IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISRTICT REGISTRY)

AT SONGEA.

MISC. CRIMINAL APPLICATION NO. 07 OF 2022

(*Originating from Preliminary Inquiry Case No. 04 of 2022 at the Court of Resident Magistrate of Songea at Songea*)

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT

VERSUS

JUMA OMARY KIBWANA MSABILA ..... 1ST RESPONDENT

HAMZA YUSUPH @ SINGANO ..... 2ND RESPONDENT

YASINI MAPONDA MUSA @ KAFUPI .....3RD RESPONDENT

HASSAN MOHAMED MPONDA .....4TH RESPONDENT

SAID STEVEN MHANDO .....5TH RESPONDENT

EX-PARTE RULING

Date of last Order: *05/05/2022*
Date of Ruling: *27/05/2022*

MLYAMBINA, J.

This is an ex-parte ruling in respect of a peculiar application calling upon judicial hunching. It involves protection of witnesses whose detailed scheme is still in the process and little jurisprudence has been in place. The application calls upon determination of among other issues: *Whether this Court can, at this stage, order that the witnesses' testimonies be given through video conferencing during trial of the*

Respondents in accordance with the provision of the Evidence Act [Cap 6 R.E. 2019]. Arising out of the importance of protecting witnesses in serious crime offences, the Court has gone further to ask; *whether should this ruling be pronounced in camera and its copy be withheld by the Court in order to protect witnesses?*

In order to address the *inter alia* afore issues, the Court will herein bring forward the brief facts of the ex-parte application lodged before this Court by the Director of Public Prosecutions (henceforth the DPP), under the provision of *section 34 (3) and (4) of the Prevention of Terrorism Act, No. 21 of 2002 as amended by section 91 of the Written Laws [Miscellaneous Amendment [No. 02] Act, 2018, read together with sections 188 (1) (a) (b) (c) (d) & (2) and 392A (1) & (2) of the Criminal Procedure Act [Cap 20 R. E. 2019](hereinafter referred as the CPA).* The DPP moved this Court for the following orders:

1. *That, this honourable Court be pleased to order that the witnesses' testimonies to be given through video conferencing during trial of the Respondents in accordance with the provisions of the Evidence Act [Cap 6 R. E. 2019];*
2. *That this honourable Court be pleased to order non-disclosure as to the identity and whereabouts of the witnesses during committal and trial*

proceedings of the Respondents for security reasons;

3. *That this honourable Court be pleased to grant non-disclosure of the statement or document likely to lead to the identification of the witnesses during committal and trial proceedings of the Respondents for security reasons;*
4. *That, this honourable Court be pleased to order committal and trial proceedings be conducted in camera in the interest of public safety; and*
5. *That this honourable Court be pleased to order any other protection measures as the Court may consider appropriate for the security of the witnesses.*

At the date scheduled for hearing, Mr. Simon Peres, the learned Senior State Attorney assisted by Ms. Elizabeth Olomi, the learned State Attorney represented the Applicant, the DPP. The application was heard orally. In support of the application, Mr. Peres Senior State Attorney craved leave of the Court to adopt two affidavits to form part of his submission. He submitted that this application has been taken at the instance of the DPP. The supporting affidavits are sworn by Ms. Shose Naiman Kimonge, Senior State Attorney to the Office of the DPP and Reginal Prosecution Officer In-charge of Ruvuma Region. Another

affidavit was affirmed by ACP Amini Mahamba, Regional Crimes Officer of Ruvuma Region.

Senior State Attorney Simon Peres averred that the Respondents are charged with the Terrorism offences namely; conspiracy to commit terrorism contrary to *section 4 (1) (2) (iii) and section 27 (c) of the Prevention of Terrorism Act No. 21 of 2002, and for participating in terrorism meeting contrary to section 4 (1) (2) (b) (iii) and (5) (a)* of the same act, collection of funds to commit terrorism act contrary to *section 4 (1) (2) (b) (iii) and section 13* of the same act, and unlawful manufacturing of armaments contrary to *section 13 (b) and 18 of the Armaments Control Act [Cap 246 R. E. 2019].* They are also charged with the offence of murder contrary to *section 211 (a) of the Penal Code [Cap 16 R. E. 2019].* The last count is harbouring of person to commit terrorism acts contrary to *section 4 (1) (2) (b) (iii) and section 19 (a) of the Prevention of Terrorism Act No. 21 of 2002.*

The Respondents are accused of committing these crimes and the *Preliminary Inquiry Case No. 4 of 2022* is pending before the Court of Resident Magistrate of Songea at Songea. It was alleged that the Respondents between 1st January, 2014 and 31st December, 2014 within Songea Municipality in Ruvuma Region at Majengo, Mabatini and

Mshangano area organised themselves and formed criminal syndicate in a manner on how to perpetrate and execute their plans by making local bombs and throw them to Police Officers who were on patrol within Songea Municipality with the intention of getting arms to be used to overthrow the existing lawful regime; that is the Government of the United Republic of Tanzania through the violence means and replace it with an Islamic State.

Moreover, Senior State Attorney Peres averred that, at various areas, by bombing Police Officers who were at patrol especially on 16th September, 2014 at Mshangano and 25th December, 2014 at Majengo area, they succeeded to injure five Police Officers who were on patrol by using locally made bombs.

Again, on 27th October, 2014 they managed to plant local improvised explosives targeting Police Officers who were at Mshangano area (barrier) with the view to acquire arms from Police Officers but it was safely ban to detonate by the explosive's experts from Songea Army, and no person was injured.

Following the three sequences of incidents, the Respondents were arrested at various areas within the United Republic of Tanzania and charged with the offences which have been submitted by the Senior

State Attorney in this application. The investigation is complete and the DPP is about to file the information to arraign them in this Court. However, they are waiting for determination of this application so that they can file information to this Court. The Respondents in committing these offences, aimed at overthrowing the lawful elected authority of the Government of the United Republic of Tanzania and replace it with an Islamic State, an act which will seriously destroy the fundamental Political, Economic and Social structure of the United Republic of Tanzania.

Furthermore, it was submitted by Senior State Attorney Simon Peres that only few offenders are arrested and others are still at large being traced by the coercive apparatus and the investigative organs to be joined with these Respondents. Therefore, it is very risk and unsafe for the prospective prosecution witnesses to testify in Court at naked eyes before the Respondents whose fellows are at large yet to be arrested. It is easier for them to intimidate or mark their identities and harm them in any ways they can, either through their relative or their fellow who are still at large untraced.

Senior State Attorney Simon Peres submitted that the scheme of witnesses' protection especially in offences relating to trans-national

organised crimes is worldwide recommended and it is enshrined in our National Laws under *section 34 of the Prevention of Terrorism Act No. 21 of 2002*. Also, it was made recently under *Written Laws (Miscellaneous Amendment [Act No. 2] of 2018 under section 91* which is enforcing or making reference to *section 188 of the CPA*. These Laws have a purpose of implementing the world-wide scheme of Witnesses Protection for the cases of transnational organised crimes like terrorism offences. Through mentioned legislations, the Court enjoins power and it is under duty to protect witnesses.

Mr. Simon was aware that, justice requires in offences of this nature which are tried by the High Court under *section 245 and 249 of the Criminal Procedure Act [Cap 20 R. E. 2019],* the statements of documents containing the substance of evidence of witnesses whom the DPP indents to call at the trial and their copies has to be supplied freely to the Respondents at committal so that the Respondents can know the nature of the cases against them. They can also be able to prepare their defence but with the legislative in offences of Terrorism Acts, the law has taken the Respondents' rights by the other hand. The reason is that the witnesses are eyes and ears of justice. They benefit nothing from the result of the case being tried except assisting justice. The public

interest protected by such privilege is to ensure that the witness *at the time he/she speaks* is not inhibited from stating fully and freely what he/she has to say.

It was the Republic opinion that in offence of serious nature like this one which the Respondents are charged with, the witnesses have to be protected from any kind of disclosure for security reasons. As it has been revealed by the Regional Crimes Officer, that, their lives are at risk because some of the offenders are yet to be arrested.

Senior State Attorney Peres reiterated that; this Court has granted a number of applications for protecting witnesses. He referred the Court to the case of **DPP v. Said Adam Said and 11 Others**, Misc. Application No. 94 of 2019, High Court of Tanzania at Mwanza which was decided on 11th November, 2019 at page 10, 11 and 6, where the High Court referred the *UN Security Council Resolution No. 34/73 and UN Resolution No. 40/34,* which requires Member State to protect witness in such kind of cases. With those resolutions, according to Senior State Attorney Peres, *section 188 of the CPA and section 34 of the Prevention of Terrorism Act (supra)* are made active and can be used to protect witnesses.

Senior State Attorney Peres admitted that the trial Court in the case of **DPP v. Said Adam Said and 11 Others** (*supra*) rejected the prayer for an order of trial of the Respondent to be conducted in Camera and through video conferencing at this stage. However, it was State Attorney Peres opinion that, it is better the prayer be granted at this stage because it will give an opportunity for the Court itself to make better arrangement on how video conferencing can be effected especially in remote areas like Ruvuma Region and other regions where IT is still at embryonic stage. He added that, even in normal criminal appeal video conferencing has failed.

Further, it was the view of Senior State Attorney Peres that, for the DPP it will give him ample time to arrange where and how to procure witnesses especially those from far to arrange a point or place where will be designated for the witnesses to testify through video conferencing. Senior State Attorney Peres informed the Court that in East Africa, it is only in Kenya where they have implemented this scheme. He prayed this Court not to be persuaded with the decision of his Lordship M. M. Siyani, J. (as he then was) in the case of **DPP v. Said Adam Said and 11 Others** (*supra*) because it will bring confusion on the part of the Court and their part as both parties need to

make early preparation on the stations where the trial will be conducted and the stations where prosecution witnesses will be presented.

Senior State Attorney Peres went on to argue that, if the prayer is to be made upon filling the information to this Court, it will entail the second application which is unnecessary and it will cost time and resources. After information they have to go at committal stage. If this prayer is made after filling of information, it will hinder progress of committal proceedings. He supported his arguments with the provision of *section 188 (1) (a) of the CPA*, which gives an option on the application for an order of trial of the Respondent in camera and through video conferencing be made before filling a charge or information or at any stage of the proceedings. With such arguments, he prayed this Court be pleased to grant all their prayers.

The Court has gone through the submissions by the Director of Public Prosecution and the affidavit sworn by Ms. Shose Naimani Kimonge who is the Senior State Attorney and the Reginal Prosecution Officer In- charge of Ruvuma Region together with the affidavit affirmed by ACP Amini Mahamba, who is the Reginal Crime Officer of Ruvuma Region with mandate of supressing crime and overseeing criminal investigation within Ruvuma Region. The affidavits in support of the

application evidences what has been amplified by Senior State Attorney Peres in his oral submission.

At the outset, the assertion by Senior State Attorney Simon Peres that in normal criminal appeal video conferencing has failed, does not depict the true state affairs. At large hearing through virtual Court has been successful save for some few pitfalls.

Having analysed the facts, this Court is of the findings that, as rightly submitted by the Senior State Attorney Mr. Peres, the protection of the witnesses is Worldwide scheme, and it is well organised both under international, regional and domestic laws. The witness is considered to be the pillars for the Court to reach the justice and yet he/she is benefited with nothing except, if not well protected, he/she can lose his/her or relative's lives. Therefore, the witnesses are eyes and ears of the justice on ground that the Court being vested with the mandate to promote and gives right it has an obligation to protect them, especially those who are supposed to testify against the accused charged with the offence which are considered to be of transnational in nature such as terrorism offence.

There are international instruments which recognise the importance of the witness protection. *Article 24 of The United Nations*

Convention Against Transnational Organised Crime (UNCATOC), deals with protection of witness from potential retaliation or intimidation. For reference, *Article 24 (supra)* provides:

> 1. *Each State Party shall take appropriate measure within its means to provide effective protection from potential retaliation or intimidation from witnesses in criminal proceedings who give testimony concerning offences covered by this convention and, as appropriate, for their relatives and other persons close to them.*
> 2. *The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*
>
> *(a) Establishing procedures for the physical protection of such persons such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and where about of such persons;*
>
> *(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensure the safety of the witness, such as permitting testimony to be given through the use of communication technology such as video links or other adequate means.*

3. States parties shall consider entering into agreements or arrangements with other State for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

The United Republic of Tanzania ratified the UNCATOC on 24th May, 2006. Tanzania has incorporated the world-wide scheme of Witnesses Protection for the cases of transnational terrorism in nature like Terrorism offences under *section 34 of the Prevention of Terrorism Act No. 21 of 2002.* Also, under *section 91 of the Written Laws (Miscellaneous Amendment [Act No. 2] of 2018* making reference to *section 188 of the Criminal Procedure Act.*

Likewise, *Article 13 of the Convention against Torture*, provide for similar protection. Another international instrument which recognise witness protection is *The United Nation Convention against Corruption (UNCC). Article 32 (1) of UNCC* provide that:

> *Each state part 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 gives testimony concerning offences established in accordance with this convention and, as*

appropriate, for their relatives and other persons close to them.

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.

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. The contention by Senior State Attorney Simon

Peres that there will arise a need to go back to the Committal court which is unnecessary, time consuming and costful is valid because there is no clear scheme guiding implementation of *Section 188 of the Criminal Procedure Act (supra).* However, that alone cannot empower a committal court to dictate the manner of trial before the High Court.

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.

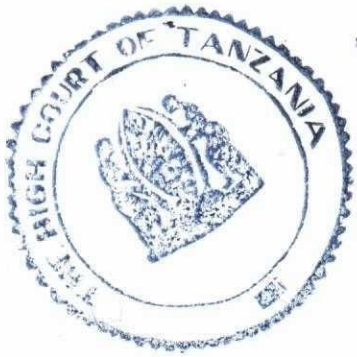
Basing on the reasons advanced above, this Court is completely persuaded by liberal interpretation approach of the witness protection provision, under *section 188 (1) (a) of the Criminal Procedure Act (supra)* as advanced by this Court in some prior cases alluded herein above representing the first 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 *Preliminary Inquiry Case No. 4 of 2022* pending before the Resident Magistrate 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