

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISCELLANEOUS CRIMINAL APPL. NO. 202 OF 2021

*(Originating from Preliminary Inquiry Case No. 33 of 2015 of the Resident
Magistrate's Court of Dar es Salaam at Kisutu)*

THE DIRECTOR OF PUBLIC

PROSECUTIONS ----- APPLICANT

VERSUS

FUNDI HAMISI KAMAKA @ FUNDI HAMISI

@ MOHAMED s/o FUNDI ----- 1ST RESPONDENT

ELIASA KALINDA KAZANA @ ILIASI

RAMADHANI ----- 2ND RESPONDENT

ISSA MUSSA MUSTAPHA ----- 3RD RESPONDENT

ATHUMAN HAMISI ABEID ----- 4TH RESPONDENT

JUMA RAJABU MBONDE ----- 5TH RESPONDENT

Date of Last Order: 15/09/2021

Date of Ruling: 30/09/2021

RULING

MGONYA, J.

The Applicant, the **DIRECTOR OF PUBLIC PROSECUTIONS** (herein to be referred as the "DPP") filed an *Ex-parte* Application under **sections 34 (3) Prevention of Terrorism Act No. 21 of 2002** read together **Section 188 (1) (b) (c) and (d) of the Criminal Procedure Act, Cap.**

20 [R.E 2019] (the Act) against the Respondents seeking orders of witnesses protection. The orders sought read as under:

- 1. That, this Honourable Court be pleased to order none disclosure of identity and whereabouts of the witnesses for security reasons during committal and trial proceedings.***
- 2. That, this Honourable Court be pleased to order none disclosure of statements and documents likely to lead to the identification of witnesses for their security reasons during committal and trial proceedings.***
- 3. That, this Honourable Court be pleased to order any other protection measure as the Court may consider appropriate for security of the witnesses.***

The Application is supported by the Affidavits of **Ms. JANETHREZA KITALY**, State Attorney working with the National Prosecutions Services and **SP ALINANUSWE REUBEN MWAKYEMBE** a Senior Superintendent of Police (SSP) in the Police Force stationed in Dar es Salaam in the Directorate of Criminal Investigation within the Tanzania Police force which is mandated with investigation of criminal cases within the country.

When the Application came for *Ex-parte* hearing, Ms. Stella Majaliwa, the Senior State Attorney requested the court to adopt the contents of the two Affidavits as part of her submission. While making reference to the said Affidavits, Ms. Majaliwa informed the court that the Respondents are facing a charge with two counts. **First count**, which cut across all Accused/Respondents herein, is arranging and participating in meeting knowing it concerned with promotion of terrorists acts contrary to **section 5 (a) of the Prevention of Terrorism Act No. 21 of 2002**. **Second**, for all Accused/Respondent is soliciting, support for commission of terrorists act contrary to **section 18 (b) of the Prevention of Terrorism Act No. 21 of 2002**.

The contents of the **Ms. JANETHREZA KITALY'S** Affidavits reveals that, the evidence contained in the Police Case file mentioned shows that on divers dates between **1st November, 2013** and **17th February, 2015** the Respondents entered into illegal agreement and formed a criminal syndicate with other person not part to this Application for the purpose of committing terrorism acts namely overthrowing the Government of the United Republic of Tanzania and replace it with Islamic State an act which intended to seriously destabilize the fundamental political Constitutional Economic and Social Structures of United Republic of Tanzania.

Further that, in the course of dealing with the investigation, it has been revealed by the Investigator **SSP ALINANUSWE REUBEN MWAKYEMBE** that intelligence has unveiled that the welfare and safety of intended Prosecution witnesses in the case facing the Respondents are in serious danger following threats and intimidation from members at large of the organized criminal syndicate in which the Respondents belong.

It has further been submitted that, from the above information, public interest demands that the identity and whereabouts of the intended Prosecution's witnesses be withheld for security reasons during committal and trial proceedings of the case facing the Respondents.

The DPP's office further declares that investigation in respect **Preliminary Inquiry Case Number 33 of 2015** is completed and the Director of Public Prosecutions intends to file information to the High Court soon after the determination of the instant Application.

It is **SP ALINANUSWE REUBEN MWAKYEMBE's** assertion through his Affidavit that, reliable intelligence information has unveiled that there has been several attempts by associates of the Respondents to obtain names and identities of persons who are likely to be witnesses for the purpose of threatening them not to cooperate with law enforcement officers in the case facing the Respondents. From

the above brief concerns, the DPP via *Ex-parte* Application prays for the above mentioned orders.

I had time to examine the Affidavit and consider the Applicant's submission. As the matter has been brought under **section 188 (1) of the CPA as repealed and replaced by section 12 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2018**, it came to my knowledge that through the same, the law gives the court power to make the orders upon an *Ex-parte* Application of the Director of Public Prosecution. For ease of reference, let me quote the same as hereunder: The same provides;

"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 conference in accordance with the provision of the evidence Act;***
- (b) non-disclosure or limitation as to the identity and whereabouts of a witnesses, 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 measures as the court may consider appropriate.”***

In the cause of examining the contents of the Affidavits attached to this Application and submission thereto, further as per the intelligence information obtained by the Authorities as well stated by **SP ALINANUSWE REUBEN MWAKYEMBE** through his Affidavit, I am satisfied that lives of the intended witnesses and their families are in danger. Further that, there has been attempts of associates of the Respondents to obtain the names of the witnesses with an evil mind. In the event therefore, there is a serious need to protect the said witnesses and the community against terrorist groups and organizations.

As well known, witnesses are the messengers of Justice who are in the position to reveal to the court the acts and actions of those who are concerned with the matter before the court so as Justice cannot only be seen but also done. In the event therefore a call for a wider scope to protect witnesses and people who volunteer to co-operate with Law Enforcement Agents to combat crimes, is of utmost importance.

Under those circumstances then, the issue before me then is whether the prayers by the DPP are tangible or not. In

replying this issue under the circumstances and upon the importance of the witnesses as demonstrated above, and for the interest of Justice to every party to fair litigation and especially those who will appear as witnesses the **Ex-parte Application before the court is accordingly granted.**

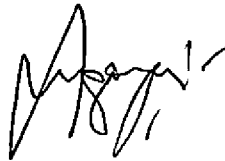
Having said that, and on the strength of the two Affidavits and submission of the Applicant's Counsel and having balanced the interest of the Respondents and those of the witnesses, indeed there is the need to protect the witnesses. Moreover, for the purposes of strengthening the rule of law and fair trial, and on the authority given by section **188 (1) (a) (b) (c) (d) and (2) of the CPA**, I proceed to order the following:

- 1. That, in conducting the proceedings of Preliminary Inquiry Case Number 33 of 2015 before Resident Magistrate Court of Kisumu at Dar es Salaam and the proceedings thereafter at the High Court, this Honourable Court grants an order for none disclosure of identity and whereabouts of the witnesses for security reasons during committal and trial proceedings.***
- 2. Further, this Honourable Court orders none disclosure of statements and documents likely to lead to the identification of witnesses in the***

above stated proceedings for their security during committal and trial proceedings; and

- 3. That, this Honourable Court proceeds to order Prosecution witnesses and their families to get state protection in the course of conducting the case and thereafter until such time when it can be established by the relevant authority that no threat exists.***

It is so ordered.

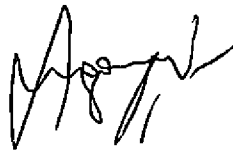


L. E. MGONYA

JUDGE

30/09/2021

Court: Ruling delivered in the presence of Ms. Stella Majaliwa, Senior State Attorney and Ms. Veronica, RMA in Chambers on this 30th September, 2021.



L. E. MGONYA

JUDGE

30/09/2021