

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

MISCELLANEOUS CRIMINAL APPLICATION No. 24 OF 2022

DIRECTOR OF PUBLIC PROSECUTIONSAPPLICANT

VS

ABASHARI HASSAN OMARY.....1ST RESPONDENT
YUSSUF ALLY HUTA @ HUSSEIN2ND RESPONDENT
ABDULRAHAMAN JUMANNE HASSAN3RD RESPONDENT
RAMADHAN HAMAD WAZIRI4TH RESPONDENT
ABDUL HASSAN JUMA.....5TH RESPONDENT
KASSIM IDRISA RAMADHAN.....6TH RESPONDENT
AMAN ISSA PAKASI.....7TH RESPONDENT
JARAFI HASHIM LEMA.....8TH RESPONDENT
ABDUL MOHAMED UMUDI @WAGOB.A.....9TH RESPONDENT
SAID MICHAEL TEMBA @ MABREKA.....10TH RESPONDENT

RULING

08th & 12th April, 2022

TIGANGA, J

Under the Certificate of Urgency certified by **Mr. Nestory Innocent Mwenda**, State Attorney, from the National Prosecutions Services, duly authorized to act for and on behalf of the Director of the Public Prosecutions, who is the applicant in this application, filed this application exparte by the chamber summons made under sections 34(3)(a) and (b) &

(4) of the Prevention of Terrorism Act No. 21 of 2002 and section 188(1) & (2) and 392A(1) of the Criminal Procedure Act [Cap 20 R.E 2002] as amended.

The same was supported by a 24 paragraphs affidavit sworn by **Mr. Nestory Innocent Mwenda**, learned State Attorney and another affidavit of 18 paragraphs sworn by **ACP Joshua Mwafulango**, the Regional Crime Officer, RCO Arusha, an officer vested with the mandate to suppress and overseeing criminal investigations within Arusha Region hence conversant with what is deposed to in the supporting affidavit.

In the chamber summons a total of four substantive orders are sought which are as follows:

- (i) That this honourable court be pleased to order none disclosure of identity and whereabouts of the witnesses for their security reasons during committal proceedings and during trial.
- (ii) That this honourable Court be pleased to order non-disclosure of the statement and documents likely to lead to the identification of witnesses for their security reasons during committal proceedings and during trial,

- (iii) That this honourable court be pleased to order trial of this matter be in Camera and Video Conference,
- (iv) That this honourable court be pleased to order any other protection measures as the court may consider appropriate for the security of the witnesses.

The affidavits filed in support of the application advance the reasons for the application and the grounds upon which the applicant asks for the orders in the chamber summons.

It is deposed in the affidavits that, the respondents stand charged before the Resident Magistrates' Court of Arusha in PI No. 02 of 2022 with offences of murder, attempted murder and terrorism. The said offences are alleged to have been committed on 05th day of May 2013 at St. Joseph Mfanyakazi Church, Olasiti area within the city of Arusha by throwing the hand grenade bomb towards the center of the crowd which upon hitting the ground it exploded and resulted into the deaths of three 3 worshippers, namely, **Regina Loning'o, James Gabriel Kessy** and **Patricia Joachim.**

Following the act, the police mounted massive investigation which resulted into the arrest of the respondents. However, some of the

conspirator and the offenders who committed the offence together with the respondent were not arrested, therefore they are still at large. For that reasons it is important not to disclose the identity of the witnesses for security reasons.

At the hearing of this application, the applicant was represented by Mr. Valence Mayenga, the learned Senior State Attorney assisted by Mr. Kauli Makasi also learned Senior State Attorney. In the submissions made in the in support of the application, the Mr. Mayenga submitted that, under the provision cited herein above, this court has power to hear and determine this application exparte. After adopting the affidavits filed in support of the application, he said the type of evidence which the applicant intends to submit in court during trial is oral testimony from the persons who will be called as witnesses, documentary and physical evidence.

He submitted further that, the witness intended to be called are not secured therefore there is fear that if they will be revealed they may be harmed or threatened. On that base he warned on the impending danger of disclosing the identity of the witnesses thereby exposing them and their families to danger taking regard to the fact that some of the suspects have not been arrested. In his view given the circumstance of this case, the

court be pleased to grant the application as prayed as it will be for the interest of justice to do so.

He asked the court to be persuaded by the decisions of this court in the case of the **DPP vs Said Adam Said & 10 Others**, Criminal Application No. 09 of 2022 High Court of Tanzania, Mwanza, Hon. Siyani J as he then was and **DPP vs Majaliwa Ngalama**, Misc. Criminal Application No. 09 of 2022, High Court of Tanzania, Morogoro, Hon. Ngwembe, J. He in the end asked the application to be granted as prayed.

Having summarized the contents of the affidavits and the arguments by the applicant as well as the cases cited to me, it is instructive to say that, this application was heard *ex parte* without the involvement of the respondent. This was done in accordance to section 188 of the Criminal Procedure Act, (*supra*). It is also instructive to find that, the application of this nature is not novel to our jurisdiction, as a number of applications of this nature have been filed and determined by this court. Although the statute provide for the procedure on what to do in case one wants to protect the witness, there is no statutory definition assigned to it. However, in the case of **DPP vs Abdi Sharif Hassan @ Msomali And Mohamed Ibrahim Juma @ Lulange**, Miscellaneous Crimiminal Application No.19

Of 2020 High Court of Tanzania, Mwanza, though not comprehensively the concept of witness protection was defined in the following terms;

"This being a relatively new concept in our jurisdiction, there is no statutory definition assigned to it. However, inferring from the concept itself, it denotes the process, mechanism, procedure and measures taken for protecting people involved in the criminal justice process as witnesses who find themselves at risk of serious personal harm as a result of their involvement."

From the above definition, a witness is a person who is either the victim of the offence or a person who by virtue of his/her position, possesses some evidential information which is needed to assist the court to make its decision over the case before it. He may have possessed the said information by personally witnessing what happened, or the information which he may have perceived to have happened. He may also have possessed the information by possessing the documents or after he at any point in time had worked on it which relates to the issue which needs to be determined by the court. That being the meaning, then, the importance of the witnesses in the administration of justice generally need not be over emphasized. That is why the Supreme Court of India in the case of **Mahender Chawla and Others vs Union of India and Others,**

Criminal Original Jurisdiction Writ Petition Criminal No.156 of 2016 cited in the above referred to case, described the witness as an important player in the judicial system who helps the judges in arriving at correct factual findings. He described the witnesses as;

"...a man whose life and faith are so completely one that when the challenge comes, to step out and testify for his faith he does so disregarding all risks and accepting all consequences".

Needless to say much, a lot may be said on the importance of witnesses in the administration of justice in any given jurisdiction. This takes us to the importance and need to protect witnesses. This need has not only involved our legislature and courts at local level, but also has involved international community and international Courts. The United Nations, under **Articles 24 and 25 of Organized Crime Convention, Adopted by the UN General Assembly: 15 November 2000, by resolution 55/25** provides that;

"State parties shall take appropriate measures within their means to provide effective protection as well as assistance to victims and witnesses of crime. Such measures may include inter alia establishing procedures to safeguard the physical integrity of people who give testimony in criminal proceedings from threats against their life and intimidation.

Witnesses must be protected from threats, intimidation, corruption, or bodily injury and States are obliged to strengthen international cooperation in this regard”.

This means, the United Nations in one of its conventions has provided for the state parties to put in place measures and mechanism for protection of witnesses.

Before the International Criminal Court, there are also measures in place for witness protection. In the case of **The Prosecutor vs William Samoei Ruto and Joshua Arab Sang**, ICC-01/09-01/11, it was held *inter alia* that;

*"Pursuant to Article 67(1) of the statute, (Rome statute) the accused have the fundamental right to a public hearing. This principle of publicity is further emphasized in regulation 20 of the Regulations of the Court which provides that all hearing shall be held in public unless otherwise provided in the statute, Rules, these regulations or ordered by the chamber. That is however subject to exception particularly those provided for in Article 68(1) and (2) of the statutes which reads in unison with Article 64(2) and (6)(e) **of the Statute and Rule 87 of the Rules give power to the trial chamber to order protective measures to protect the safety, physical and psychological well-being dignity and privacy of the***

victim and witnesses and to hold any part of the proceedings in camera. However these measures shall not be prejudicial to or inconsistent with the right of the accused to fair and impartial trial,therefore the chamber finds that the protective measures sought, specifically the allocation of the pseudonym for use during the trial and face and voice distortion during testimony should be granted in this case."
[Emphasis added]

In the common wealth jurisdiction, in United Kingdom in particular, having realized this as a problem, both legislative and procedural measures have been put in place to ensure that criminal trials are not bogged down on the accounts of insecurity of the witnesses. In the United Kingdom for example, the Youth Justice and Criminal Evidence Act,1999 sets out a range of protective measures that are available to witnesses in criminal proceedings who are deemed to be 'intimidated'. The special measures which are relevant for intimidated witnesses are; **screening the witness from the accused, evidence by live link, evidence given in private** etc. The common measures in protecting witness in United Kingdom are but not limited to, holding the proceedings in camera, excluding the public with court-room closed, withholding the names of the witnesses, re location, and anonymity of witnesses.

In India by the Witness Protection Scheme of 2018 of India, the country has put in place the scheme to provide for the mechanism, procedures and regulations for the protection of witnesses whose safety are in actual or perceived danger, as elaborated in the case of **Mahender Chawla and Others vs Union of India and Others** Criminal Original Jurisdiction Writ Petition Criminal No.156 of 2016. In its preface the scheme provides the aim and objective to be;

"The objective of the scheme is to ensure that the investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination.....Witnesses need to be given confidence to come forward to assist the law enforcement and judicial authorities with full assurance of safety. The scheme aims to identify series of measures that may be adopted to safeguard witnesses and their family members from intimidation and threat against their live, reputation and property"

While in East Africa, Kenya being cited as example, the protection of witnesses is recognized by the fundamental law of the country. Article 50(8) of the Constitution of Kenya of 2010 which provides that;

"...this Article does not prevent the exclusion of the press or other members 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.

While sub article (9) of the same constitution directs the parliament to enact the legislation providing for the protection, rights and welfare of victims of offences who are potential witnesses in any given case.

Following that constitutional mandate, the Witness Protection Act Cap 79 RE 2012 of the laws of Kenya was enacted which among other measures, it established the Agency which oversees all issues related to witness protection. Interpreting the Act, the High Court of Kenya at Meru, in **Republic vs Doyo Galgalo and 3 Others** Criminal Case No.16 of 2019 it was held at page 5 of the ruling, that the witness protection measures do not violate the provision of Article 50 of the Constitution of Kenya which provides for fair hearing.

Having looked at the position as provided under the United Nations Convention, international law and criminal court, common wealth and regional experience, it suffices to find that Tanzania, having realized to

have no law providing for the protection of the witnesses, amended the law to provide for the same. The law in place is section 188(1) (a) (b)(c)(d), and 188(2) of the Criminal Procedure Act [Cap 20 RE.2002] which for easy reference it is hereunder quoted *in extenso*.

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

Paragraphs (b) and (c) relevant witness statements or documents shall not be disclosed to the accused during committal or trial.

From the provision at hand, this court may, at the application by the Director of Public Prosecutions made *ex parte*, give the orders stipulated under section 188 of the Criminal Procedure Act as amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, No. 7 of 2018 for purposes of protecting the witnesses or the intended witnesses. The experience from other jurisdictions require the court while giving orders for witness's protection, to balance between the safety of the witnesses, the right of the accused person to fair hearing and the interest of the public.

It is on record that, in our jurisdiction, criminal trials are characterized by openness and disclosure. The law i.e section 245, 246 and 247 of the Criminal Procedure Act [Cap 20 R.E.2002] requires the prosecution to disclose the substance of the evidence intended to be relied upon in proving the case against the accused person. The law was actually in conformity with the constitutional principle of the right of hearing thereby disclosing the substance of the evidence to the accused person for him to prepare his meaningful defence.

While the accused's rights needs to be protected, the right of the victim must also be, it is only where witnesses are protected, themselves and their family members that, they can freely testify in court. The conventional or orthodox mode of administration of criminal justice put much emphasis on protecting the right of the accused person while neglecting the right of the victim and witnesses.

As rightly observed by my brother Hon. M.M. Siyani, J, in the case of **DPP vs Said Adam Said and 10 others**, (supra), the openness in judicial proceedings depicts the right to a fair trial which enables the accused persons to know their case against them, prepare and present their defence, and test the prosecution case by cross-examination. However, in some cases, where the accused and their allies may not want the witness to testify, disclosure of the evidence and the witness may lead to the identity of the witness and thus cause danger to them. In the premises disclosure may result into threat to the witnesses thus discouraging them to come forward fearing to risk their lives and those of their family members. That can sometimes act as a bar to successful prosecutions, particularly in homicides, organized crimes and other serious crimes as witnesses fear that if their identity is revealed to the accused

persons, their associates, relatives or the public generally, they or their friends and family members will be at risk of serious harm. Such serious cases should be treated as exceptional cases to the general rule of openness and disclosure of criminal trials. In this, the mechanism of protecting them should be put in place to assure them of their security.

In this application, the affidavits of **Nestory Innocent Mwenda** and **ACP Joshua Mwafulango** have deposed both actual and perceived threat to the witnesses. Actual threat is based on the nature of the offence facing the accused, that the way the offence were committed, its obvious that the perpetrator would not be ready to see any person causing them put behind bars while perceived threat is based on the fact that they are not sure whether the accused and their allies will not interfere with the freedom and security of the witnesses. That, has necessitates the protection of witnesses. There is no doubt that it is one of the serious offences which deserves the protection of witnesses.

The above said and having considered the importance of protection of witness under international, common wealth and regional experience as well as at country level in cases of this nature as indicated in the case of **DPP vs Said Adam Said & 10 Others**, (supra), **DPP vs Majaliwa**

Ngalama, (supra) and **DPP vs Abdi Sharif Hassan @ Msomali And Mohamed Ibrahim Juma @ Lulange**, (supra) cited hereinabove, the application is granted under the following terms.

- (a) That the identities of the intended witnesses in PI No. 02 of 2022 should not disclosed during committal proceedings be and trial.
- (b) I hereby order non-disclosure of the statements of the intended witnesses containing their evidence and documents likely to lead to the identification of witnesses, during committal proceedings.
- (c) In order to balance between the rights of the accused and the security of the witnesses and the interest of the public, it is ordered that during committal the accused persons be supplied with a summary of the facts constituting the substance of the evidence intended to be relied upon by the prosecution.
- (d) The said summary should not mention the names of the intended witnesses or any other person who by association may lead to the identity of the witnesses and the place or location of the witnesses. These I believe will give the accused


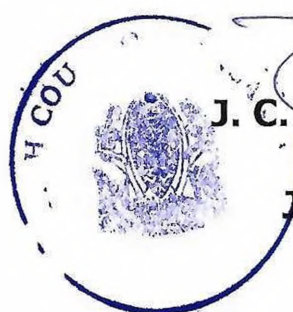
persons sufficient information to know the substance of the evidence, to prepare their defence and for cross examination purposes.

- (e) I find the prayers for conducting of trial by video conference and in camera to be prematurely made. In my view, this should be made before the assigned judge after the information has been filed before the High Court so that for him or her to have full control of the proceedings by directing the manner in which the trial shall be conducted.

That said and done, the application is therefore allowed to the extent elaborated above.

It is accordingly ordered.

DATED at **ARUSHA** on 12th day of April, 2022



J. C. TIGANGA
JUDGE