IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MISCELLANEOUS ECONOMIC APPLICATION NO. 1 OF 2022

(Originating from Economic Case No.18 of 2020 of the District Court of Songea District at Songea)

THE DIRECTOR OF PUBLIC PROSECUTION..... APPLICANT

VERSUS

MOHAMED MOHAMED ADAM

@MBUKO@MASUMBUKO..... RESPONDENT

EXPARTE RULING

Date of Last Order: 05/05/2022
Date of Ruling: 27/05/2022

MLYAMBINA, J.

The application before the Court concerns with an unprecedented circumstance justifying protection of witnesses. The application is brought by way of chamber summons under certificate of urgency and made ex-parte (not requiring the Respondent to file a counter affidavit or be present). It has been made under *sections 34 (3) of the Prevention of Terrorism Act No. 21 of 2002* read together with *section*

188 (1)(a), (b), (c), (d) & 188(2) of the Criminal Procedure Act [Cap 20 R. E. 2019]. It consists of five prayers: *One*, seeking permission of the Court to witnesses so as to give testimony through video conference in accordance with the provisions of *the Evidence Act [Cap 6 R.E. 2019]. Two*, the Court to order none disclosure of identity and whereabouts of the witnesses for security reasons during committal and trial proceedings. *Three*, the Court 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. *Four*, the trial proceedings in respect *of Economic Case No. 18 of 2020* to be conducted in camera. *Five*, any other protection measure as the Court may consider appropriate for the security of the protection witnesses in respect of *Economic Case No. 18 of 2020* including but not limited to:

(a) Prohibition on dissemination and publication of documentary evidence and any other testimony bearing identity of prosecution witnesses without prior leave of the Court.

(b) Prohibition on dissemination and publication of information that is likely to disclose location, residence and whereabouts of the prosecution witnesses or any of their close relatives.

The application was supported by two affidavits; one sworn by Edgar Evarist Bantulaki, a State Attorney in the National Prosecution Services and the other affirmed by ACP Amin Mahamba, the Regional Crimes Officer of Ruvuma Region.

The reasons behind this application were depicted under both affidavits. As per the deponents, if the intended witnesses in *Economic Case No.18 of 2020 before the District Court of Songea District at Songea* are not afforded protection measures there will be lower chances of successful prosecution by the Applicant due to the reason that the intended witnesses could refuse to appear and testify in Court.

On the date set for the ex-parte hearing, Ms Elizabeth Olomi a State Attorney argued the application on behalf of the Applicant. She was assisted by Mr. Simon Peres, a Senior State Attorney. She began her submission by narrating the factual background *albeit* in brief of the Economic Case facing the Respondent which is pending before the District Court of Songea. Ms. Elizabeth Olomi then elaborated the legal basis of this application. Further, she reiterated the prayers highlighted in their chamber summons. Next, she craved leave of this Court for the

two affidavits filed to form part of their submission. She then gave a detailed account of the counts facing the Respondent.

Ms. Elizabeth Olomi, went on submitting that the Respondent was arrested on the 11th May 2020. That, upon completion of the investigation it was revealed that; the Respondent is direct connected to the event of bombing since it occurred while he was in course of detonating a locally improvised bomb. Further, the Respondent is a member of terrorist cell whom they are planning to make several attacks through setting bombs in various institutions including the police station and other places prone to public gatherings. Also, the Respondent and his allies are planning to recruit young men (based in Songea) for the purpose of teaching them military techniques and finally establish an Islamic Military State in the United Republic of Tanzania.

Further, Ms. Elizabeth Olomi contended that the Applicant acting through the information of ACP Amini Mahamba has discovered that: the intended witness in this case are at higher risk of harm since most of the Respondent's criminal associates are yet to be arrested and they are seeking information concerning the identities and whereabouts of the intended witness in order to preclude them from giving testimony

against him. That, following such discoveries, the Applicant decided to file the present application seeking the relevant orders.

In an endeavour to drive home her arguments, Ms. Elizabeth Olomi pointed that *sections 245 to 249 of the Criminal Procedure Act (supra)* requires after completion of investigation, the DPP is supposed to file information in this Court but the said information among other things must have statement of the intended witness containing their identities and their whereabouts. Thus, due to the seriousness of the charge in this particular case, she begged this Court to allow their prayers as presented in their application.

I have given ample consideration in respect to this entire ex-parte application by the Applicant. *Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended* provides for a fair trial and public hearing to the suspect whose fate is at stake in Courts of law. The same principle is amplified under *sections 246, 247 up to 254 of the Criminal Procedure Act [Cap 20 R.E. 2019].*

As a general principle, in all committal proceedings the suspect has the right to know and to be supplied with the witness's statements and documents intended to be used by the prosecution side. Under *section*

247 of the Criminal Procedure Act (supra), the Court is required to make a list of all witnesses whom the Director of Public Prosecutions intends to call. While under *section 249 (1) of the Criminal Procedure Act (supra),* the accused is entitled at any time before the trial to have a copy of the record of committal proceedings without payment. The records to be supplied to the accused contains a copy of the charge or charges, copies of the statements and documents produced to the Court during committal proceedings and a copy of the record of the proceedings before the Court.

The rationale behind supplying copies of statements and documents is to enable the accused to know the nature of the charge he is facing and be able to prepare for his/her defence and avoid surprises in criminal litigation. In the case of **Musa Mwaikunda v. Republic** [2006] TLR 392 it was stated that fair trial includes: Fair and public hearing; giving an accused all relevant information on a case facing him; hearing is public (although the press and public can be excluded for highly sensitive cases); hearing by independent and impartial decision maker and; followed by a public decision.

On the face of it, the application for protection of witnesses is an exception to the above fundamental general acceptable principle of natural justice that a person against whom a charge is made, as a matter of right, must be afforded a public hearing and be given reasonable all relevant information on a case facing him. There are various reasons: *First*, the nature and seriousness of the offence (terrorism) which Respondent is charged and currently awaits him before the District Court warrants the Applicant to seek for the requested orders as he did. In terrorism, homicides and some organized crimes, the law has set procedural mechanism on how to limit some of the suspects rights for public interest, and justice. For instance, in terrorism offences, it is worldwide provided and accepted for every state to have scheme or mechanisms protection of witnesses who are in imminent danger or threat from the terrorist groups. *Article 24 of the Organized Crime Convention (OCC), 2000* gives guidance on protection of witnesses.

In accordance with *Article 24, paragraph 1 of the Organized Crime Convention,* States must take appropriate measures within their means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning

offences covered by the Convention and, as appropriate, for their relatives and other persons close to them. Under *Article 24, paragraph 2*, such measures where appropriate and within the means of the State Party includes but not limited to providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness.

The United Republic of Tanzania ratified the OCC on 24th May, 2006 and incorporated the world-wide scheme of Witnesses Protection for the cases of Transactional Terrorism in nature like Terrorism offences under *section 34 of the Prevention of Terrorism Act, 2002.* The same has been done, under *section 91 of the Written Laws (Miscellaneous Amendment [Act No. 2] of 2018* making reference to *section 188 of the Criminal Procedure Act (supra).*

The second reason for protection of witness which is on line with the first reason is that, there is sufficient evidence depicted (through the sworn and affirmed affidavits) that, at a greater likelihood, the lives of the intended prosecution witness together with their families are in real danger from the respondent and or his allies who are still at large within the public.

There are also other international instruments which provides for the necessity of each member states to establish a scheme of witnesses' protection. Hereunder is a survey of some of the instruments.

(1) International Covenant on Civil and Political Rights (ICCPR), 1966.

Articles 6, 7, 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the right to life, right to freedom from torture and cruel, inhuman or degrading treatment or punishment, right to personal security, and the right to fair trial. It also obligates States Parties under *Article 2 (3)* of ICCPR to ensure access to an effective remedy when rights are violated. It is under the said Articles states are supposed not to ignore known threats to the life of persons under their jurisdiction and to "take reasonable and appropriate" protective measures.

The United Republic of Tanzania has neither ratified nor domesticated it in a single statute though the provisions therein are incorporated in the Constitution of 1977 as amended from time to time. Eg. The right to life is covered under *Article 14,* right to personal freedom under *Article 15* and right to privacy and personal security under *Article 16.*

(2) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Article 13 of The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) explicitly enumerates an obligation to protect victims and witnesses. It provides:

> *Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.*

Similarly, the United Republic of Tanzania has neither ratified the CAT nor domesticated it in a single statute. But the provisions therein are incorporated in the constitution of 1977. Eg. The right to life is covered under *Article 14* and right to privacy and personal security under *Article 16.*

(3) Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1969

Article 5 (b) of The International Convention on the Elimination of All Forms of Racial Discrimination requires that the "right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution be guaranteed without discrimination based in race, colour, or

national or ethnic origin. Witness protection, like any other form of protection, must be provided to all persons equally regardless of race.

Correspondingly, the United Republic of Tanzania has neither ratified the ICERD nor domesticated it in a single statute. But the provisions therein are incorporated in the constitution. Eg. The right to equality is covered under *Article 12* and right to equality before the law under *Article 13.*

(4) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), 2003

Article 16 (1) and (2) of The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) guarantees the right of migrant workers and members of their families to liberty and security of person, entitling them "to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions". Such protection includes protection of witnesses who are migrant workers who are at risk of violence, physical injury, threats and intimidation. But the United Republic of Tanzania has not ratified this convention.

Likewise, the United Republic of Tanzania has neither ratified the ICRMW nor domesticated it in a single statute. But there is in place the *Anti-Trafficking in Persons Act, 2008. Part IV of the said Act (sections 17-24)* covers rescue, rehabilitation, protection and assistance to victims.

(5) International Convention for the Protection of All Persons from Enforced Disappearance (ICED)

Article 16 (1) and (2) of The International Convention for the Protection of All Persons from Enforced Disappearance obligates States Parties to ensure that complainants, witnesses, relatives of a disappeared person and their defence counsel, as well as persons participating in the investigation, are protected from ill-treatment or intimidation as a consequence of the complaint or any evidence given. *Article 12 of ICED* explicitly requires States Parties to ensure that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.

Congruently, the United Republic of Tanzania has neither ratified the ICED nor domesticated it in a single statute. But the provisions therein are incorporated in the constitution. Eg. Right to privacy and personal security under *Article 16.*

Needless, under the UN system, there are various resolutions which seeks to protect victims of crimes and abuse of power. It suffices here to mention the hereunder UN Declaration.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N.G.A. Resolution 40/34, Annex, 40 U.N. GAOR Supp. (No. 53) p. 214, UN Doc. A/RES/40/34, (1985). It states:

> *The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by [...] taking measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf from intimidation and retaliation...Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.*

The afore declaration aims at protecting victims, their relatives and witnesses and reparation from injury arising out of crime and abuse of power.

There are also various Regional Bodies which guarantees protection of witnesses and representative of the parties. For the sake of this ruling, one protocol will serve the need.

The Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court of Human and Peoples' Rights, 2004.

Article 10 (3) The Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court of Human and Peoples' Rights, 2004 states that:

> *Any person, witness or representative of the parties, who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.*

Elsewhere in other jurisdiction, for example in the Republic of Kenya; *Article 50 (1) (d) of their Constitution of 2010* provides expressly for right to fair trial. The same Article under *sub article (8)* observes for *Witness Protection Act [Cap 79]* and, Witnesses' Protection Rules, of

2015. *The Kenyan Chief Justice Rules of Court, 2014* under *Rule 4* covers the scope of the Courts power and extent of protection limit. The scope of protection is limited and Court's decisions are public as can be seen in the case of **Republic v. Kevin Odhiambo & 4 Others,** Miscellaneous Application No.01 of 2018 [2018] KLR.

In South Africa, there are specific laws which deals with the issue of witnesses' protection. *Section 7 (1) of the Witness Protection Act No. 112 of 1998* provides:

> *Any witness who has reason to believe that his/her safety or the safety of any member of his family, her extended family may be threatened by reason of being a witness, may apply for protection.*

In India the scope on witness protection is wide like that of the Republic of Kenya. *The Witness Protection Scheme of 2018* was a result of the Supreme Court decision in the Writ Petition (Criminal) No.156 of 2016, **Mahender Chawla and Others v. Union of India and Others** 4 (2017) 1SCC 529. The Supreme Court reproduced a proposed witness protection scheme which it ruled out to be a law until legislation is enacted. *Article 13 of the Witness Protection Scheme,* which is about confidentiality of the Court records shows that a Court ruling is public in

accordance with Court's order. *Article 13 of the Witness Protection Scheme* provides:

> *All stakeholders including the Police, the Prosecution Department, Court Staff, Lawyers from both sides shall maintain full confidentiality and shall ensure that under no circumstance, any record, document or information in relation to the proceedings under this scheme shall be shared with any person in any manner except with the Trial Court/Appellate Court and that too, on a written order.*
>
> *All the records pertaining to proceedings under this scheme shall be preserved till such time the related trial or appeal thereof is pending before a Court of Law. After one year of disposal of the last Court proceedings, the hard copy of the records can be weeded out by the Competent Authority after preserving the scanned soft copies of the same.*

In Sierra Leone, witness protection is provided under *Article 16 of the Special Court Statute, 2000*. It aims to provide all necessary support and protection not only to witnesses but also to the victim appearing for both prosecution and defence and establish measures for short term and long-term protection and support. *Article 16 of The Special Court Statute (supra)* provides:

The register shall set up a victim and witnesses unit within the registry. This unit shall provide in consultation with the office of the prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the testimony given by such witness. The unit personnel shall include expert in trauma, including trauma related to crime of sexual violence against children.

It follows from the above provision of the law that there can be no invariable rule on who should be protected. It may include witnesses and victims of sexual violence against children. Therefore, while putting the scheme in place, it is important to bring into account victims who are in most cases identical twin of witnesses and most of them are witnesses too.

Indeed, victims and witnesses may experience bombing and killings and any other shocking stories. As such, the scheme should apart from providing physical protection, provide psychological protection by employing psychologists.

In the Sierra Leone case of **Prosecutor v. Alex Tamba Brima and Others,** 16 of 2004 [2005] SCSL 39 (08 March, 2005), the Special Court of Sierra Leone while dealing with the disclosure of the identity of a protected witness Tf1 – 081, held that:

Prosecution that identifies protected witness is in violation of the Court orders and could amount to a contempt of Court, punishable in accordance with Rule 77 of the Rules.

The above statutory statement of principle is recommendable worth of being considered, subject to modification, while establishing witness protection scheme in our jurisdiction.

As already noted, in Tanzania there is no specific law which deals with the protection of witness, but it is addressed under provisions of section *34 of the Prevention of Terrorism Act No. 21 of 2002. The Written Laws (Miscellaneous Amendment) (No. 2) Act 2018 amended section 34 of the principle Act by substituting subsection 3, thus:*

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

Section 188 (1) of Criminal Procedure Act provides:

Notwithstanding any other written laws, before filling a charge or information, or at any stage of the proceedings under this act, the Court may, upon an ex parte application by Director of Public Prosecutions, order-

(a) a witness testimony to the given through video conferencing in accordance with the provision of the Evidence Act;

(b) non-disclosure or limitation as to the identity and where about of a witness, taking into account the security of a witness;

(c) non-disclosure of a statement 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 trial.

The law is clear under provision of *section 188 of the Criminal Procedure Act (supra)* that the Court may give an order to protect the witness upon the ex parte application by the Director of Public Prosecutions. It is an exceptional procedure departed from the usual known practice which is evidenced under provision of *sections 245* of the *Criminal Procedure Act [Cap. 20 R.E. 2019].* The later requires the committal Court must read and explain to the accused persons the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intents to call at the

trial and supply to them free copies of those documents when committed for trial. To the contrary, *section 188* of the *Criminal Procedure Act* directs the Court otherwise especially when the witnesses are at hazardous situation pending on the nature of the case, they are about to give their testimonies and the disclosure of their particulars might put them and their relatives into risk.

The reason(s) behind the amendment of *subsection (3) of section 34 of the prevention of Terrorist Act No. 21 of 2002, the Written Laws (Miscellaneous Amendment) (No. 2) Act 2018* is; to provide the protection for the witnesses who are called person to testify before the Court especially in crimes covered under *The Prevention of Terrorism Act.*

In the Kenyan case of **Republic v. Galgalo and 3 Others,** Criminal Case No. 16 of 2019 High Court of Kenya, at Meru, the Court has this to say in relation to the protection of witness:

> *The safety of such person as well as those related to them is important consideration here. It bears repeating that it is not an idle talk that the safety of the witness may be endangered by the accused person by disclosing their identity to the accused they will be compromising their safety as well as those related to them.*

The Court is persuaded with the above quoted decision, though right to fair trial is of paramount importance, the safety of witness has to be taken into consideration too so that the witness cannot be discouraged from testifying so that justice can be seen done. In the case of **Director of Public Prosecutions v. Abdi Sharif Hassan @ Mosmal and Another,** Miscellaneous Criminal Application No. 19 of 2020, High Court of Tanzania at Mwanza, my brethren Tiganga, J. observed that:

> *Openness in judicial proceedings depicts the right to fair trial which enable the accused person 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 witness to come forward fearing to risk their life's and those of their family members.*

Bearing in mind the nature of the offences which the Respondents are charged with, and taking into account it is alleged that, the Respondents are working under a syndicate and most of them are no yet to be arrested, letting the witness to testify openly without any protection might cost their lives or the lives of their loved ones.

Nevertheless, the dilemma remains at what juncture and to what extent can a particular order of witness protection be judiciously sought? In response to that dilemma, I had revisited two schools of thought established by my fellow judges who encountered similar situations. The first school has adopted a more liberal approach. The second school has taken a strict view.

The first school is represented by among others my brethren his Lordship Mruma J. In the case of the **Director of Public Prosecution v. Haruna Mussa Lugeye and Another,** Misc. Criminal Application No. 188 of 2021, High Court of Tanzania at Dar es Salaam District Registry (unreported), the Applicant had requested for an ex-parte order against the Respondents under *section 34 (3) of the Prevention of Terrorism Act No.2 of 2002* read together with *section 188 (1) (b) (c) and (d) of the Criminal Procedure Act (supra).* The same was granted with restriction. My brethren Mruma, J. cautioned at page 5 of the ruling that:

> *Witness protection should never be allowed where it appears that it is intended to delay justice or cause any injustice to the accused persons.*

Another profounder of the first school of thought is his Lordship Siyan J. (as he then was). In the case of the **Director of Public Prosecutions v. Said Adam Said and 10 Others**, Misc. Criminal Application No.94 of 2019 High Court of Tanzania at Mwanza District Registry (unreported), the Applicant had requested for an ex-parte order against the Respondents under the whole *section 188 (1) of the Criminal Procedure Act (supra).* The Court having satisfied itself on the nature of the case, the submission plus sworn evidences in the affidavit revealing the possibility of the lives of the intended witness and their family to face danger as result of acceptance in collaboration to testify, granted the application though in a restricted manner. My brethren Siyani J. (as he then was) at page 11 of the ruling stated that:

> *...I however decline at this stage to grant an order for trial of the Respondents in camera and through video conferencing. It is my opinion that, such prayer be made upon filling of the information to this Court. Order Accordingly.*

My brethren his Lordship Luvanda, J. forms part of the profounder of the first school of thought. In the case of the **Director of Public Prosecution v. Ramadhani s/o Hassan Makai @Makai and 4 Others,** Misc. Economic Cause No.1 of 2021 High Court of Tanzania

Corruption and Economic Crimes Division (unreported), the Applicant had requested for an ex-parte order against the Respondents under *section 34 (3) of the Prevention of Terrorism Act No.2 of 2021* read together with the whole *section 188 (1) and 188 (2) of the Criminal Procedure Act.* The Court after having been convinced that protection of witness in that matter is inevitable, afforded the protection requested through grant of orders made thereunder save that it rejected to order trial by way of video conferencing at the stage of committal proceedings. If I may make reference to that part, it was held:

> *Herein, I make departure and took a liberal approach, as a matter of compliance to the mandatory provisions of section 246 vis-à-vis section 188 (1) (2) Cap 20 supra and order the following: (4) I decline to grant or make any order for a trial to be conducted by way of video conferencing at this juncture. To my view, this prayer can be conveniently made and deliberated during trial.*

In the case of **Director of Public Prosecution v. Abashari Hassan Omary 9 Others,** Misc. Criminal Application No. 24 of 2022 High Court of Tanzania at Arusha District Registry (unreported), the Applicant had requested for an ex-parte order against the Respondents under the *section 34 (3) of the Prevention of Terrorism Act No.2 of 2021* read together whole *section 188 (1), 188 (2) and 392A (1) of the*

Criminal Procedure Act (supra). The Court after having been pleased that the circumstances therein dictates witness protection measures as advanced under the relevant provisions of the law permitted the same although to a limited extent. It was illustrated at page 18 of the Ruling that:

> *I find the prayers for conducting of trial by video conference and in camera to be prematurely made. In my view, this should be made before the assigned judge after the information has been filed before the High Court so that for him or her to have full control of the proceedings by directing the manner in which the trial shall be conducted.*

The *ratio decidendi* and common denominator in all of the above authoritative judicial pronouncement of this Court clinches the position that, though protection of witnesses is important, in affording witness's protection measures, the Court must ensure that protection procedures are executed in a way that does not undermine the right of a Respondent to a fair and open trial.

The second school of thought is represented by, among others, my learned Sister, her Ladyship Mansoor J. In the case of **The Director of Public Prosecution v. Haji Omari Mtana and 21 Others**,

Miscellaneous Criminal Application No. 13 of 2022, High Court of Tanzania at Tanga (unreported). After analysis of the affidavit evidence and submission of the Applicant, her Ladyship granted among other orders to the effect that:

> *The testimony of the witnesses shall be given in camera in exclusion of public or press; the use of anonymous witnesses is also permitted during committal as well as during trial.*

Similarly, in the case of **Director of Public Prosecution v. Yusuf Ally Huta @ Hussein and 5 Others,** Misc. Criminal Application No.21 of 2022 High Court of Tanzania at Arusha District Registry (unreported), the Court, through my learned Sister, her Ladyship Kamzora J, after a thoroughly evaluation of the application granted all prayers requested inclusive of trial by way of video conferencing in accordance with provisions of *the Evidence Act [Cap 6 R. E. 2019].*

Another profounder of the second school of thought is my brethren Ngwembe J. in the case of **Director of Public Prosecution v. Majaliwa Mohamed Ngalama and 20 Others,** Misc. Criminal Application No.9 of 2020 High Court of Tanzania at Morogoro District Registry (unreported). After scrutiny of the application, the Court

granted all the prayers including trial in camera and through video conference.

In the case of **Director of Public Prosecution v. Shaban Mussa @ Mmasa @ Jamal and 7 Others,** Misc. Criminal Application No.90 of 2021 High Court of Tanzania at Arusha District Registry (unreported). In this application, the Applicant therein had requested for an ex-parte order against the Respondents under *section 34 (3) of the Prevention of Terrorism Act (supra)* read together with the whole *section 188 (1) and (2) of the Criminal Procedure Act (supra).* The Court speaking through my learned Sister her Ladyship Kamzora, J. after having scrutinized the application allowed all the prayers reflected under *section 188 (1)* including trial by way of video conferencing in accordance with provisions of *the Evidence Act [Cap 6 R.E. 2019].*

After such a glance on the prevailing decisions within the realm of this Court, I find it imperative, at this juncture to state that, the designation of the relevant law provisions establishing witness protection measures, as it stands, is subject to different interpretation. In some instances, this Court interpret the provision in a wide sense and by noting that the provisions are discretionary in way that, if applied do not

prejudice any side. At large, unlike profounder of the second school of thought, profounders of the first school of thought are adamant of granting prayers of trial through video conferencing while committal proceeding is yet to be concluded.

If I may assist in chunking down the rationale behind the Court's trend on the narrow/restricted interpretation of *section 188 (1),* specifically *section 188 (1) (a) of the Criminal Procedure Act (supra)* which provides for testimony of witness by way of video conference. The following is my observation:

Section 2 of the Criminal Procedure Act (supra) defines the term 'Committal Proceedings' to mean; proceedings held by a subordinate Court with a view to the committal of an accused person to the High Court. The legal basis for committal proceedings is placed under *section 178 of the Criminal Procedure Act (supra)* which states as follows:

> *No criminal case shall be brought under cognizance of the High Court unless it has been previously investigated by a subordinate Court and the accused person has been committed for trial before the High Court.*

Moreover, *section 244 of the Criminal Procedure Act (supra)* gives power to the subordinate Courts to deal with committal proceedings.

Here, it is worth to note that a subordinate Court is not conducting trial when it is holding committal proceedings. Needless to say, it can neither be said to have concurrent jurisdiction with the High Court in trying the matter nor that be assumed to interfere the role of the High Court. That is why committal proceedings are also known as preliminary inquiry. This premise can be discerned from *section 245 (3) of Criminal Procedure Act (supra). Section 245 (3)* provides as follows:

> *After having read and explained to the accused the charge or charges the magistrate shall address him in the following words or words to the like effect: "This is not your trial. If it is so decided, you will be tried later in the High Court, and the evidence against you will then be adduced. You will then be able to make your defence and call witnesses on your behalf.*

Henceforth, when a subordinate Court is conducting a preliminary inquiry, its powers are limited only to the committal proceedings before it, and not otherwise.

Granting the prayers of trial (witness testimony) by video conference or and in camera while a case is still in the domain of the committal Court is a predetermination of the accused's plea and the nature of the trial which in essence the accused persons have no such

idea. During committal proceedings an accused does not give his plea, it is until when he is arraigned before the High Court. Seeking an order that witness testimony be given by video conference order or in camera during committal becomes baseless. What if the accused upon being arraigned at the High Court pleads guilty to the information? I also observe that, granting order of testimony be by way of video conferencing and or in camera at the committal stage looks like trial has commenced in the High Court while the accused is not present (or has not been arraigned) which may vitiate the trial.

Be it as it may, this discussion though fascinating should not detain this Court, but suffice it, to add that the existence of *section 188 (1) and (2) of the Criminal Procedure Act (supra)* without further explicit guidance on its application and demarcation pose an over-all challenge on its application.

It is the expectation of this Court that the long-waited protection of witnesses' scheme will clear the challenge and abide to all international best practice including but not limited to: *One*, informed Consent. It is expected the scheme will ensure witnesses are informed in unambiguous terms of the risks, what measures may be taken, and their

own responsibilities in mitigating the risks. Participants shall then give free and informed consent to any measure applied.

Two, neutrality and independence. It is the expectation of this Court that witness protection scheme mechanism will be free and neutral from the control or influence of alleged perpetrators of crimes and human rights violations. *Three*, witness-focused. It is highly expected that the scheme shall be proportionate to the assessed risk. *Four*, fairness to suspects and Respondents. The scheme shall be consistent with the rights of the accused, including the right to a fair trial in accordance with international standards. *Five*, clarity. A clear legal, procedural, and institutional framework is needed to provide the certainty and predictability necessary to ensure that all parties are aware of the protection measures available before agreeing to testify or cooperate with a criminal investigation machinery. *Six*, transparency and accountability. It is expected that the mechanism shall be clearly accountable for both its performance and finances, through an oversight mechanism that does not compromise independence or confidentiality. *Seven*, inclusivity. All of those placed at risk due to their role in an investigation or proceeding including witnesses and victims, and other participants such as State Attorneys shall be protected from the moment

they are engaged in risk until that risk has been removed. *Eight*, holistic approach. Witness protection measures shall not exist in isolation but reflect the overall state of law enforcement or other truth-seeking structures.

All said, it is the stance of this Court that, the claiming of witness protection measures under the relevant law provisions should be in forbearance to *section 244 and 246 Criminal Procedure Act (supra).* Here I mean, the inescapable conclusion at this stage is that, the grant of witness protection measures should ensure that there is no infringement to provisions governing committal proceedings which in essence precede and facilitate trial proceedings. In that context, there will, in my view, be a satisfactory balance as regards the safety of intended prosecution witnesses, the rights of accused persons, safety of the defence witnesses and the public at large.

There arises another important point. If the object of filing this application ex-parte is meant to protect a witness in serious crime, should this ruling be pronounced in camera and its copy be withheld by the Court? In attending such question, the Court will weigh the prons and cons for delivering or disseminating ruling on witnesses' protection

to the public especially on Tanzlii website before committal proceedings. Some of the practical disadvantages are as follows:

One, if the ruling is delivered to the public before committal, it will defeat the purpose of *sections 188 of the Criminal Procedure Act [Cap. 20 R.E. 2019] and section 34 (3) of the Prevention of Terrorism Act No. 21 of 2002.* These sections involve ex-parte applications. They do not require involvement of the other party. Hence, disseminating the ruling to the other party or the public on what transpired in Court will offend the meaning of the alleged sections or intention of the legislature.

Unlike in civil cases, the ruling on ex-parte application is made public because the other party has a right to come forward to defend or act upon it. Orders sought by the Director of Public Prosecutions under the above sections are not appealable in any way once granted by the Court. The Respondent is only informed at committal stage why his right to witness statement and documents are curtailed or not supplied to him as per *sections 246 and 249 of the Criminal Procedure Act [Cap 20 R.E 2019].*

Two, if ruling of the Court is made too detailed to the extent of disclosing some information which may lead the Respondents or other suspects who are still at large to know what is going on is made public,

it will make them aware that they are required to be tried in Court, hence will complicate the process of their arrest.

Three, disseminating a ruling on witness protection in social media and Tanzlii website before committal is fatal because the ruling may contain facts that are likely to disclose information to the public and create hatred to the public on the Respondents and their families. Also, other suspect can start struggling to hinder justice process.

On the other hand, there are advantages of supplying a ruling to the Respondent:

First, the ruling affects the Respondents directly as it denies their rights. It is a legal requirement under *sections 246 (2) and 249 (3) of the Criminal Procedure Act [Cap 20 R.E 2019]* that the Respondents should get a copy of witness's statement in order for them to prepare for defence. It is better to be issued with copy of the ruling so as to know why their rights are taken off procedurally.

Second, disseminating ruling to the public will enable the Respondent not be taken by surprise during committal and trial. He /she will have prior information or knowledge on existence of Court ruling procedurally depriving his /her right to have access to witnesses' statements and documents during committal and trial proceedings.

Third, making a ruling public, will maintain a fair trial. The reason is that a person is presumed innocent until proven guilty. The modal of criminality in any democratic society entails that any criminal act has the effect to the public. As such, the said public deserves to access the decision of the Court on any criminal case or application.

Fourth, the public has right to information especially in legal matters so as to know jurisprudence development specially to practicing advocates and academicians. Therefore, none disseminating of the Court ruling is to deny the public rights.

However, weighing out the prons and cons, I find it imperative for the Court to inform the Respondents on the ex-parte ruling against them during committal proceedings without issuing copies to them. This proposition is in alignment with the provisions of *Section 188 of the Criminal Procedure Act (supra)* which specifically stipulates that the hearing of the witness protection applications have to be made ex-parte. The Court find this proposition to be aligned to the justifiable restrictions to the rule of disclosure. The reason is that, it cannot be said the Respondents are totally denied knowledge of the existence of the ruling. The Respondents will be informed at committal stage, the ruling will form part of Court record and may even form a ground of an appeal.

Therefore, it is the findings of the Court that this ruling should not be made public before conclusion of the committal proceedings as that will have the potential effect of defeating the very purpose on which the application for witness protection was made.

Basing on the reasons advanced above, this Court is completely persuaded by liberal interpretation approach of the witness protection provision, under *section 188 (1) (a) of the Criminal Procedure Act (supra)* as advanced by this Court in some prior cases alluded herein above representing the first school of thought.

Having subscribed to the liberal position, I allow this ex-parte application to the extent clarified herein below:

1. The identities (including the names and whereabouts) of the intended witnesses in *Economic Case No.18 of 2020* pending before District Court of Songea at Songea be withheld during committal proceedings and trial but shall be disclosed to the trial Magistrate during committal and to the trial Judge during trial proceedings.

2. There shall be none disclosure of statements and documents which are likely to lead to the identification of witnesses for their security reasons during committal and trial proceedings.

3. There shall be no dissemination and publication of documentary evidence and any other testimony bearing identity of prosecution witnesses without prior leave of the Court.

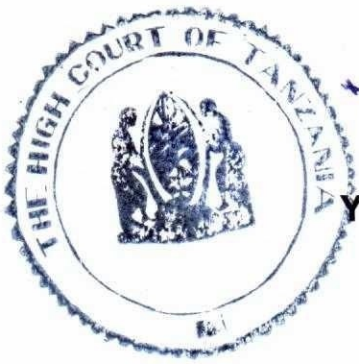
4. There shall be no dissemination and publication of information that is likely to disclose location, residence and whereabouts of the prosecution witnesses or any of their close relatives.

5. The prayers in respect of orders of trial in camera and by way of video conferencing is hereby rejected for being pre-maturely preferred.

6. This ruling should not be made public before committal proceedings of the case are concluded.

7. The trial of the case to commence as quickly as possible after conclusion of the committal proceedings.

It is so ordered.



Y. J. MLYAMBINA

JUDGE

27/05/2022

Ex-parte Ruling delivered in camera and dated this 27th day of May, 2022 in the presence of Senior State Attorney Hebel Kihaka and learned State Attorney Hellen Chuma. Right of Appeal fully explained.

Y. J. MLYAMBINA

JUDGE

27/05/2022