

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)

ARUSHA

MISC. CRIMINAL APPLICATION NO. 21 OF 2022

(Originating from P.I Case No. 5 of 2022 of the Resident Magistrate's Court of
Arusha Region at Arusha)

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPLICANT

VERSUS

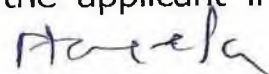
- 1. YUSUF ALLY HUTA @ HUSSEIN.....1ST RESPONDENT**
- 2. JAFARI HASHIM LEMA.....2ND RESPONDENT**
- 3. RAMADHANI HAMAD WAZIRI.....3RD RESPONDENT**
- 4. ABDUL MOHAMED HUMUDI @ WAGABA...4TH RESPONDENT**
- 5. ABASHARA HASSAN OMARY.....5TH RESPONDENT**
- 6. ABDULRAHAMAN JUMANNE HASSAN.....6TH RESPONDENT**

RULING

31.03.2022 & 21.04.2022

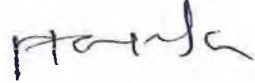
N.R. MWASEBA, J.

Under the Certificate of Urgency certified by Ms Tusaje Samwel Kapange, State Attorney at the National Prosecutions Services for and on behalf of the Director of Public Prosecution, the applicant in this



application, filed this application *ex parte* by the chamber summons made under Section 34 (3) of Prevention of Terrorism Act No. 21 of 2002 as amended by the Written Laws (Miscellaneous Amendment) Act No. 2 of 2018 read together with Sections 188 (1), (2) and 392 A (2) of the Criminal Procedure Act [Cap 20 RE.2019].

The same was supported by a 22 paragraph affidavit sworn by Ms Tusaje Samwel Kapange, Learned State Attorney and another affidavit of 14 paragraphs sworn by ACP Joshua Mwafulango, the Regional Crimes Officer for Arusha Region with the mandate of suppressing crime and overseeing criminal investigations within Arusha region. In the chamber summons a total of five substantive orders are sought which are as follows:

1. That, this honourable court be pleased to order that witnesses' testimony be given through video conference.
2. That, this honourable court be pleased to order non-disclosure of identity and whereabouts of the witnesses for security reasons during committal and trial proceedings.
3. That, this honourable court be pleased to order non-disclosure of the statements and documents likely to lead to the identification of the witnesses for their security reasons during committal and trial proceeding. 

4. That, this honourable court be pleased to order the trial proceedings to be conducted in camera.
5. That, this honourable court be pleased to order any other protection measure as the court may consider appropriate for security of witnesses including but not limited to:
 - a. Prohibition of dissemination and publication of any documentary evidence and any testimony bearing identity of prosecution witnesses without prior leave of the court.
 - b. Prohibition of 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 filed affidavit supporting the application did advance the reasons for the application and the grounds upon which the applicants seek for orders as depicted from the chamber summons.

The filed affidavit deposed that, the respondents stand charged before the Resident Magistrates' Court of Arusha in PI No. 05 of 2022 for offences of: conspiracy to commit terrorism, provision of funds, failure to disclose information relating to terrorism, murder and attempted murders. The offences are alleged to have been committed on diverse dates between 1st day of January 2010 and 15th day of June 2013 at various places within Arusha region by committing terrorism offences,

Amela

murder and attempted murder. The main intention was to strategize on establishing an Islamic state within the United Republic of Tanzania with the intention of seriously destabilizing the fundamental political, constitutional, economic and social structures of the United Republic of Tanzania.

On 31.03.2022 when the application was called for *ex parte* hearing Mr Nestory Mwenda, Learned State Attorney appeared representing the Director of Public Prosecution (DPP).

In his submission supporting the application, he adopted two affidavits in support of application deposed by Tusaje S. Kapange (State Attorney) from National Prosecution Service (NPS) office and ACP Joshua Mwafulango, the Assistant Commissioner of Police and the Regional Crimes Officer (RCO), Arusha Region. He told the court that the basis of this application is PI No. 05 of 2022 which is pending before the Resident Magistrate's Court at Arusha. In that case the accused persons/respondents are charged with fourteen (14) counts including terrorism offence, murder and attempted murder.

He added that, according to the information received from the RCO and the investigation conducted there are some suspects who have not been apprehended, thus, the protection of the witnesses and their families are important. Further to that, it was contended that the offences the

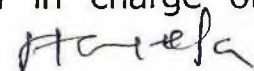
Tusaje

respondents stand charged with are serious in nature and have effect on the society.

He further told the court that on 15.06.2013 the respondents threw a bomb at Soweto Grounds which led to the death of four people and several people were injured. As the respondents are dangerous to the society and to the witnesses in case their names will be revealed to the respondents and other suspects who are yet to be apprehended, that is why they prayed for the application to be granted so that they can proceed to file information to the High Court and the matter to proceed.

To add salt to his submission, he cited the case of **D.P.P vs Said Adam and 10 Others**, Misc. Application No. 94 of 2019, **D.P.P vs Fundi Hamis Kamaka @ Fundi and 4 Others**, Misc. Criminal Application No. 202 of 2021 and **D.P.P vs Majaliwa Mohamed Ngarama and 20 Others**, Misc. Application No. 9 of 2022 where this court granted the application of this kind. It was his submission that, although the court is not bound by the cited decisions, he prayed for it to be persuaded with its previous decision.

Having gone through and examined the: affidavit and considered the applicant's submission; contents of the affidavit of the Regional Crimes Officer, ACP Joshua Mwafulango who is the overall in charge of



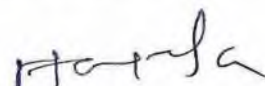
investigation in Arusha Region; and that of Tusaje S. Kapange, Senior State Attorney I have the following observations.

Both affidavits reveal that under the conducted investigation it was discovered that the purpose of the respondents' group was to commit terrorism acts with the aim of overthrowing the existing government and establishing their own Islamic state.

The investigation further revealed that, the accused persons together with their associates are struggling to get the identity of the intended prosecution witnesses in order to intimidate and prevent them from testifying in court against them.

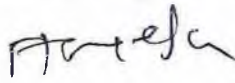
The witness is generally considered to be one of the most important instruments to ascertain the truth in criminal proceedings. Due to those facts under the international laws, witness protection is provided for under **Article 64 (7) of Rome Statute of International Criminal Court** which states that:

"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 are also Rules of Procedure and Evidence which govern modality of how witness protection order may be sought and the said procedures are laid down from Rule 87 to 88 which provide amongst other things that the application needs to be *ex parte*, also hearing of the *ex parte* application be made in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk. 

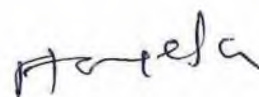
Another international instrument which recognises witness protection is **The United Nations Convention against Corruption** (UNCC) which on Article 32(1) provides that:

"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**, No. 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 offence of treason, sedition, murder, rape, public violence robbery and few others.

Other regional instruments include the regional victim/witness protection protocol to combat trafficking, commercial exploitation and sexual abuse of women and children in South Asia, which specifically under Article 11 it provides that:

"The State Parties to provide that:

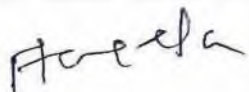
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(a) All proceedings involving application for securing protection and the action taken thereon by the persons (Court Officials, Police Officers, Technical Support Providers or any person involved with the protection procedure) shall be under obligation 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 our country (Tanzania) the issue of witness protection is enshrined under the law. The **Written Laws (Miscellaneous Amendments) (No.2) Act, 2018** which amended **Section 34 of the Prevention of Terrorism Act** No. 21 of 2002 deleted 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, CAP 20 R.E 2019** reads as follows: 

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

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

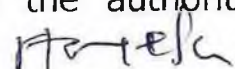
(b) non-disclosure or limitation as to the identity and whereabouts of a witness, taking into account the security of a witness;

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

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

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

Witness protection is 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 supported 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 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.

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

The law is clear under **Section 188 of the CPA** that the court may, upon an *ex parte* application by the Director of Public Prosecutions, give an order to protect the intended prosecution witness. The manner and modality under which the application is made may sometimes develop fear that witness protection is likely to prejudice fair trial of the respondents. This is because the application is made and determined *ex parte* in exclusion of the respondents. It is a common understanding under our laws that, disclosure of witnesses and substance of evidence is one of the criteria towards fair trial. **Section 245 to 247 of the**

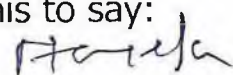
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Criminal Procedure Act (Supra) requires the prosecution side to disclose the substance of the evidence intended to be relied upon by the prosecution side to prove the case against the accused person.

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 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."

Subscribing to such reasoning the witness protection is of paramount importance in ensuring justice to both parties because evidence supporting the case is coming from witnesses whom, if they are not protected, they may fail to testify due to fear and intimidation. The law aims 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 at page 3, the High Court of Kenya had this to say:



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

Although not binding, this decision is persuasive, and I am not barred from borrowing the inspiration from the same. Just like this court borrowed a leaf from other jurisdictions, in same footage I am as well 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 **Mahender 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 State Attorney and the affidavits in support of application it is clear that the nature of the offences which are conspiracy to commit terrorism, murder and attempted murder and the modality used to execute the terrorist act of bombing various parts

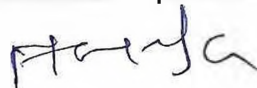
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of our country particularly in Arusha City, hence serious offences which require protection of the witnesses.

It goes without saying that with regard to the nature of the offences the respondents stand charged with, the lives of intended prosecution witnesses are in danger and there is a dire need of being protected.

Being inspired by the decision from other jurisdictions such as Court in India and Kenya, 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 the protection order of the witnesses. Therefore, this court grants the application and order as follows:

- 1) The Witnesses 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;

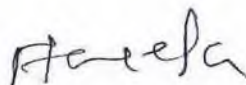


- 3) Non-disclosure of the statements and documents likely to lead to the identification of witnesses for their security reasons during committal and trial proceedings;
- 4) Prohibition of dissemination and publication of any documentary evidence and information bearing the identity of the witnesses 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