

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

MISCELLANEOUS CRIMINAL APPLICATION NO. 02 OF 2022
(Originating from the Resident Magistrate Court of Shinyanga in Criminal
Case P.I No. 10 of 2016)

THE DIRECTOR OF PUBLIC PROSECUTIONSAPPLICANT

VERSUS

1.FUNDI YONA ZAKARIA @ ABUU NURU
2.ABDULLAH AHMED HASSAN
3.JAMAL HUSSEIN MADENI }RESPONDENTS

RULING

11th & 14th April, 2022

A. MATUMA, J.

In this Application, the Applicant; ***The Director of Public Prosecutions*** seeks for an order of witness protection under the provisions of section 34 (3) of the prevention of Terrorism Act no. 21 of 2002 read together with section 188 (1) (a) (b) (c) and 392 A (1) of the Criminal Procedure Act, Cap. 20 R.E 2019.

This application has been made exparte and the orders for the protection of witnesses which are being sought are;

1. *That, this Honorable Court be pleased to order the witnesses' testimony be given through video conferencing.*



2. *That, this Honorable Court be pleased to order non-disclosure of identities and whereabouts of witnesses.*
3. *That, this Honorable Court be pleased to order non-disclosure of statements and documents likely to lead identification of witnesses for their security reasons during committal and trial proceedings.*
4. *That the trial proceedings in respect of Preliminary Inquiry (PI) case No 10/2016 to be conducted in camera.*
5. *That, this Honorable Court be pleased to order any other protection measures as the Court may consider appropriate for security of witnesses.*

At the hearing of this application, M/s Aurelia Arbogasti Makundi learned Senior State Attorney and Juma Mahona learned State Attorney represented the applicant.

The respondents were absent obviously for the reason that this application has been made ex parte in terms of section 34 (3) of the prevention of Terrorism Act Supra.

Submitting for the orders sought, the learned State Attorneys reiterated what has been deposed in the affidavits of Aurelia Arbogasti Makundi (Senior State Attorney) and ACP Alex Mkama (Regional Crimes Officer) of Shinyanga Region in support of the chamber summons.

In both the oral submissions before me and depositions in the two affidavits, the respondents stands charged in the Resident Magistrate Court of Shinyanga at Shinyanga vide Criminal Case (P.I) no. 10 of 2016 for conspiracy to commit an offence contrary to section 27 (C) of the prevention of Terrorism Act supra.

It is alleged that within Kahama Inmate Prison, some suspects of terrorism were held pending their legal course. That the respondents

herein in corroboration with other Criminal syndicates conspired to invade Kahama Inmate Prison and assist such other suspects of terrorism to escape. It is on such circumstances; the respondents were arrested and charged as herein above stated.

The learned State Attorneys submitted that investigation of the charges against the respondents is complete and they are about to file information to this Court for trial of the respondents but it has come to the knowledge of the investigation organ that the intended prosecution witnesses are in danger of being harmed by the respondents and their associates.

According to the Affidavit of the Regional Crimes Officer ACP Alex Mukama, the respondents in corroboration with their associates who are at large are struggling to procure the identities of such intended witnesses in order to impend them from testifying in court against the respondents during trial.

The source of information relating to the alleged threat to witnesses, plan to inflict physical harm against them and impend them from testifying against the respondents is what has been referred to in the affidavit of RCO; ***reliable intelligence information.***

Frankly speaking both the two affidavits that of the learned Senior State Attorney and that of the Regional Crimes Officer contains nothing but speculations, conjectures, suspicious, allegations and hearsays.

This is because there is no fact deposed or evidence given by affidavit to the alleged struggle by the respondents to impend any of the prosecution witnesses from testifying in Court against them or even positive evidence to the alleged intended physical harm to witnesses.

Instead, the depositions relies to what has been termed as "**reliable intelligence information**".

This Court has not been availed any opportunity to scrutiny whether the alleged intelligence information are really reliable. We are now moved to work on presumptions that such intelligence information are really there and that they are reliable.

That is very dangerous to the administration of Criminal justice as an innocent person may be subjected to the so called intelligence information by ill will motive and yet the Court is not able to scrutiny such information for its source is undisclosed.

Intelligence information are not necessary be true at all times. Some informers are by themselves Criminals and purports to give intelligence information just to blind fold the investigative organs to detect them.

In the case of **Republic versus Iddrisa s/o Hamis and James Kanaku, Criminal Session Case no. 34 of 2020**, the High Court of Tanzania at Kigoma held that the so called informers are there to give tips to the investigation organs which are to be worked upon to collect independent evidence as the Court will never use the so called "intelligence information" to convict a Criminal suspect.

The Court further held that if no independent evidence is collected then the informer would be necessitated to be turned into being a witness and be physically available in the witness dock to be subjected to cross examination by the accused or his advocate, and for the Court to assess his or her credibility and reliability.

In the instant matter, it is difficult to ascertain such intelligence information and its reliability. What is reliable to the Regional Crimes Officer is not necessarily reliable to the Court as well. This is due to the

fact that the Regional Crimes Officer has his own criteria's to evaluate the information, and the Court has its own rules of procedure to determine reliability of the information so given.

In the instant matter we have hearsays from RCO and the learned State Attorney and thus unable to verify the so called "intelligence information".

This is very dangerous in the administration of Criminal justice as I have said earlier.

Even Police Officers are not that much clean to the extent that they may swear affidavits which should be taken as whole truth without any query. Some of them have been proved to have acted maliciously against innocent individuals to the detriment of justice. In the case of ***Republic versus Lazaro Elias @ Robert Patrick Mbawala, Criminal Session case no. 13 of 2020***, High Court of Tanzania at Kigoma, the accused was totally insane. No body was able to communicate with him, even the court. Both the learned State Attorney (prosecutor) and the defence advocate agreed that examination of his mental status was necessary before trial. He was thus ordered to be detained at Isanga mental Institute for mental examination under section 219 (1) of the CPA. The mental examination report came reflecting that he was totally insane both at the time of the commission of the offence and still insane, yet from this insane person, a Police investigator had procured a well detailed confession statement towards the alleged murder. How did he manage to procure such statement from this insane person, only God knows!

It is from such scenarios among others; the criminal justice requires transparency, fair hearing and accord opportunity to each party to be

heard fully. See **Article 13 (6) (a)** of the constitution of the United Republic of Tanzania.

In regard to transparency the provisions of section 245, 246 and 247 of the Criminal Procedure Act, Cap. 20 R.E 2019 were enacted to enable the accused to know the nature of the offence he is to face during trial by the High Court and hear the contents of the statements of Prosecution witnesses and or the substances of evidence of the witnesses who did not write their statements.

Therefore the accused is committed by the subordinate Court for trial to this Court acquainted fully with the facts, evidence, list of witnesses and exhibits for his preparation in defence.

Protection of witnesses intends to deny the Criminal suspect the right to state anything against the witness even if he has substantial ground to impeach the credibility of such witness because he is denied the identify of such witness. Thus even his real enemy or a person with the ill will motive might purport to be a witness against him for undisclosed ill will motives which would otherwise been revealed by the suspect during defence or through cross examination.

Therefore protection of witnesses although legally accepted both Internationally, Regionally and at the National level, it should be exercised with a great caution, faithfully, in a God fearing manner, and Honestly. Otherwise Criminal justice is at stake especially when it finds itself into the hands of a Police officer who can procure a well detailed confession statement from an insane person as herein demonstrated.

The Regional Crimes Officer having obtained the so called "**reliable intelligence information**" should have told us whether he

investigated such information and found them to be true. Should have given us some facts obtained from the alleged intelligence.

Despite of all these observations, I am inclined to allow this application in part just because the life of the said intended witnesses is alleged to be in danger. I cannot test the life of a person into the danger just because of poor presentation of the evidence and facts to establish such danger. The life of an individual would always override.

On the other hand the rights of the respondents to a fair trial should be observed as well. They should not be treated as already criminals without any trial by mere allegations through affidavits of the learned State Attorney and RCO.

In the circumstances this application is allowed to the extent that, I order the identities of the intended witnesses which includes their whereabouts be withheld. I also order none disclosure of their statements and documents likely to lead to their identities. The withholding of the identities of the witnesses and none disclosure order given herein above shall operate both at the committal proceedings and during trial in this Court. But during trial, the bench should be accorded opportunity to see each and every witness for assessment of their credibility and for avoidance of persecution of the respondents instead of prosecution.

For clarity, I direct that instead of reading the statements of witnesses during committal proceedings, only the charge/information and facts constituting the case be read out to the respondents.

I however decline at this stage to grant the order that the trial of the respondents be in held in camera and through video conferencing.

The prosecution if so wishes shall file an application to that effect when the information is already filed in this Court in which this Court

shall be able to scrutiny the seriousness of the matter and nature of evidence which are lacking at this stage. Otherwise, it would be treating the hearsays in the affidavits of the applicant as being true without any query. The law does not allow me to sail into speculations, allegations, suspicious, conjectures and hearsays as it was held in a number of cases including that of ***Mohamed Musero versus Republic (1993) TLR 290*** and ***Shishir Shyamsingh versus Republic, (DC) Criminal Appeal no. 54 of 2020*** in the High Court of Tanzania at Kigoma. In Shishir's case supra, the Court held;

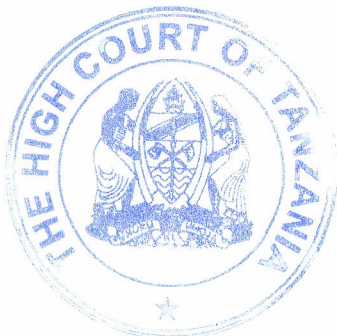
"In our Criminal jurisprudence, it is wrong for the Magistrate or Judge to act on conjectures and speculations in making decisions as such conjectures and speculations have no room in Criminal trials."

This application is therefore granted to the extent herein above stated.

Taking into consideration that the respondents have been in remand custody since the year 2016, I direct that the information be filed as soon as possible and without any undue delay. Once it is filed, the Deputy Registrar should communicate to the subordinate Court to have the respondents committed soon to this Court for their trial.

It is hereby ordered that this ruling be supplied to the Respondents for them to know the ex-parte orders issued against them so that they are not taken by surprise during their committal proceedings.

It is so ordered.



A. MATUMA
Judge
14/04/2022