

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. CRIMINAL APPLICATION NO. 25 of 2022

(Originating from PI Case No. 07 of 2022 of the Resident Magistrate's Court of Arusha
at Arusha)

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

Versus

- 1. YUSUPH S/OALLY HUTA @ HUSSEIN.....1ST RESPONDENT**
- 2. SUMAIYA D/O JUMA SALIM @
SUMAYYA JUMA SALIMU.....2ND RESPONDENT**
- 3. HASSAN S/O ABDALLAH OMARY.....3RD RESONDENT**
- 4. BARAKA S/O NTEMBO BILANGO.....4TH RESPONDENT**
- 5. NIGANYA S/O HAMIS NIGANYA.....5TH RESPONDENT**
- 6. MORIS S/O JOHN MUZI.....6TH RESPONDENT**
- 7. RAMADHAN S/O HAMAD WAZIRI.....7TH RESPONDENT**
- 8. BUCHUMI S/O HASSAN MAZI.....8TH RESPONDENT**

31/03/2022 & 21/04/2022

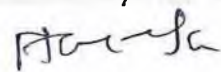
RULING

N.R. MWASEBA, J.

This application was brought exparte under the provision of Section 34
(3) of the Prevention of Terrorism Act No. 21 of 2002 read together with
Section 188 (1) and (2) of the Criminal Procedure Act Cap. 20 R.E 2019.

The Director of Public Prosecution has moved this court for the following orders:

- 1) That, this Honourable Court be pleased to order that witness testimony to be given through video conference.*
- 2) That, this honorable court be pleased to order non-disclosure of identity and whereabouts of the witnesses for security reasons during committal and trial proceedings.*
- 3) That, this Honorable Court be pleased to order non-disclosure of statement and documents likely to lead to the identification of witnesses for their security reasons during committal and trial proceedings.*
- 4) That, the trial proceedings in respect of committal case No 07 of 2022 to be conducted in camera.*
- 5) Any other protection measure as the court may consider appropriate for the security of the prosecution witnesses in respect of PI case No 07 of 2022, 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.

When the matter was called for ex parte hearing Mr. Nestory Mwenda, State Attorney appeared for the Director of Public Prosecution (DPP) who is the applicant herein. In his submission in support of the application, he adopted two affidavits in support of the application deposed by Agnes Hyera (Senior State Attorney) from National Prosecution Service (NPS) office and ACP Joshua Mwafulango, the Assistant Commissioner of Police and the Regional Crimes Officer (RCO) for Arusha Region. Mr Mwenda submitted that the basis of this application is PI No. 07 of 2022 which is pending before the Resident Magistrate's Court at Arusha. That, in that case the accused persons/respondents are charged with four counts including terrorism offence, unlawful possession of armaments and unlawful possession of ammunition.

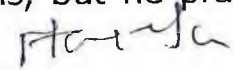
It was contended that the offences are serious in nature and have effect on the society. According to the two affidavits filed in support of the application, he submitted that, the respondents and other suspects who

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are yet to be apprehended have been engaged in terrorism acts and wanted to release bombs in different places in Arusha and there was an incident that bombs were released in different places prior to their arrest.

Mr Mwenda added by submitting that so long as the suspects were found in possession of armaments and ammunition, it is obvious that they are engaged in those offences. He avers that as per affidavit of the Arusha RCO the suspects have a strong network and other suspects are yet to be arrested. So, he prays that this application be granted for the security of their witnesses. He went on to submit that the applications for witness protection have been determined by this court in different cases such as in **Misc. Criminal Application No. 94/2019, DPP vs. Said Adam Said & 10 others**, Misc. Criminal Application No. 202 of 2021, **DPP vs. Fundi Hamisi Kamaka @ Fundi Hamisi @Mohamed Fundi & 4 others**, Misc. Criminal Application No. 9 of 2022, **DPP vs. Majaliwa Mohamed Ngalama and 20 others**, Misc. Criminal Application No. 9 of 2022. He insisted that in all those cases the court granted the application due to the reason advanced therein.

In concluding his submission, Mr Mwenda urged that he is aware of the fact that this court is not bound by those decisions, but he prays that



this court be persuaded accordingly and grant their application as prayed.

I have considered the submission by the State Attorney and deeply gone through the chamber application and two affidavits in support of the application.

In those affidavits it is revealed that under the conducted investigation, it was discovered that the purpose of the respondent's group is to recruit young Muslims and receive military exercise for the aim of overthrowing the existing government and establish their own Islamic state.

The investigation further revealed that, the accused persons in collaboration with their associates are struggling to get the identity of the intended prosecution witness in order to stop them from testifying in court against the respondents.

Having analyzed the facts deposed in the affidavits, the issue is whether this application has merit.

Ordinarily, the witness is generally considered to be one of the most important instruments to ascertain the truth in criminal proceedings.

Under the international laws, witness protection is provided for under the Rome Statute of International Criminal Court (ICC) as provided in Article 64 (7) which states that:

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

The Rome Statute went further to state the specific act in respect of witness protection as under Article 68(5) which provides that:

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

In the application of the Rome Statute there is also Rules of Procedure and Evidence which govern the modality of how witness protection order

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may be sought and the said procedures are laid down from Rule 87 to 88 which provides amongst others that: A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk.

Other international instruments which recognise witness protection include **The United Nations Convention against Corruption (UNCC)** on Article 32(1) which provides that:

"Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them."

Apart from the international instruments there are also regional instruments like the Witness Protection Act 112 of 1998 whereas the schedule to the said Act provides for the offences in respect of which protection may be granted to the witness such as the offence of

Harassment

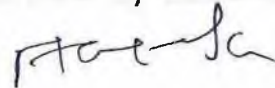
treason, sedition, murder, rape, public violence robbery to mention but a few. There is also regional victim/witness protection protocol to combat trafficking, commercial exploitation and sexual abuse of women and children in South Asia specifically under Article 11 which partly provides that:

"The State Parties to provide that:

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

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

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



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

For the purpose of this application the relevant provision is **Section 188 (1) (a), (b), (c) and (d) and (2) of the Criminal Procedure Act** which reads:

"Notwithstanding any other written law, before filing a charge or information, or at any stage of the proceedings under this Act, the court may, upon an ex-parte application by the Director of Public Prosecutions, order-

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

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

(c) non-disclosure of statements or documents likely to lead to the identification of a witness; or

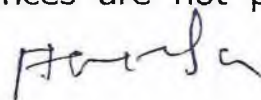
(d) any other protection measure as the court may consider appropriate.

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(2) Where the court orders for protection measures under paragraph (b) and (c) of subsection (1), relevant witness statements or documents shall not be disclosed to the accused during committal or trial.”

Witness protection may be a new phenomenon to our jurisdiction but the law recognizing witness protection gives us the authority to authorize compliance to the law without jeopardizing justice for the parties. Considering the cited authorities, many jurisdictions have similar view when it comes to witness protection issues. As advocated by the Supreme Court of India in **Mahender Chawla and Others vs Union of India and Others**, Criminal Original Jurisdiction Writ Petition Criminal No. 156 of 2016 by the Supreme Court of India and in the case of **Republic vs Doyo Galgalo and 3 others**, Criminal Case No. 16 of 2019, High Court of Kenya at Meru, where the importance of witness protection was underscored.

More so, witness protection is important to ensure that the investigation, prosecution and trial of criminal offences are not prejudiced by the intimidation or threat to witnesses.



The law is clear under **Section 188 of the CPA** that the court may, upon an ex parte application by the Director of Public Prosecutions, give an order to protect the intended prosecution witnesses. The manner and modality under which the application is made may sometimes develop fear that witness protection is likely to prejudice fair trial of the respondents. This is because the application is made and determined ex parte in exclusion of the respondents. It is a common understanding under our laws that, disclosure of witnesses and substance of evidence is one of the criteria towards fair trial. **Section 245 to 247 of the Criminal Procedure Act** Cap 20 RE 2019 requires the prosecution side to disclose the substance of the evidence intended to be relied upon by the prosecution side to prove the case against the accused person.

While observing the right to fair trial, it is also important to ensure that witnesses and their families are protected so as to be free while testifying before the court. At page 16 of the ruling in **Abdi Sharif Hassan @ Mosmal & Another**, Misc. Criminal Application No. 19 of 2020 Hon. Tiganga, J., observed that:

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

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defense and test the prosecution case by cross-examination. However, in some cases, it has disadvantages as it may discourage other witnesses to come forward fearing to risk their lives and those of their family members."

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

"One of the major considerations in granting protection order is where the life or safety of the person may be endangered as a result of his being a witness. Therefore, the protection of witnesses entails inter alia safety of the witness. From the prescriptions and the words used in the constitution and the law, the concealment of the identity of a witness is necessary, in a free and democratic society, to protect witnesses or vulnerable

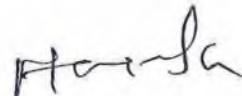
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persons, it is a justified measure, and therefore, not a violation to a fair trial."

Although not binding, this decision is persuasive, and I am not barred from borrowing the inspiration from the same. I am therefore, inspired to borrow a leaf from the above High Court of Kenya's decision as well as the decision by the Indian Supreme Court in **Mwahender Chawla & Others (supra)**. I have the same view that the coverup of the identity of a witness is necessary to protect witnesses to insure end of justice.

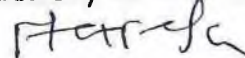
Considering the submission by the Senior State Attorney and the affidavits in support of application, it is clear that the nature of the offences, viz. terrorism, unlawful possession of armaments and ammunition and the modality used to execute the terrorist act of bombing various parts of our country, specifically in Arusha City, suggest a serious offence which requires protection of witnesses.

It is clear that, with the nature of the offence to which the respondents are charged with, the lives of the intended prosecution witnesses are in danger and there is a dire need of being protected.



Being inspired by the decision from other jurisdictions as
aforementioned, the decisions of this court by my brothers Mlacha, J.
and Tiganga, J., the affidavits in support of the chamber application,
both local and international laws and the submission by Mr Mwenda, I
find the present application fit for issuing protection order of the
witnesses. I therefore, grant the application and order as follows:

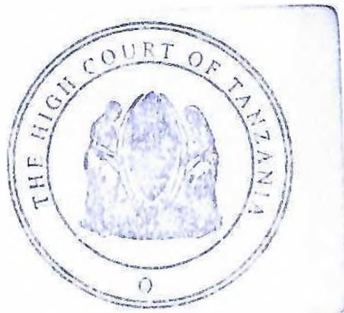
- 1) The witness testimony be given through video conference in
accordance with the provision of the Evidence Act Cap. 6 Revised
Edition 2019;
- 2) Non-disclosure of identity and whereabouts of the witnesses for
security reasons during committal proceedings and trial
proceedings;
- 3) Non-disclosure of the statements and documents likely to lead to
the identification of witnesses for their security reasons during
committal and trial proceedings;
- 4) Proceedings in respect of committal case No. 7 of 2022 to be
conducted in camera; and
- 5) Prohibition of dissemination and publication of any documentary
evidence and information bearing the identity of the witnesses and

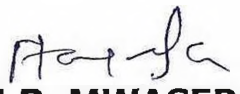


their close relative and their location without prior leave of the court.

It is so ordered.

DATED at **ARUSHA** this 21st day of April, 2022.




N.R. MWASEBA

JUDGE

21.04.2022