

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MTWARA SUB-REGISTRY

MISC. ECONOMIC APPLICATION NO. 01 OF 2022

(Originating from Economic Case No. 1 of 2022 in the Resident Magistrate's Court of Mtwara at Mtwara)

DIRECTOR OF PUBLIC PROSECUTIONS..... APPLICANT

VERSUS

- | | | |
|---|---|--------------------|
| 1. RAMADHANI S/O HASSAN MAKAI @ MAKAI | } | RESPONDENTS |
| 2. ABDULRAZAK S/O ABDU @ MNIELEWA TUNAU LAPA | | |
| 3. RASHID S/O ISSA KONTOLA @ LIKO | | |
| 4. SALUM S/O MUSSA MNEMBA | | |
| 5. BUSRA S/O MAHAMUDU ALLY | | |

RULING

8th and 27th April, 2022

BANZI, J.:

The Applicant herein, the Director of Public Prosecutions ("the DPP") filed this *ex-parte* application by way of chamber summons seeking for the following orders; witnesses' testimony to be given through video conference in accordance with the provisions of the Evidence Act [Cap. 6 R. E. 2019]; non-disclosure of identity and whereabouts of the witnesses for security reasons during committal proceedings; none disclosure of statements and documents likely to lead to the identification of witnesses for their security

reasons during committal and trial proceedings and any other protection measure as the Court may consider appropriate for security of the witnesses.

The application was made under section 34 (3) of the Prevention of Terrorism Act, No. 21 of 2002 as amended ("the Prevention of Terrorism Act") and section 188 (1) (a), (b), (c) and (d) of the Criminal Procedure Act [Cap 20 R.E. 2019] ("the CPA"). It is supported by affidavits of Ms. Mwahija M. Ahmed, learned Principal State Attorney and Superintendent of Police Adam Salim Amiri, the Regional Crimes Officer of Mtwara Region.

According to the affidavits with its annexures, the Respondents are jointly and severally charged with the offences of conspiracy to commit terrorist acts, recruitment of persons to participate into terrorist acts, facilitation of commission of terrorist acts in foreign state, use of property from commission of terrorist acts and failure to disclose information relating to offences and terrorist act. These offences are alleged to be committed on unknown dates between August and October, 2017 at Tangazo village, within Mtwara rural in Mtwara Region.

At the hearing of the application, Ms. Tully Helela, learned State Attorney appeared on behalf of the Applicant and she began her submission by requesting the Court to adopt the contents of two affidavits as part of the submission. She further submitted that, according to investigation file, the

1st Respondent was arrested on 1st August, 2017 following an information that, there are people who are engaging in terrorist activities. After the arrest and interrogation, he managed to mention his colleagues including the 2nd, 3rd, 4th and 5th Respondents who were later arrested. Also, the police seized from them various items intended to make local bombs. She added that, other suspects who are still at large are intimidating and creating fear to prosecutions' witnesses in order to prevent them to appear and testify before the Court. While acknowledging the right of accused person of being aware of the nature of prosecution evidence from the stage of committal proceedings, it was her view that, this application will not prejudice such right but rather it is aimed at hiding the identity of the witnesses. She went on and submitted that, witnesses are persons who assist Court to dispense justice to all parties, therefore, it is better for them to be protected especially in cases of this nature. She supported her submission by the cases of **DPP v. Fundi Hamis Kamaka @ Fundi Hamis @ Mohamed Fundi and 4 Others**, Misc. Criminal Application No. 202 of 2021 HC at Dar es Salaam (unreported), **DPP v. Haruna Mussa Lugeye and Another**, Misc. Criminal Application No. 188 of 2021 HC at Dar es Salaam (unreported), **DPP v. Yahya Twahiru Mpemba and 15 Others**, Misc. Criminal Application No. 88 of 2021 HC at Arusha (unreported) and **DPP v. Abdi Sharif Hassan @ Msomali and Another**, Misc. Criminal Application No. 19 of 2020 HC at

Mwanza (unreported) where the Court granted similar orders as prayed in this application. She concluded by praying for the application to be granted for the interest of justice and safety of their witnesses.

I have carefully considered the contents of the affidavits and the submission by learned State Attorney. It is worthwhile noting here that, all criminal and economic cases before the High Court are preceded by committal proceedings where the statements and documents containing the substance of the evidence of witnesses whom the DPP intends to call at the trial are read out to the accused person. The rationale behind this is based on the principle of disclosure whereby, the accused person is required to know the nature of evidence against him before the commencement of the trial. The whole process is also aimed at ensuring a fair trial. However, such disclosure in serious and sensitive cases like the one at hand may pose risk to such witnesses as far as their safety and well-being are concerned. Thus, their protection is not only paramount but also inevitable in administration of criminal justice. Otherwise, criminal trials will be prejudiced because of intimidation and threats of the witnesses.

Section 34 (3) of the Prevention of Terrorism Act permits the Court to order the case to proceed in a manner stated in section 188 of the CPA. Section 188 (1) and (2) reads as follows:

"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."

It is apparent from the extract above that, this Court is vested with discretion to dispense with the disclosure requirement when there is probable risk and danger to the lives of the intended witnesses.

In the matter at hand, the Respondents are facing terrorism charges. The affidavits in support of the application show that, the Respondents

acting in collaboration with their associates who are still at large are struggling to get the identities of the intended prosecution witnesses and intend to use whatever means necessary to inflict physical harm upon them in order to stop them from testifying in Court against the Respondents. Considering the particular circumstances of the case, where the Respondents' associates are still at large, it is the considered view of this Court that, disclosing their identities, particulars and whereabouts during the committal proceedings and trial will expose the witnesses to risk of physical harm as deposed in the affidavits. Thus, in order to strike balance between the rights of the Respondents to a fair trial under the principle of disclosure on the one hand, and the safety and security of the witnesses on the other, I allow the application and order the following:

1. The identities of the intended prosecution witnesses in Economic Case No. 1 of 2022 at the Resident Magistrate's Court of Mtwara be withheld including their names, particulars and whereabouts, during committal proceedings and trial.
2. Non-disclosure of statements and documents likely to lead to the identification of witnesses during committal and trial proceedings.
3. The prosecution side shall prepare a comprehensive summary of detailed facts without disclosing identities, particulars and

whereabouts of witnesses and the same to be read during the committal proceedings and supplied to the Respondents to enable them to understand the nature and substance of the prosecution evidence.

4. With the Rules concerning Remote Proceedings and Electronic Recording in place, I decline to grant or make any order for a trial to be conducted by way of video conferencing at this juncture because such prayer(s) can be made during trial, as the proceedings will be unfolding.

It is accordingly ordered.



A handwritten signature in blue ink, consisting of a stylized 'I' followed by a series of loops and a long horizontal stroke.

I. K. BANZI
JUDGE
27/04/2022

Delivered in the presence of Ms. Dhamiri Masinde, learned State Attorney for the Applicant



A handwritten signature in blue ink, consisting of a stylized 'I' followed by a series of loops and a long horizontal stroke.

I. K. BANZI
JUDGE
27/04/2022