

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM**

**MISC. CRIMINAL APPLICATION NO. 28 OF 2022**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT**

**VERSUS**

**ALLY OTHUMAN RASHID..... 1<sup>ST</sup> RESPONDENT**

**FARAJI ALI RAMADHANI.....2<sup>ND</sup> RESPONDENT**

**SHABAN BAKARI WAZIRI.....3<sup>RD</sup> RESPONDENT**

**MUSSA DAVID MTWEVE.....3<sup>RD</sup> RESPONDENT**

**RULING**

Date of last Order: 14/03/2022.

Date of Ruling: 18/03/2022.

**E.E. KAKOLAKI, J**

This is a ruling in respect of the ex-parte application preferred by the applicant under certificate of urgency against the respondents seeking for the following orders:

1. That, this Court be pleased to order none disclosure of identity and whereabouts of the witnesses.
2. That, this Court be pleased to order none disclosure of statements and documents likely to lead to the identification of witnesses.

3. That, some witnesses give their testimony through video conferencing.
4. That, this Court be pleased to order trial proceedings to be conducted in camera.
5. That, this Court be pleased to order any other protection measure as it may consider appropriate for the security of the witnesses.

The application has been brought under section 188(1)(a),(b),(c),(d), 188(2) and 392(1) of the Criminal Procedure Act, [Cap. 20 R.E 2019] hereinto referred as CPA, duly supported by affidavits of Ms. Tully Helela, State Attorney and SP. Jumanne Malangahe and officer of the Tanzania Police Force working in the Anti-Terrorism and Transnational Organised Crime section which is under the Directorate of Criminal Investigation.

Briefly the respondents in which the orders sought are concerned with, before the Resident Magistrate's Court of Dar es salaam at Kisutu in P.I No. 18 of 2013 are jointly and together standing charged with two counts of offences under the Prevention of Terrorism Act, No. 21 of 2002. The said charges are Recruitment of Persons to be Members of Terrorist Group, Contrary to Section 21(a) and Professing to be Member of Terrorist Group; Contrary to section 25(1)(b) both under the Prevention of Terrorism Act. They are jointly and together accused of professing to be members of **AI**

**Shabaab** which is a terrorist group in the 2<sup>nd</sup> count and while the 1<sup>st</sup> accused is accused of recruiting the 2<sup>nd</sup>,3<sup>rd</sup> and 4<sup>th</sup> accused to travel to Somalia for the purposes of joining **Al Shabaab** a terrorist group. Having being arraigned in court since 2013 for want of jurisdiction of the subordinate court to hear and determine their case, it appears now the prosecution is in preparation of committing them to the competent court hence the present application.

When the matter came for hearing the Applicant appeared represented by Mr. Waziri Magumbo, Senior State Attorney assisted by Ms. Tully Hellela, State Attorney. At the beginning of his submission Mr. Magumbo sought leave of the court which was granted for the applicant to drop the second prayer for an order of none disclosure of statements and documents likely to lead to the identification of witnesses. That done, submitting in support of the application the court was informed that, the offences with which the respondents are charged with under Prevention of Terrorism Act are serious ones posing threat not only to the existing Government but also safety of the entire public in which the State is duty bound to protect. He said, witnesses are ears and eyes of criminal justice thus a need to protect them in making sure that criminals are fairly prosecuted without allowing them

with an opportunity to instill fear or threat to the prosecution witnesses. He contended in this case, there is reliable information as exhibited by adopted affidavits of the Tully Helela and SP. Jumanne that, the intended witnesses are exposed to threat and/or intimidation by criminal syndicate in which the respondents belong to, with intent to discourage or ensure that, they refrain from rendering their testimonies against the respondents in case facing them. That, the said threat extends not only to the witnesses but also their families and close relatives who are to be protected too. According to him, unless the names and identities of the persons likely to be witnesses in P.I No. 18 of 2013 are withheld, the instilled fear will seriously affect the case as the intended witnesses will refrain from testifying against the accused. It was his submission that, this court has discretionary powers to grant the prayers sought. In supporting his stance he referred the court to its own decision in the case of **DPP Vs. Ramadhani Hassan Makai @ Makai and 4 Others**, Misc. Economic Cause No. 1 of 2021, **DPP Vs. Haruna Mussa Lugeye and Another**, Misc. Criminal Application No. 188 of 2021, **DPP Vs. Yahya Twahiru Mpemba and 15 Others**, Misc. Criminal Application No. 88 of 2021 and **DPP Vs. Abdi Sharif Hassan @ Msomali and Another**, Misc. Criminal Application No. 19 of 2020, where the court granted the

sought orders for witnesses protection. Mr. Magumbo rested his submission by praying the court to grant the application by issuing the prayed orders.

Having briefly narrated the applicant's submission, I wish to state from the outset that under section 188(1) of the CPA this court has discretionary powers to grant ex-parte the orders sought by the applicant and any other orders it deems fit to grant, for the purposes of protecting the to be witness, but upon being satisfied that, there are sufficient grounds advanced by the applicant warranting grant of the same. Section 188(1) of CPA provides thus:

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

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

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

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

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

It is worth noting that, above provision of the law came in as implementation of the global legally binding instrument which imposes obligation to its member states to make sure that witnesses of transnational and organised crimes are protected. Article 24(1) and (2) of the United Nations Convention against Transnational Organized Crime, 2000 (UNTOC) provides that, member states to the Convention shall employ appropriate measures within their means for protection of witnesses from potential retaliation or intimidation in criminal proceedings. Article 24 of UNTOC reads:

***1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for 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 whereabouts of such persons;***

***(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means. (Emphasis supplied)***

It is from that mandate, I find this court has a role to play in implementing the already set evidential rule for protection of potential witnesses of serious crimes and any other crimes from any posed threats or danger to their life, their families or close relatives while discharging their role during court proceedings and thereafter, but without interference or affecting the accused's rights to fair hearing. I hold that view as the purpose of the above cited provisions is to protect witnesses in criminal cases from potential retaliation or intimidations by employing procedural measures such as video conferencing, voice and face distortion techniques, allow a witness to testify in camera and withholding of details of a witness's identity. See also Good Practice for the Protection of Witnesses in Criminal Proceedings involving Organised Crime as [www.unodc.org/documents](http://www.unodc.org/documents).

Now back to the issue at hand, I find it apposite to consider each and every order prayed by applicant albeit so briefly. To start with the first prayer for an order of none disclosure of identity and whereabouts of the witnesses, this court finds the prayer is justifiable for being supported by the facts stated in paragraphs 8 of both affidavits that, there is reliable information the intended witnesses are exposed to threat or intimidation of being harmed with their families and close relatives by the criminal syndicate belonging to the respondents in this matter. It is from that evidence, I hold their identities and whereabouts in all statements and documents intended to be relied on by the applicant during trial of the case, should be withheld by either erasing the said particulars or use pseudo names in lieu of. However I direct that, such exercise should be done with great circumspection and without affecting the accused rights to fair hearing as guaranteed under section 246(2) of the CPA. The said section 246(2) of the CPA provides thus:

***"Sec. 246(2) Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the***



***substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial"* [emphasis added].**

The above cited provision is couched in mandatory terms and it requires the witness statements and documentary exhibits to be named/listed and read to the accused person during committal stage to enable him/her understand the substance of the case facing him/her and prepare his/her defence when the matter comes for hearing before the High Court. To do otherwise is tantamount to deny the accused person of his right to fair hearing whose effect is to render tendering and reliance of such evidence during the trial a futile exercise. See the case of **Masamba Musiba @ Musiba Masai Masamba Vs. R**, Criminal Appeal No. 138 of 2019 (CAT-unreported). I therefore uphold the first prayer with the above specified limitations.

Next for determination is the third and fourth prayers which I find it appropriate to consolidate and consider jointly. In the two prayers the applicant is seeking for orders of conducting the trial proceedings in camera and allow witnesses to testify via video conferencing. The law under section 188(1) of CPA provides for grant of the prayed orders before filing of the charge or information, or *at any stage of the proceedings* under the Act. The two sought orders in my opinion are premature as no reason has been

put forth by the applicant to justify as to why they should be granted at this stage and not during the trial. I so opine as the law allows grant of any order for protection of witness at any stage of proceedings under the CPA. Since the same can be prayed and granted during the trial, I refrain from granting them for being prematurely brought and proceed to advise the applicant to advance them during the trial of the case in this court.

In the circumstances, and for the fore stated reason, I grant the application in respect of the first prayer only, otherwise the rest to of the prayers are to be considered by the trial court. For clarity, I order none disclosure of identity and whereabouts of witnesses in all witnesses' statements and documentary exhibits. The applicant can either erase witness names and particulars or their whereabouts and/or use pseudo names in both witness statements and documents to disguise their identity.

It is so ordered.

DATED at Dar es salaam this 18<sup>th</sup> day of March, 2022.



E. E. KAKOLAKI  
**JUDGE**  
18/03/2022.

Ruling delivered at Dar es Salaam in chambers this 11<sup>th</sup> March, 2022 in the presence of Mr. Faraji Nguka for the applicant and Ms. Monica Msuya, court clerk and in the absence of the Respondents for being ex-parte preferred.



E. E. KAKOLAKI  
**JUDGE**  
18/03/2022

