

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CRIMINAL APPLICATION NO. 26 OF 2022

*(Originating from Arusha Resident Magistrates Court in Preliminary Inquiry
Case No. 03 of 2022)*

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

VERSUS

YUSUPH ALLY HUTA 1ST RESPONDENT

AMAN MUSSA @ PAKASI 2ND RESPONDENT

RAJABU YAKUB ADALLAH @ IKAPU..... 3RD RESPONDENT

ABASHARI HASSAN OMARY 4TH RESPONDENT

IDD SALUM ABDALLAH 5TH RESPONDENT

SHABAN IDD @ BABA TUNA 6TH RESPONDENT

RULING

06/04/2022 & 05/05/2022

KAMUZORA, J.

This application is brought under a certificate of urgency and preferred under the provisions of section 34 (3) of the Prevention of Terrorism Act No. 21 of 2002 as amended by Act No. 2 of 2018 read together with section 188 (1) and (2) of the Criminal Procedure Act Cap

20 RE 2019. The Director of Public Prosecution has ex-parte 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 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 statements and documents likely to lead to the identification of witnesses for their security reasons during committal and trial proceedings.*
- 4) That, this Honourable Court be pleased to order any other protection measures as the court may consider appropriate for security of the witnesses.*
- 5) That, this Honourable court be pleased to order the trial and proceedings to be conducted in camera.*

When the matter was called for hearing Mr. Kauli George Makasi, Senior State Attorney appeared representing the Applicant, the Director of Public Prosecution (DPP). In his submission in support of the application he craved for the leave of this court to adopt two affidavits in support of application deposed by Valance Mayenda Senior State Attorney from National Prosecution Service (NPS) office and ACP Joshua Mwafulango, Regional Crimes Officer (RCO), Arusha Region.

Mr. Makasi submitted that this application originates from Preliminary Inquiry (PI) No. 3 of 2022 before the Resident Magistrate Court of Arusha to which the respondents are the accused persons to that case. That, the PI case consists of ten counts and some of the offences are charged under the Terrorism Act and others under the Penal Code. That, the respondents were involved in the bombing of VAMA Restaurant which is situated at Uzunguni area within Arusha Region on the night of 7th July 2014 the incident which left seven victims seriously bodily injured and several properties damaged including the restaurant itself. That, following that incident, the RCO commenced an investigation and discovered that the incident was a terrorist attack and the respondents were among the members of the terrorist group which intended to overthrow the government and thereby establish an Islamic State within Tanzania. That, the investigation by RCO revealed further that the respondents were not alone as they were being aided by other fellows who are within the United Republic of Tanzania but who are still at large. That, the accused persons who are the respondents in this application acting in collaboration with their associates who are at large are struggling to get the identities of the intended prosecution witnesses in order to stop them from testifying in court against the respondent when their case is due for hearing. In those circumstances learned State Attorney is of the

view that disclosure of the identities of the intended prosecution witnesses during committal and trial of the respondents will expose the witnesses to the risk of physical harm as the respondents and their fellows are ready to apply whatever means necessary in order to stop the witnesses from testifying in court.

Mr. Makasi prayed for the application to be granted on ground that it intends to protect the said intended prosecution witnesses. He insisted that, this kind of application is not new in this Hon. Court as this Hon court had already dealt with similar applications. He referred **Misc. Criminal application No 9 of 2022, the DPP Vs Majaliwa Mohamed Ngalama and 2 others**, HC at Morogoro, Ngwembe J. and **Misc. Criminal Application No. 202 of 2021, The DPP Vs Fundi Hamis Kamaka @ Mohamed Fundi and 4 others**, HC at DSM, Mgonya J.

I have considered the submission by the Senior State Attorney and keenly gone through the chamber application and two affidavits in support of the application. The contents of the affidavit of the Regional Crimes Officer one ACP Joshua Mwafulango who is the overall incharge of investigation in Arusha Region and that of Valance Mayenda, Senior State Attorney reveal similar facts. The affidavits reveal that, in the mid-June 2014, the police officers received intelligence information that there was

a group of people having bombs that were intended to be used in terrorist acts within Arusha Region and some other places in the United Republic of Tanzania. While working on that information on 7th July 2014, the 1st, 2nd, 3rd and 4th respondents detonated a hand grenade that blew VAMA restaurant situated at Uzunguni area within Arusha town an incident that left seven victims with serious bodily injuries and damaged several properties in the restaurant.

The police investigation led to the arrest of the respondents and upon interrogation it revealed that, they have mission of committing terrorist acts. The investigation also revealed that, since June 2014 the respondents and other persons were part of a terrorist syndicate that emerged in Tanzania with a view of overthrowing the lawful authority of the Government of the United Republic of Tanzania and replace it with Islamic state. That, the evidence also revealed that the respondents had formed a terrorist group with other suspects with the intention of attacking people that who according to their belief, do not live according to their extremist faith.

That, the investigation further revealed that the acts of the respondents aimed at seriously destabilizing the fundamental political, constitutional, economic and social structure of the United Republic of Tanzania. That, in order to execute their mission, the respondents and

other persons yet to be arrested agreed to acquire materials that will be used in making local bombs and purchase industrial grenade to be used to attack the police stations with the view of acquiring firearms to be used in execution of their criminal acts of overthrowing the Government of the United Republic of Tanzania and replace it with the Islamic state.

That, some of the respondents' associates are still at large and struggling to get the identities of the intended prosecution witnesses in order to stop them from testifying in court against the respondents during trial. That, those associates may use whatever means necessary including infliction of physical harm in order to stop the witnesses from testifying. That, any disclosure of the identities of the intended witnesses during committal or trial will expose them to the risk of physical harm.

Having analysed the facts deposed in the affidavits and the submission by the Senior State Attorney, it is important to address the merit of this application. The concept of witness protection is well recognized both under International, Regional and Domestic laws. The witness is universally considered to be one of the most important persons to ascertain the truth in any trial. Different International laws recognises the importance of witness protection. While Rome Statute under Article 64 (7) recognises the importance of openness of the court proceeding, it

gives exception in special circumstances under Article 68(5) for witness protection. Article 64 (7) read;

“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.”

Article 68(5) of the Rome Statute 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 application of the Rome Statute there is also Rules of Procedure and Evidence which governs the modality of how witness protection order may be sought and the said procedures are laid down from rule 87 to 88 which provides amongst others that, the application needs to be ex-parte and hearing of the ex-parte application be made in camera to determine the 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 Instruments which recognise witness protection is the United Nation Convention against Corruption (UNCC) specifically under 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 on victim/witness protection. The Protocol to Combat Trafficking, Commercial Exploitation and Sexual Abuse of Women and Children in South Asia requires member states to ensure witness protection by keeping confidential all information and documents in proceedings involving application for securing protection. Read Article 11 of the Protocol.

There is also experience of other jurisdictions having put in place the laws to protect the welfare of the witness. In South Africa, they have the Witness Protection Act 112 of 1998 [No. 112 of 1998]. Under the schedule to the said Act, it lists the offences in respect of which protection

may be granted to the witness such as in offence of treason, sedition, murder, rape, public violence, robbery, just to mention a few. In Kenya, witness protection has a foundation in the Constitution. Article 50 (8) of the Constitution of Kenya provides;

*"This Article does not prevent the exclusion of the press or other member of the public from any proceedings if the exclusion is necessary, in a free and democratic society to **protect witnesses or vulnerable persons**, morality, public order or national security."*

Kenya has also enacted a specific Act for witness protection; the Witness Protection Act, Cap.79 R.E 2012.

In Tanzanian context, witness protection is covered under the law. Section 34 (3) of the Prevention of Terrorism Act No. 21 of 2002 as amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2018 read: -

"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."

The provision of section 188 (1)(a), (b), (c) and (d) and (2) of the Criminal Procedure Act which read: -

"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.

(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."

From the above provisions, witness protection is well covered in our jurisdiction. Thus, courts in Tanzania like other courts in other jurisdictions are supposed to ensure compliance to the law for purpose of witness protection. As invigorated by the Supreme Court of India in **Mwahender Chawla & Others Vs. Union of India & Others, Writ Petition (Criminal) No. 156 of 2016**) and the High Court of Kenya in **Republic Vs. Doyo Galgalo High Court of Kenya at Meru Criminal Case No. 16/2019, Pg. 6 Para 5** 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.

However, it must be noted that, the concept of witness protection does not defeat the purpose of committal proceedings or fair trial. It only brings in limitations to ensure that justice is done to both parties. 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 set out the procedures for committal of accused person by the subordinate court. The law 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. Section 246 (2) of the CPA read

"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."

The above provision encourages openness in trial as a means of showing that justice is seen to be done to the parties and the public at large. In this I agree with my brother Hon. Tiganga, J., in **Abdi Sharif Hassan @ Mosmal & Another (supra)** where he 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.

It becomes important therefore that, while observing the right to fair trial, it must be ensured that witnesses and their families are protected to enable them testify freely in court. The 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.

One may think that the statement of the witnesses should not be read by the prosecution during committal but in my view, while the purpose of section 188 is to protect witness it does not defeat the purpose of committal proceedings and fair trial. The section is clear that, only the substance of the statement or evidence or document likely to disclose the identity of the witnesses should not be disclosed. This may be done by coding the names in the statement or leaving out part of the statement likely to disclose identities or whereabouts of the witnesses. However, the prosecution side is still bound to ensure the substance of the evidence are generally known to the accused person during committal without necessarily disclosing the witnesses' identities or their whereabouts. This will help the accused to know the substance of evidence to enable them to prepare their defence but at the same time protect witnesses to ensure that they freely testify in court. That, could be termed as fair trial to the parties. The High Court of Kenya while dealing with the issue of fair trial in **Doyo Galgalo's** case 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 persons, it is a justified measure, and therefore, not a violation to a fair trial.”

This decision although not binding, it is persuasive and we are not barred from borrowing the inspiration from the same as it was so held by the Court of Appeal of Tanzania in the case of the Court of Appeal decision in **Criminal Appeal No. 220 of 2011, The AG Vs. Mugesu Antony & Others**. This court in **Misc. Criminal Application No. 94/2019, DPP Vs. Said Adam Said & 10 others**, page 9 & 10, Hon. Siyan, J. underscored the importance of witness protection and issued an order for protection of witnesses and ordered non-disclosure of statements likely to identify the witnesses during committal proceedings. In **Misc. Criminal Application No. 19/2020, DPP Vs. Abdi Sharif Hassan @ Mosmal & Another** Hon. Tiganga, J. at page 17 to 18 also underscored the importance of witness protection and issued protection order. Similarly, this court in the case of **The DPP Vs Fundi Hamis Kamaka @ Mohamed Fundi and 4 others**, HC at DSM and in **Misc. Criminal Application No 9 of 2022, DPP Vs Majaliwa Mohamed Ngarama and 20 others**, HC at Morogoro also underscored the importance of witness protection and issued an order for non-disclosure of witnesses' identity.

This court in **Said Adam Said** (supra) **Abdi Sharif Hassan @ Mosmal** (supra) was inspired to borrow leaf from other jurisdictions thus, in same footage I am as well inspired to borrow leaf from the above Kenyan decision as well as the decision by the Indian Supreme Court in **Mwahender Chawla & Others** (supra). I have the same view that the concealment of the identity of witnesses 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 offence which are; attempted murder, participating in terrorism meetings, funding terrorism acts and failure to disclose information relating offences of terrorism and terrorism acts are serious offences which require protection of witnesses. I find the present application fit for issuing protection order of the witnesses.

I therefore grant the application and order for non-disclosure of identity and whereabouts of the witnesses for security reasons during committal and trial proceedings. I also order for non-disclosure of statements and documents likely to lead to the identification of witnesses for their security reasons during committal and trial proceedings. To be specific, during committal proceedings only statements/substance of evidence and documents likely to lead to the identification of the

witnesses and their whereabouts should be withheld. During trial, the proceedings be conducted in camera and the witnesses' testimony be given through video conference as the circumstance may allow and in accordance with the provision of the Evidence Act Cap. 6 Revised Edition 2019. It is further ordered that, no dissemination and or publication of any documentary evidence or any other testimony bearing identity of prosecution witnesses without prior leave of the court. Again, it is prohibited to disseminate and or publish any information that is likely to disclose location, residence and whereabouts of the prosecution witnesses and any of their close relative. The witnesses deserve protection before, during and after trial to ensure their safety and that of their families.

It is so ordered.

DATED at **ARUSHA** this 05th Day of May, 2022



A handwritten signature in blue ink, appearing to read "D. C. Kamuzora".

D. C. KAMUZORA

JUDGE