

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**MISC. CRIMINAL APPLICATION NO. 13 OF 2022**

(Arising from COMMITTAL Case No 6/2022 of the RESIDENT MAGISTRATE Court of  
TANGA at TANGA)

**THE DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT**

**VERSUS**

1. HAJI OMARI MTANA
2. JUMA OMARY MTANA
3. KHALID SALEHE SEKINTU
4. SAID ABDALLAH MTENGA
5. ATHUMANI MBAROUK
6. SALIMU OMARY
7. OMARY SAID
8. KASSIMU MUSSA
9. KIBUMA ALLY
10. OMARY MWINYI JUMA
11. TOBA SALEHE SEKINTU
12. IDRISA ALLY ABEID
13. RAMADHANI ATHUMANI MNGUMI
14. SHABANI ATHUMANI MAGONO



15. ABDALLAH MRISHO KAMOTE KISEKO
16. MYAMISI SAIDI
17. RAMADHANI MIRAJI ABU MOHAMED MASTER
18. ABDULRAHMAN HASSAN MENJUMA MHADU JOHO
19. JUMA SALEHE KINONDO
20. JUMA OMARI MTANA JUMA MKUBWA
21. RAJABU OMARI MTANA
22. JAWA OMARI MTANA

### **RULING**

Latifa Mansoor, J  
Date of Ruling- 01<sup>st</sup> April, 2022

The Director of Public Prosecution "DPP" brought the application under 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 application was brought under a Certificate of Urgency, and so it was heard and determined under the urgency. The application was supported by the affidavit of Nestory Mwenda, a State Attorney in the National Prosecution Services. Basically, the DPP seeks for protection of witnesses involved in the case undergoing committal proceedings



at the Resident Magistrate Court for Tanga at Tanga, Committal Case No. 6 of 2022.

The hearing of the application was *ex parte* as this is what is provided by section 188 of the Criminal Procedure Act, Cap 20 R.E 2019. For ease of reference, I shall reproduce hereunder the provisions of section 188 of CPA, it reads:

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. Cap 4 s.8 (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.

The State Attorneys appearing for the DPP said there are witnesses in this case with respect to whom there is well founded assumption that they will incur problems in connection with their testimony and they will be hindered in the further exercise of their profession. These are police officers who have met the accused while working undercover. The second category of witnesses who seeks the protection are those witnesses who fear for their lives, health and safety, they also fear the disruption of their family life and socio-economic existence. The third category of witnesses who seek protection under this application are those

whose names appear in cautioned statements, and the State attorneys submit that these statements can be tendered during committal proceedings and during Trial but the names and identity of the witnesses mentioned therein should not be shown.

I have heard the State Attorney's submissions and have considered the affidavit deposed by Nestory Mwenda, the State Attorney, and the affidavit of Marco Godfrey Chilya, the Assistant Commissioner of Police and the Regional Crimes Officer of Tanga Region, and also, I have considered the seriousness of the offence which is now under committal proceedings at the RM's Court Tanga, and I shall rule as hereunder.

It is without dispute that the Criminal Procedure Act, Cap 20 R.E 2019 provides for an open trial. Section 246 to 254 of the Criminal Procedure Act deals with supply of copies of police report and other documents, and supply of copies of statements and documents to the accused persons facing trial and also requires evidence to be taken in the immediate presence of the accused. Section 246 (2) reads

(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.

Section 246 (3) of the Act, states the court is required to address the accused person in the following word or words to the like effect:

"You have now heard the substance of the evidence that the prosecution intends to call at your trial. You may either reserve your defense, which you are at liberty to do, or say anything which you may wish to say relevant to the charge against you. Anything you say will be taken down and may be used in evidence at your trial."

Section 247 of the Act the court is required to make a list of all witnesses whom the Director of Public Prosecutions intends to call and section 249. -(1) of the Act the accused is entitled at any time before the trial to have

a copy of the record of the committal proceedings without payment. And the records to be supplied to the accused contains a copy of the charge or charges, copies of the statements and documents produced to the court during the committal proceedings and a copy of the record of the proceedings before the court.

All these provisions existing in the Act ensure a fair trial to the accused. However, under the same laws, the proceedings in camera are permitted for example in case of trials regarding offence of statutory rape and the identity of the child victim are permitted not to be disclosed. Similarly, section 227 of the CPA, proceedings may continue, conviction may be entered and the sentence can be imposed in the absence of the accused. Also, under the Law of the Child Act, the name, address or school or any other particulars calculated to lead to identification of the juvenile or the publication of the picture of a juvenile are strictly prohibited. Thus, these are special statutes which were intended to protect witness identity. In the same spirit section 34 (3) and (4) of the Prevention of Terrorism Act, read together with section 188 of the CPA, these provisions intend to protect the identity of

the witnesses for public interest or public order and so it cannot be said that the principle of open trial or fair trial have been breached.

In this country, we are governed by democratic constitutions and rule of law, the position is that the right to an open 'public trial' in the immediate presence of the accused is fundamental but is not treated as absolute and competing rights require to be balanced. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interests of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interest of justice. Thus, the provisions of the Criminal Procedure Act highlighted above require that the trial of an accused must be 'fair', should be an "open, public trial" and declares that the accused has a right to a trial conducted "in his presence and to examine or have examined, the witnesses against him". These rights however must be balanced, and this is the essence of having section 188 of the CPA. As said herein above, such exceptions to public trial is provided under section 227 of CPA where inquiries and trials



can be held in the absence of the accused in certain cases where the Judge or the Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in the Court. Again, Procedure for examination and cross-examination of witnesses is specified, this can be done in camera or simply by accepting the statement of the witness without procuring his attendance in court. But witnesses can now be examined by video conference procedure as per the Amendment of the Criminal Procedure Act.

Thus, the above provisions of the Criminal Procedure Act would show that neither the right to an open public trial nor the right of examination of the prosecution witnesses in the immediate presence of the accused are absolute. There are a good number of exceptions as shown above. There are some other special laws in force in our country which also provide exceptions to the right of the accused for open public trial as against the right of the victim for a fair trial. This is clearly shown in section 34 (3) and (4) of the Prevention of Terrorism Act, in the Law of the Child Act, and under section 188 of CPA. The State has also an interest in the fair administration of justice. That interest of the

State requires that victims and witnesses depose without fear or intimidation and that the Judge is given sufficient powers to achieve that object through section 188 of CPA. Section 188 of CPA deals with 'witness identity' protection and also in the statute to prevent terrorist activities, section 34 of Prevention of Terrorism Act provides that unless sufficient protection is granted to victims and witnesses, it is not possible to curb the menace. Sec 34(3) of the Act provides a procedure to protect witness identity. It read as follows:

Section 34 (3) A court may on motion by or on behalf of the DPP in the interest of public safety or public order that no person shall publish the name address or photograph of any witness in any case tried or about to be tried before it for any offence under this Act.

Court is given discretion to do so wherever the circumstances so desired. Again section 34 empowers the Court to take measures in public interest or public order so as to direct that information

in regard to all or any of the proceedings pending before the Court shall not be published in any manner.

That said, I am satisfied that since this case seems to involve a serious crime and there is a possibility that the witnesses will incur problems in connection to their daily performance of work, some of the witness's fear for their lives or the lives of their close family, the court order to conceal the identity of the witnesses during the committal proceedings as well as during trial. In order to prevent witnesses from being endangered, the use of statement of anonymous witnesses as evidence in the Court is permitted. The witnesses do not have to state their names/addresses but the Trial Judge must be informed.

In the upshot, the Court grants the following orders, as prayed:

1. 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.

2. Witness identities shall not be disclosed. The witnesses shall not have to state their names and address but the Trial Judge shall be informed;
3. There shall be no disclosure of the statements and documents which are likely to lead to the identification of the witnesses during committal and during trial.

It is so ordered.

DATED AND DELIVERED AT TANGA THIS 1<sup>ST</sup> DAY OF APRIL 2022



  
L. MANSOOR

JUDGE

1<sup>ST</sup> APRIL, 2022