IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISCELLANEOUS CRIMINAL APPLICATION NO. 90 OF 2021

(Original Arusha Resident Magistrates' Court in Preliminary Inquiry Case No. 50 of 2014)

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT

Versus

SHABAN MUSSA @ MMASA @ JAMAL ..... 1ST RESPONDENT

ATHUMAN HUSSEIN MMASA ..... 2ND RESPONDENT

MOHAMED NURU @ MUHAKA ..... 3RD RESPONDENT

JAFARI HASHIM LEMA ..... 4TH RESPONDENT

ABDUL MOHAMED HUMUD SALIM @ WAGOBA ..... 5TH RESPONDENT

SAID MAIKO TEMBA @ SAIDI MABREKA ..... 6TH RESPONDENT

AMAN MUSSA & PAKASI ..... 7TH RESPONDENT

RAJABU YAKUB ADALLAH @ IKAPU ..... 8TH RESPONDENT

RULING

10/11/2021 & 01/12/2021

KAMUZORA, J.

This application was brought under the provision of section 34 (3) of the Prevention of Terrorism Act No. 21 of 2002 as amended by Written Laws (Miscellaneous Amendment) Act No. 2 of 2018 read together with section 188 (1) (b), (c), (d), and (2) of the Criminal Procedure Act Cap.

20 Revised Edition 2019. The Director of Public Prosecution has ex-parte moved this court for the following orders: -

1) *That, this Honourable Court be pleased to order that witness testimony to be given through video conference in accordance with the provision of the Evidence Act Cap. 6 Revised Edition 2019;*
2) *That, this Honourable court be pleased to order non-disclosure of identity and whereabouts of the witnesses for security reasons during committal and trial proceedings;*
3) *That, this Honourable Court be pleased to order non-disclosure of statement and documents likely to lead to the identification of witnesses for their security reasons during committal and trial proceedings;*
4) *That, this Honourable Court be pleased to order any other protection measures as the court may consider appropriate for security of the witnesses.*

When the matter was called for hearing Mr. Felix Kwetukia, Senior State Attorney appeared representing the Applicant Director of Public Prosecution (DPP). In his submission in support of the application he craved for the leave of this court to adopt two affidavits in support of application deponed by Abdallah Chavula, (Senior State Attorney) from National Prosecution Service (NPS) office and ACP Joshua Mwafulango, Regional Crimes Officer (RCO), Arusha Region. Mr. Kwetukia submitted that the basis of this application is PI No. 50 of 2014 which is pending

before the Resident Magistrate's Court at Arusha. That, in that case the accused persons/respondents are jointly charged on the first and second counts of terrorism acts, the 3rd and 4th respondents are charged for third court for issuing ammunition to be used for terrorism acts while the 4th, 5th and 6th respondent are charged for the 4th count for giving support to terrorism acts. It was contended that the offences originate from the terrorism incident in which a hand grenade was used in bombing VAMA Restaurant at Uzunguni area within Arusha Municipality and Arusha Region. That, the incident took place on 07/07/2014 resulting to the injuries to seven people and damages to the properties. That, the investigation was conducted resulting into the arrest of the respondents. It was further contended that the attack was made because the restaurant was operating against the religious faith of the respondents. That, the respondents aimed at seriously destabilize the fundamental political, constitutional, economic and social structure of the United Republic of Tanzania. The counsel referred this court to the affidavit of ACP Joshua Mwaflango and Abdallah Chavula and insisted that, the same reflect that the lives of prosecution witnesses are in danger due to threat from people who are respondents' associates who are not yet arrested. On that basis Mr. Kwetukia insisted on the prayer for an order to protect the prosecution witnesses. He was of the view

that although witness protection issue is a new phenomenon in our jurisdiction, we can borrow the inspiration from other jurisdictions. He referred an Indian case of **Mwahender Chawla & Others Vs. Union of India & Others, Writ Petition (Criminal) No. 156 of 2016)** Page 3 where, the Supreme Justices of Indian Supreme Court underscored that, witnesses are the eyes and ears of justice and insisted that they need to be protected. He also referred a Kenyan case of **Republic Vs. Doyo Galgalo High Court of Kenya at Meru Criminal Case No. 16/2019, Pg. 6** Para 5 where the High Court of Kenya underscored the importance in witness protection. Mr. Kwetulia added that, the issue of borrowing leaf of the decision in other jurisdictions is not a new issue. He referred the Court of Appeal decision in **Criminal Appeal No. 220 of 2011,** The AG **Vs. Mugesi Antony & Others** to where the court made a conclusion that, where there is a lacuna, you can borrow leaf from other jurisdictions.

Mr. Kwetukia submitted further that, apart from the decisions from other jurisdictions, the High Court of Tanzania also have encountered similar scenarios in three different occasions. That, in **Misc. Criminal Application No. 94/2019,** DPP Vs. **Said Adam Said & 10 others,** page 9 & 10, Hon. Siyan, J. underscored the importance of witness protection and issued an order for protection of witnesses and ordered

non-disclosure of statements likely to identify the witnesses during committal proceedings. In **Misc. Criminal Application No. 19/2020, DPP Vs. Abdi Sharif Hassan @ Mosmal & Another** Hon. Tiganga, J. at page 17 to 18 also underscored the importance of witness protection and issued protection order. Similarly, in the case of **DPP Vs. Farid Ahmed and 35 others, Misc, Criminal Application No. 145/2020**, Hon. Mlacha, J, at page 22 to 23 also underscored the importance of witness protection and issued an order for non-disclosure of witnesses' identity.

In concluding his submission Mr. Kwetukia urged this court to consider the gravity of the offence against the respondents, and the threat upon the intended witnesses and be pleased to grant the application as presented.

I have considered the submission by the Senior State Attorney and keenly gone through the chamber application and two affidavits in support of the application. The contents of the affidavit of the Regional Crimes Officer one ACP Joshua Mwafulango who is the overall incharge of investigation in Arusha Region and that of Abdallah Chavula, Senior State Attorney who is performing the functions of Regional Prosecutions Officer at Arusha Region reveal similar facts. The affidavits reveal that, in the mid-June 2014, the police received intelligence information there

is a group of people having bombs that are intended to be used in terrorist acts within Arusha Region and some other places in the United Republic of Tanzania. While working on that information on 7th July 2014, the 1st, 2nd, 3rd and 4th respondents detonated a hand grenade that blew VAMA restaurant situated at Uzunguni area within Arusha town an incident that leaf seven victims with serious bodily injuries and damaged several properties in the restaurant.

The police investigation led to the arrest of the 1st, 2nd, 3rd and 4th respondents and the 5th and 6th respondents who were harbouring the 1st to 4th respondents at their residencies at Da es salaam and Pwani. Upon interrogation it revealed that, they have mission of committing terrorist acts. The investigation revealed that, the respondents were part of a terrorist syndicate that emerged in Tanzania with a view overthrowing the lawful authority of the Government of the United Republic of Tanzania and replace it with Islamic state. The evidence also revealed to them that the respondents had formed a terrorist group with other suspects with the intention of attacking people that who according to their belief, do not live according to their extremist faith.

That, the investigation has further revealed that the acts of the respondents aimed at seriously destabilizing the fundamental political, constitutional, economic and social structure of the United Republic of

Tanzania. That in order to execute their mission, the respondents and other persons yet to be arrested agreed to acquire materials that will in making local bombs and purchase industrial grenade to be used kto bomb police stations with the view of acquiring firearms to be used in execution of their criminal acts of overthrowing the Government pf the United Republic of Tanzania and replace it with the Islamic State.

That some of the respondents' associates are still at large and struggling to get the identities of the intended prosecution witnesses in order to stop them from testifying in court against the respondents during trial. That, those associates may use whatever means necessary including infliction of physical harm in order to stop the witnesses from testifying. That, the disclosure of the identities of the intended witnesses during committal or trial will expose them to the risk of physical harm.

That, in considering the seriousness of the charges facing the respondents and being the regional crimes officer, ACP Joshua Mwafulango have been engaged in continuous review of security welfare of the intended prosecution witnesses and their families. That in performing the duty of protecting witness it has come to the knowledge of the RCO that the respondents in collaboration with their associates who are still at large are struggling to get the identities of the intended prosecution witnesses in order to impede them from testifying in court

against the respondents. That, any disclosure of the identity or whereabout of the prosecution witnesses during committal and trial will expose them to the risk of physical harm.

Having analyzed the facts deponed in the affidavits, it is important to address the merit of this application. The importance of witness protection is well recognized both under International, Regional and Domestic laws. The witness is universally considered to be one of the most important persons to ascertain the truth in any trial. Different International laws recognises the importance of witness protection. Under the Rome Statute, while Article 64 (7) of the Statute recognise the importance of openness of the court proceeding, it gives exception in special circumstances under Article 68(5) for witness protection. Article 64 (7) read;

> *"The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence."*

Article 68(5) of the Rome Statute provides that,

> *" Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a*

witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

In the application of the Rome Statute there is also Rules of Procedure and Evidence which governs the modality of how witness protection order may be sought and the said procedures are laid down from rule 87 to 88 which provides amongst other that, the application needs to be ex-parte also hearing of the ex-parte application be made in camera to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk.

Another International Instruments which recognise witness protection is The United Nation Convention against Corruption (UNCC) precisely on Article 32(1) which provides that,

"Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences

established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them."

Apart from the International Instruments there are also Regional Instruments on victim/witness protection. The Protocol to Combat Trafficking, Commercial Exploitation and Sexual Abuse of Women and Children in South Asia requires member states to ensure witness protection. Article 11 that of the Protocol provides: -

"*The State Parties to provide that:*

(a) All proceedings involving application for securing protection and the action taken thereon by the persons (Court Officials, Police Officers, Technical Support Providers or any person involved with the protection procedure) shall be under obligation to keep all the information and documents confidential. No information or documents given or submitted in support thereof shall be released except upon written order of the court.

(b) Violation of the confidentiality of the said proceedings/actions to be an offence."

There is also experience of other countries having put in place the laws to protect the welfare of the witness. In South Africa, they have the Witness Protection Act 112 of 1998 [No. 112 of 1998]. Under the schedule to the said Act, it provides for the offences in respect of which protection may be granted to the witness such as in offence of treason,

sedition, murder, rape, public violence robbery just to mention a few. In Kenya witness protection has a foundation in the constitution. Under Article 50 (8) of the Constitution of Kenya, it provides;

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

Kenya has also enacted a specific Act for witness protection; the Witness Protection Act, Cap.79 R.E 2012.

In Tanzania context, witness protection is covered under the law, section 34 of the Prevention of Terrorism Act No. 21 of 2002. The Written Laws (Miscellaneous Amendments) (No.2) Act, 2018 amended section 34 of the Principal Act by deleting subsection (3) and substituting for it the following:

"(3) A Court may, on an ex-parte application by the Director of Public Prosecutions, order that the case proceeds in a manner stated in section 188 of the Criminal Procedure Act."

For purpose of this application the relevant proviso is section 188 (1)(a), (b), (c) and (d) and (2) of the Criminal Procedure Act which read;

"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 paragraph (b) and (c) of subsection (1), relevant witness statements or documents shall not be disclosed to the accused during committal or trial."

Thus, witness protection in Tanzania may be a new phenomenon to our jurisdiction but having the law recognizing witness protection gives us the authority to ensure compliance to the law but not to the extent of jeopardizing justice for the parties. With the view of cited authorities, many jurisdictions had similar view when it comes to witness protection issues. As advocated by the Supreme Court of India in **Mwahender** Chawla & Others**(supra)** and the High Court of Kenya in **Doyo Ga**lgalo (supra) witness protection is important to ensure that

the investigation, prosecution and trial of criminal offences are not prejudiced by the intimidation or threat to witnesses.

The law is clear under section 188 of the CPA that the court may, upon an ex-parte application by the Director of Public Prosecutions, give an order to protect the intended prosecution witness. The manner and modality under which the application is made may sometimes develop fear that witness protection is likely to prejudice fair trial of the respondents. This is because the application is made and determined ex-parte in exclusion of the respondents. It is a common understanding under our laws that, disclosure of witnesses and substance of evidence is one of the criteria towards fair trial. Section 245 to 247 of the Criminal Procedure Act Cap 20 RE 2019 requires the prosecution side to disclose the substance of the evidence intended to be relied upon by the prosecution side to prove the case against the accused person. I agree with my brothers Siyan J, *as he then was* and Tiganga J, that while observing the right to fair trial, it is also important to ensure that witnesses and their families are protected to enable them testify freely in court. At page 16 of the ruling in **Abdi Sharif Hassan @ Mosmal & Another (supra)** Hon. Tiganga, J., observed that,

> *".... openness in judicial proceedings depicts the right to fair trial which enables the accused persons to prepare and present their*

defense, 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.

I subscribe to such reasoning with the view that witness protection is paramount in ensuring justice to both parties. It must be noted that, evidence supporting the case is expected to come from witnesses whom, if not well protected, they may fail to testify due to fear or intimidation. The purpose of the law is to ensure that all witnesses testify without fear so that justice can be done to both parties. The High Court of Kenya while dealing with the issue of fair trial in **Doyo Galgalo's** case at page 3 had this to say;

"One of the major considerations in granting protection order is where the life or safety of the person may be endangered as a result of his being a witness. Therefore, the protection of witnesses entails inter alia safety of the witness. From the prescriptions and the words used in the constitution and the law, ***the concealment of the identity of a witness is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, it is a justified measure, and therefore, not a violation to a fair trial."***

This decision although not binding, it is persuasive and we are not barred from borrowing the inspiration from the same as it was so held by the Court of Appeal of Tanzania in the case of **Mugesi Antony and**

others (supra). This court in the above three cases cited by the applicant **Said Adam Said & 10 others (supra), Abdi Sharif Hassan @ Mosmal & Another** (supra) and **Farid Ahmed and 35 others (supra)** was inspired to borrow leaf from other jurisdictions thus, in same footage I am as well inspired to borrow leaf from the above Kenyan decision as well as the decision by the Indian Supreme Court in **Mwahender Chawla & Others(supra).** I have the same view that the concealment of the identity of a witness is necessary to protect witnesses to insure end of justice.

Considering the submission by the Senior State Attorney and the affidavits in support of application it is clear that the nature of the offence which is terrorism and the modality used to execute the terrorist act of bombing the restaurant within the organized crimes hence a serious offence which require protection of witnesses. It is clear that, with the nature of the offence to which the respondents are charged, the lives of intended prosecution witnesses are in danger and there is a need to be protected.

Being inspired by the decision from other jurisdictions; India and Kenya, the decisions of this court by my brothers Siyani J *as he then was,* Mlacha J and Tiganga J, the affidavits in support of the chamber application, both local and international laws and the submission by Mr.

Kwetukia, I find the present application fit for issuing protection order of the witnesses. I therefore allow the application and order as follows: -

1) Witnesses' testimony to be given through video conference in accordance with the provision of the Evidence Act Cap. 6 Revised Edition 2019;
2) Non-disclosure of identity and whereabouts of the witnesses for security reasons during committal proceedings and trial proceedings;
3) Non-disclosure of statements and documents likely to lead to the identification of witnesses for their security reasons during committal and trial proceedings;
4) Charge sheet and facts constituting the offence with exclusion of those facts which are likely to disclose the identity of witness should be read and supplied to the respondents during committal proceedings.
5) The witnesses deserve protection before and after trial to ensure their safety and that of their families.

It is so ordered.

DATED at ARUSHA this 01st Day of December, 2021

D. C. KAMUZORA

JUDGE