

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. CRIMINAL APPLICATION NO. 22 OF 2022

*(Originating from the Resident Magistrates Court of Arusha at Arusha in
Preliminary Inquiry Case No. 04 of 2022)*

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

VERSUS

YAHYA TWAHIRU MPEMBA 1ST RESPONDENT
YUSUPH ALLY HUTA @ HUSSEIN 2ND RESPONDENT
ABASHARI HASSAN OMAR 3RD RESPONDENT
KASSIM IDRIS RAMADHANI 4TH RESPONDENT
JAFARI HASHIM LEMA 5TH RESPONDENT
ABDUL MOHAMED HUMUDI @ WAGOBA 6TH RESPONDENT
SAID MICHAEL TEMBA @ MABREKA 7TH RESPONDENT
HASSAN ALLY MFINANGA @ AMIR HASSAN..... 8TH RESPONDENT
ANUWAR NASHER HAYER 9TH RESPONDENT
YUSUPH ALLY ATHUMAN @ SEFU 10TH RESPONDENT
ABDUL HASSAN UMA @ ABDUL MASTER 11TH RESPONDENT
SWALEHE HASSAN OMARI @ SWALEHE CHINGA 12TH RESPONDENT
RAJABU YAKUBU ABDALAH @ IKAPU 13TH RESPONDENT

RULING

06/04/2022 & 05/05/2022

KAMUZORA, J.

This application is brought under a certificate of urgency and preferred under the provision of section 34 (3) (a)(b) and (4) of the Prevention of Terrorism Act No. 21 of 2002 as amended by Written Laws

(Miscellaneous Amendment) Act No. 2 of 2018 read together with section 188 (1) (2) and 392A (2) of the Criminal Procedure Act Cap. 20 Revised Edition 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 statement 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 the trial proceedings to be conducted in camera.*
- 5) That, this Honourable Court be pleased to order any other protection measures as the court may consider appropriate for security of the witnesses including but not limited to.*
 - a) Prohibition on dissemination and publication of any documentary evidence and any other testimony bearing identity of prosecution witnesses without prior leave of the court.*
 - b) Prohibition on dissemination and publication on information that is likely to disclose location, residence and whereabouts of the prosecution witnesses are any of their close relative.*

When the matter was called for hearing Mr. Valence Mayenga, and Mr. Kauli Makasi both Senior State Attorneys appeared representing the Applicant, the Director of Public Prosecution (DPP).

In his submission in support of the application Mr. Mayenga adopted two affidavits in support of application deposed by Tusaje Samwel Kapange, State Attorney from National Prosecution Service (NPS) office and ACP Joshua Mwafulango, Regional Crimes Officer (RCO), Arusha Region. Mr. Mayenga submitted that the basis of this application is PI No. 04 of 2022 to which 13 accused persons who are the respondents in this application are charged for 8 counts for the offences of attempted murder, participating in terrorism meeting, funding terrorism acts and failure to disclose information relating offences of terrorism and terrorism acts.

Mr. Mayenga submitted that other suspects to the offence are still at large thus disclosing names and identity of the witnesses during committal proceedings and trial will endanger the safety and security of prosecution witnesses. He added that in PI No. 4 of 2022 the respondents are charged for detonating a hand grenade in the house of a person whose name for purpose of this matter is concealed and will be referred to as SAS. That, the incident being a serious offence, it makes the lives of the witnesses to be at high risk because some of the suspects are still at large. To support his argument, he referred the decision of this court in

Misc. Criminal Application No 9 of 2022, DPP Vs Majaliwa Mohamed Ngarama and 20 others HC at Morogoro and **Misc. Criminal Application No 94 of 2019, DPP Vs Said Adam Said and 10 others**, HC at Mwanza.

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 affidavit of the Regional Crimes Officer one ACP Joshua Mwafulango who is the overall in charge of investigation in Arusha Region and the affidavit of Tusaje Samwel Kapange, State Attorney from National Prosecution Service Office.

The simple facts as depicted from the two affidavits reveal that, on diverse dates between January 2014 to July 2014, the respondents conspired to form a criminal syndicate for purpose of committing several terrorist acts within Arusha. That, the 2nd, 4th and 5th accused persons together with others who are still at large were preaching, radicalizing and encouraging Muslim youth to join and attend physical training for confronting those who are against them and forming an army for execution of the intended jihad movement.

That, the syndicate aimed at establishing an Islamic state in the United Republic of Tanzania by promoting violence and eliminate those who are against their cause, thereby seriously destabilizing the political,

economic and social structure of the United Republic of Tanzania. That, the 5th accused person organised and fundraised money for buying weapons/hand grenade to be used during execution of jihad movement while the 6th, 7th and 8th accused persons gave financial support to the said group supporting jihad illegal activities of buying weapon for terrorism acts.

That, on diverse dates between January 2014 and July 2014, at Mianzini area within the district and region of Arusha the respondents together with other persons who are at large convened and planned to attack SAS, a Muslim cleric who was preaching against their illegal cause of jihad. That, on 3rd July 2014, the respondents implemented their plan and attacked the homestead of the said SAS by throwing a hand grenade inside his house through a window which exploded and caused serious multiple injuries to SAS and MHK.

It was also deponed that, some members of the group are yet to be arrested and some of the weapons obtained by them for execution of the terrorist acts are being tracked by the investigative organs. That, the organised syndicate in which the respondents belong have been attempting to locate the whereabouts of the prosecution intended witnesses for purpose of influencing them not to testify in court against the respondents. That, they are trying to obstruct justice by instilling fear

to the intended prosecution witnesses and they have pledged to use every means necessary to ensure that the said witnesses will not testify in court against the respondents. That, if the identity or whereabouts of the prosecution witnesses will be disclosed at any time before or during trial of the case, then there is high possibility that their welfare and safety will be at risk.

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 recognise 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, molarity, 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 **DPP Vs. Farid Ahmed and 35 others, Misc. Criminal Application No. 145/2020**, and in **Misc. Criminal Application No 9 of 2022, DPP Vs Majaliwa Mohamed Ngarama and 20 others** also underscored the importance of witness protection and issued an order for non-disclosure of witnesses' identity.

This court in the above first three cases 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

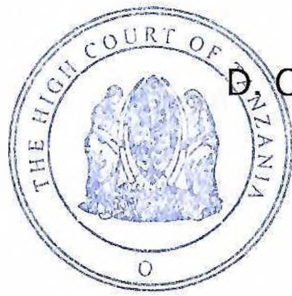
terrorism acts and failure to disclose information relating offences of terrorism and terrorism acts are serious offences which require protection of witnesses. I find the present application fit for issuing protection order of the witnesses.

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 statement 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




D. C. KAMUZORA
JUDGE