st</sup> respondent financed the criminal syndicate mentioned above by giving one **Twaha Said Katundu @ Dr. Gwaluba Adam Twalibu** Tanzania Shillings 1,100,000/= say (one million and one hundred thousand) for purposes of purchasing hand grenades and other weapons to be used in the execution of the said criminal enterprise at Ushirombo police station, while on 6<sup>th</sup> September 2014, the 2<sup>nd</sup> respondent for similar purposes financed the same person mentioned above, a sum of Tanzania shillings 500,000/= (five hundred thousand) to travel to Ushirombo to attack Ushirombo police station.

According to the deponents the said money given to **Twaha Said Katundu @ Dr. Gwaluba Adam Twalibu** by the respondents, was used to purchase hand grenades and firearms. On that very date, having been financed by the respondents, the said **Twaha Said Katundu @ Dr. Gwaluba Adam Twalibu** together with his fellows in such a criminal syndicate who are, **Saidi Adam Saidi, Nasibu Omari Hamahama, Saad Habib Abdallah, Hamad Adam Mohamed @Twalib, Tesha Rwiza@Murshid, Ramadhan Mohamed Msangi, Abubakar Selemani Omari, Jumanne Issa Suwed and Amon Amiri Msharaba** executed their criminal rackets by invading Ushirombo police station and killed three

police officers namely **WP.7106 PC Uria, G.2615 PC Dustan and E.3977 Cpl David** and injured **H.627 PC Mohamed**. They also in the process, stole several weapons including 11 SMG, 1 Pistol, 5 pump action, 1 anti - riot gun, 205 SMG bullets, 14 pump action bullets, 8 pistol bullets and 11 tear gas.

After the investigation the said **Twaha Said Katundu @ Dr. Gwaluba Adam Twalibu** with his fellows mentioned hereinabove were arrested and charged before Bukombe District Court at Ushirombo in PI No.31 of 2014; that was before the arrest of the respondents and consequently charged in PI.No.103 of 2015 before the Resident Magistrates' Court of Mwanza.

On 11 November 2019, the Director of Public Prosecutions, filed an application, Misc. Crim. Application No. 94 of 2019 in respect of PI No. 31 of 2014 which was seeking for various orders for witness protection. That application was granted by my brother Hon. Siyani, J, on 24<sup>th</sup> Dec, 2019.

I is the contention of the deponent that, given the nature of the case PI. No. 103 of 2015 the intended witnesses and their families are in danger following the eminent threats and intimidation from the members of the organized crime syndicate mentioned herein, as certified in the affidavit of Inspector **Alijua Amulike Simeon** the investigator. As the two Preliminary Investigation cases namely PI. No. 31 of 2014 and No. 103 of 2015 were discovered to be stemming from the same criminal syndicate and transaction, definitely these two cases will be having the same witnesses. Now while the said witnesses will be protected in one case, they will not be in the other case if this application is not made and granted. That has

necessitated this application in order to secure and protect the witnesses in PI. No. 103 of 2015 as well.

Inspector **Alijua Amulike Simeon** deposed in his affidavit that, being an investigator, he has been constantly reviewing the security situation over the lake zone areas and particularly concerning the case he was investigating. According to him, his review revealed that given the situation, the witnesses in the two that is PI No. PI. No. 31 of 2014 and No. 103 of 2015 cases and their families are in danger, if not protected. The proper mode of protection according to him, is non-disclosure of the names and the statements of the witnesses during committal proceedings, hearing of cases in camera, hearing by video conference and many other methods of protecting witnesses.

At the hearing of this application, the applicant Mr. Biswalo Mganga-the DPP himself appeared in person and he was assisted by a team of three Attorneys namely, Mr. Castus Ndamugoba and Ms. Mwaseba Senior State Attorneys as well as Mr. Constantine Kakula – State Attorney. In his submission in support of the application, Mr. Mganga adopted the contents of the two affidavits sworn by Contantine Kakula - State Attorney from his office and that of Inspector. Alijua Amulike Simeon from the Directorate of Criminal Investigation in the Anti-Terrorism and Transnational Organized Crime section of Tanzania Police Force stationed in Dar Es Salaam who is also an investigator assigned to investigate a criminal case facing the respondents i.e PI No. 103 of 2015 before Mwanza Resident Magistrates' Court.

Without unnecessarily repeating what is already on record, it suffices to say that Mr. Biswalo Mganga, - the DPP, warned of the impending danger of exposing the witnesses and their evidence for their security and the security of their families.

Realizing the fact that the concept of witness protection is new in our jurisdiction, Mr. Mganga asked this court to be persuaded by and take inspiration of the practice from other jurisdictions. He referred the court on the warning as contained in the Hand Book, titled 'Criminal Justice Response to Terrorism, 2009 Edition', particularly at page 58 of the hand book, under which it was warned that some of the dangers in criminal justice is witness intimidation and witness tampering. He warned on the possibility of compromising the potential witnesses, if not protected.

He submitted that, non-protection of witnesses may lead to fear, thus affecting the effective testifying of witnesses in court. He submitted further that there are various measures which needs to be employed in the process of protecting the witnesses. One of those measures according to him, is the importance and need to separate the witnesses from the offender, which in his opinion will reduce the threat from the terrorist groups supporting the offenders or from the offenders themselves.

He cited the decision in the case of **Mahender Chawla and Others vs Union of India and Others** Criminal Original Jurisdiction Writ Petition Criminal No.156 of 2016 by the Supreme Court of India, he insisted that, in that case, the importance of witness protection was underscored, the witnesses were termed to be the eye and the ear of justice, therefore they

need to be protected. He reminded the court that, the concept of witness protection does not only intends to protect the prosecution witnesses, but also the defence witnesses as well. On that, he cited the case of **Goodluck Kyando vs Republic** [2006] TLR 363.

While mindful of the constitutional rights of the accused person, he submitted that the courts in Kenya have gone a step ahead in dealing with this concept that, we need to balance the right of the accused persons and that of the victims. He cited the case of **Republic vs Doyo Galgalo and 3 others**, Criminal Case No.16 of 2019 High Court of Kenya at Meru, in which it was held that, witness protection measures' do not abrogate the provisions of the constitution.

Mr. Biswalo Mganga further submitted that, the principle of witness protection is now part of our law as provided under section 188(1) of the Criminal Procedure Act as amended by Written Laws Misc. Amendment (No.2) Act No.07 of 2018. That law allowed the court, upon application by the Director of Public Prosecutions ex parte, to give order of non-disclosure of witnesses, the place where they are and may also direct that the trial be conducted in camera or the witness testify through video conference.

He submitted that the application has been preferred under section 188(2) of the Criminal Procedure Act, as amended by Written Laws Misc. Amendment Act No.02 of 2018 because section 245 of the CPA requires the Director of Public Prosecutions, to file an information with all statements of all witnesses as well as all other documentary evidence. According to him, that exposes the witnesses' identities, which facts may expose the witnesses

into the danger of being known by accused persons or their associates. In a way this application is asking for an order to dispense with the reading of the statements of the witnesses before the subordinate court.

Knowing that the cases cited are of foreign jurisdiction, Mr. Biswalo Mganga cited the case of **Attorney General vs Mugesli Anthony and 2 Others** Criminal Appeal No. 220 of 2011 where it was held that, courts in Tanzania are allowed to take inspiration of the foreign decisions on the novel or strange matter which have not been adequately dealt with in our country. He asked the court in this application to take inspiration of two decisions of Kenya and India already cited, which are from the common law jurisdiction, to determine the matter before hand.

Further to that, he also asked this court to be persuaded by the decision of my brother Hon. M.M. Siyani, J in Misc. Crim. Application No. 94 of 2019 as the case for which he issued such an order, will be consolidated with the case for which these orders are sought. He in the end prayed the application to be granted as prayed.

Having summarized the contents of the affidavits and the arguments by the applicant, it is instructive to find that the application at hand is for witness protection. This being a relatively new concept in our jurisdiction, there is no statutory definition assigned to it. However, inferring from the concept itself, it denotes the process, mechanism, procedure and measures taken for protecting people involved in the criminal justice process as witnesses who find themselves at risk of serious personal harm as a result of that involvement. A witness is a person who is either the victim of the

offence or a person by virtue of his/her position possesses some evidential information which is needed to assist the court to make its decision over the case before it. This witness may have possessed the said information by physically witnessing what happened, or which he may have perceived to have happened. He may also have possessed the information by possessing the documents, or that at any point in time he came across any documents relating to the issue which needs to be determined by the court.

That being the meaning, then the importance of the witnesses in the administration of justice generally need not be over emphasized. That is why the Supreme Court of India in the case of **Mahender Chawla and Others vs Union of India and Others**, Criminal Original Jurisdiction Writ Petition Criminal No.156 of 2016 cited to me by Mr.Biswalo Mganga, described the witness as an important player in the judicial system who helps the judges in arriving at correct factual findings. He described the witnesses as;

*"...a man whose life and faith are so completely one that when the challenge comes, to step out and testify for his faith he does so disregarding all risks and accepting all consequences".*

Needless to say much, a lot may be said on the importance of witnesses in the administration of justice in any given jurisdiction.

Realizing that the concept is novel in our jurisdiction, Mr. Biswalo Mganga cited the case of **Attorney General vs Mugesu Anthony and 2 Others** Criminal Appeal No. 220 of 2011 urging this Court to take inspiration of the experience from other jurisdictions which have adequately dealt with the concept. He cited the two decisions of Kenya and India which dealt with

the concept in their respective jurisdictions. At page 34 of the judgment cited above, the Court of Appeal of Tanzania, having been asked to seek inspiration of the South African decision, it held *inter alia* that;

*"...Strictly speaking, Tanzanian courts are not bound by such decisions. However, it will not be wrong when dealing with matters arising from similar circumstances to seek inspiration or borrow leaf from decisions arising from similar legislations in identical circumstances around the world including South Africa, Australia, the United Kingdom etc, irrespective of the differences in legal system."*

Heeding to the request by Mr. Mganga that I borrow leaf from other jurisdictions, and under the authority of the case cited above, there is no dispute that the concept of witness protection is a bit new to our jurisdiction. That being the case, in taking inspiration of other jurisdictions, I will, in my such endeavor, begin by looking at the experience at the United Nations level, then, the international criminal tribunals, the common law experience which will be represented by United Kingdom and India, and the regional experience which will be represented by Kenya.

Under the United Nations, in accordance with Articles 24 and 25 of Organized Crime Convention, Adopted by the UN General Assembly: 15 November 2000, by resolution 55/25 provides that;

*"State parties shall take appropriate measures within their means to provide effective protection as well as assistance to victims and witnesses of crime. Such measures may include inter*

*alia establishing procedures to safeguard the physical integrity of people who give testimony in criminal proceedings from threats against their life and intimidation. Witnesses must be protected from threats, intimidation, corruption, or bodily injury and States are obliged to strengthen international cooperation in this regard”.*

This means, the United Nations in one of its conventions has provided for the state parties to put in place measures and mechanism for protection of witnesses.

Before the international Criminal Court, there are also measures in place for witness protection. In the case of **The Prosecutor vs William Samoei Ruto and Joshua Arab Sang**, ICC-01/09-01/11, it was held *inter alia* that;

*"Pursuant to Article 67(1) of the statute, (Rome statute) the accused have the fundamental right to a public hearing. This principle of publicity is further emphasized in regulation 20 of the Regulations of the Court which provides that all hearing shall be held in public unless otherwise provided in the statute, Rules, these regulations or ordered by the chamber. That is however subject to exception particularly those provided for in Article 68(1) and (2) of the statutes which reads in unison with Article 64(2) and (6)(e) **of the Statute and Rule 87 of the Rules give power to the trial chamber to order protective measures to protect the safety, physical and***

***psychological well-being dignity and privacy of the victim and witnesses and to hold any part of the proceedings in camera.** However these measures shall not be prejudicial to or inconsistent with the right of the accused to fair and impartial trial, .....therefore the chamber finds that the protective measures sought, specifically the allocation of the pseudonym for use during the trial and face and voice distortion during testimony should be granted in this case."* [Emphasis added]

In the common wealth jurisdiction, in United Kingdom in particular, having realized this as a problem, both legislative and procedural measures have been put in place to ensure that criminal trials are not bogged down on the accounts of insecurity of the witnesses. In the United Kingdom for example, the Youth Justice and Criminal Evidence Act, 1999 sets out a range of protective measures that are available to witnesses in criminal proceedings who are deemed to be 'intimidated'. The special measures which are relevant for intimidated witnesses are; **screening the witness from the accused, evidence by live link, evidence given in private** etc. The common measures in protecting witness in United Kingdom are but not limited to, holding the proceedings in camera, excluding the public with court-room closed, withholding the names of the witnesses, re location, and anonymity of witnesses.

In India by the Witness Protection Scheme of 2018 of India, the country has put in place the scheme to provide for the mechanism,

procedures and regulations for the protection of witnesses whose safety are in actual or perceived danger, as elaborated in the case of **Mahender Chawla and Others vs Union of India and Others** Criminal Original Jurisdiction Writ Petition Criminal No.156 of 2016. In its preface the scheme provides the aim and objective to be;

*"The objective of the scheme is to ensure that the investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination.....Witnesses need to be given confidence to come forward to assist the law enforcement and judicial authorities with full assurance of safety. The scheme aims to identify series of measures that may be adopted to safeguard witnesses and their family members from intimidation and threat against their live, reputation and property"*

While in East Africa, Kenya being cited as example, the protection of witnesses is recognized by the fundamental law of the country. Article 50(8) of the Constitution of Kenya of 2010 which provides that;

*"...this Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.*

While sub article (9) of the same constitution directs the parliament to enact the legislation providing for the protection, rights and welfare of victims of offences who are potential witnesses in any given case.

Following that constitutional mandate, the Witness Protection Act Cap 79 RE 2012 of the laws of Kenya was enacted which among other measures, it established the Agency which oversees all issues related to witness protection. Interpreting the Act, the High Court of Kenya at Meru, in **Republic vs Doyo Galgalo and 3 Others** Criminal Case No.16 of 2019 it was held at page 5 of the ruling, that the witness protection measures do not violate the provision of Article 50 of the Constitution of Kenya which provides for fair hearing.

Having looked at the position as provided under the United Nations Convention, international law and criminal court, common wealth and regional experience, it suffices to find that Tanzania, having realized to have no law providing for the protection of the witnesses, amended the law to provide for the same. The law in place is section 188(1) (a) (b)(c)(d), and 188(2) of the Criminal Procedure Act [Cap 20 RE.2002] which for easy reference it is hereunder quoted *in extenso*.

188.-(1) *notwithstanding any other written law, before filing a charge or information, or at any stage of the proceedings under this Act, the court may, upon an ex-parte application by the Director of Public Prosecutions, order;*

- (a) a witness testimony to be given through video conferencing in accordance with the provision of the Evidence Act;*
- (b) non-disclosure or limitation as to the identity and whereabouts of a witness, taking into account the security of a witness;*
- (c) non-disclosure of statements or documents likely to lead to the identification of a witness; or*
- (d) any other protection measure as the court may consider appropriate.*

*(2) Where the court orders for protection measures under Paragraphs (b) and (c) relevant witness statements or documents shall not be disclosed to the accused during committal or trial.*

From the provision at hand, this court may, at the application by the Director of Public Prosecutions made *ex parte*, give the orders stipulated under section 188 of the Criminal Procedure Act as amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, No. 7 of 2018 for purposes of protecting the witnesses or the intended witnesses. The experience from other jurisdictions require the court while giving orders for witness's protection, to balance between the safety of the witnesses, the right of the accused person to fair hearing and the interest of the public.

In our jurisdiction, criminal trials are characterized by openness and disclosure. The law i.e section 245, 246 and 247 of the Criminal Procedure Act [Cap 20 R.E.2002] requires the prosecution to disclose the substance of the evidence intended to be relied upon in proving the case against the accused person. The law was actually in conformity with the constitutional principle of the right of hearing thereby disclosing the substance of the evidence to the accused person for him to prepare his meaningful defence.

While the accused's rights needs to be protected, the right of the victim must also be, it is only where witnesses are protected, themselves and their family members that, they can freely testify in court. I entirely agree with Mr. Biswalo Mganga that, the conventional or orthodox mode of administration of criminal justice, put much efforts in protecting the right of the accused person while neglecting the right of the victim and witnesses.

As rightly observed by my brother Hon. M.M. Siyani, J, that the openness in judicial proceedings depicts the right to a fair trial which enables the accused persons to prepare and present their defence, and test the prosecution case by cross-examination. However in some cases, it has disadvantages as it may discourage other witnesses to come forward fearing to risk their lives and those of their family members.

That can sometimes act as a bar to successful prosecutions, particularly in homicides, organized crimes and other serious crimes as witnesses fear that if their identity is revealed to the accused persons, their associates, relatives or the public generally, they or their friends and family members will be at risk of serious harm.

Such serious cases should be treated specially, as exceptional cases to the general rule of openness and disclosure of criminal justice trials. In this, the mechanism of protecting them should be put in place to assure them of their security.

In this application, the affidavits of Constatine Kakula and Alijua Amulike Simeon have deposed both actual and perceived threat to the witnesses. That, has necessitates the protection of witnesses. In the said affidavits, looking at the way the offence was planned, the way it was committed, and the facts that it claimed the lives of three police officers, prove that the offence is the organized one. There is no doubt that it is one of the serious offence which deserves the protection of witnesses.

The above said, and having considered the importance of protection of witness under international, common wealth and regional experience in cases of this nature, I allow the application in the following terms;

- (a) That the identities of the intended witnesses in PI No. 103 of 2015 be withheld, that will includes their names and whereabouts.
- (b) I hereby order non-disclosure of the statements of the intended witnesses containing their evidence and documents likely to lead to the identification of witnesses, during committal proceedings.
- (c) In order to balance between the rights of the accused and the security of the witnesses and the interest of the public, it is ordered that during trial the accused persons be supplied with a

summary of the facts constituting the substance of the evidence intended to be relied upon by the prosecution.

- (d) The said summary should not mention the names of the intended witnesses or any other person who by association may lead to the identity of the witnesses and the place or location of the witnesses. These I believe will give the accused persons the sufficient information to know the substance of the evidence, to prepare their defence and for cross examination purposes.
- (e) I find the prayers for conduction of the trial by video conference and the in camera trial to be prematurely submitted. They should in my opinion, await for the information to be filed to the High Court so that the assigned Judge can have full control of the proceedings by directing how the trial should be conducted.

That said and done, the application is therefore allowed to the extent elaborated above.

It is accordingly so ordered.

DATED at MWANZA on 19<sup>nd</sup> day of May 2020



**J. C. Tiganga**

**Judge**

**19/05/2020**

Ruling delivered at Mwanza this 19<sup>th</sup> day of May, 2020 in the presence of the applicant Mr. Biswalo Mganga –Director of Public Prosecutions and Mr.

Constantine Kakula learned State Attorney on line through audio teleconference for the Applicant.



**J. C. Tiganga**

**Judge**

**19/05/2020**

