

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT TANGA SUB-REGISTRY

ECONOMIC APPLICATION NO. 01 OF 2022

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

DIRECTOR OF PUBLIC PROSECUTIONS..... APPLICANT

VERSUS

ALLY OMARY ALLY @ MSAFI..... RESPONDENT

RULING

27th June and 6th July, 2022

BANZI, J.:

This ruling emanates from an *ex-parte* application filed by the Director of Public Prosecutions ("the DPP") pursuant to section 34 (3) of the Prevention of Terrorism Act, No. 21 of 2002 as amended read together with sections 188 (1) (a), (b), (c) and (d) and 392A of the Criminal Procedure Act [Cap. 20 R.E. 2019] ("the CPA"). Through the chamber summons, the Applicant is seeking for the following orders:

- (i) witnesses' testimony to be given through video conference
- (ii) non-disclosure of identity and whereabouts of the witnesses for security reasons during committal proceedings;

- (iii) non-disclosure of statements and documents likely to lead to the identification of witnesses for their security reasons during committal and trial proceedings;
- (iv) trial proceedings to be conducted in camera;
- (v) and any other protection measure as the Court may consider appropriate for security of the prosecution witnesses including but not limited to: -
 - (a) prohibition on dissemination and publication of documentary evidence and any other testimony bearing identity of prosecution witnesses without prior leave of the Court; and
 - (b) prohibition on dissemination and publication of information that is likely to disclose location, residence and whereabouts of the prosecution witnesses or any of their close relatives.

The application is supported by affidavits of Mr. Joseph Mgaya Makene, learned State Attorney and Assistant Commissioner of Police Marco Godfrey Chilya, the Regional Crimes Officer of Tanga Region.

According to the affidavits with its annexure, the Respondent is alleged to commit various offences under the Prevention of Terrorism Act and the Armaments Control Act [Cap. 246 R.E. 2002] including conspiracy to commit terrorist act, profess to members of terrorist groups, possession of property for commission of a terrorist act and unlawful possession of armament.

These offences are alleged to be committed on diverse dates between January, 2013 and October, 2016 at Negero village, within Kilindi District in Tanga Region.

At the hearing, Ms. Tully Helela, learned State Attorney appeared on behalf of the Applicant and on the outset, she prayed to adopt the contents of two affidavits as part of her submission. She further submitted that, the Respondent is charged with terrorism offences which by their nature are serious offences creating fear to witnesses, relatives and family. She added that, according to the affidavits, the Respondent and his associates who are still at large are struggling to use whatever means to inflict physical harm on the intended prosecution witnesses in order to impede them from testifying in 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 identities and whereabouts of the witnesses for purpose of assuring their security. She supported her submission by the cases of **DPP v. Abdi Sharif Hassan @ Msomali and Another**, Misc. Criminal Application No. 19 of 2020 HC at Mwanza (unreported), **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) where the Court granted similar orders as prayed in this application. She concluded by praying for orders mentioned in the Chamber Summons to be granted.

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. A need to protect witness was also discussed by the Supreme Court of India in the case of **Mahender Chawla and Others v. Union of India and Others** (2019) 14 SCC 615 when approving Witness Protection Scheme, 2018 whereby, it was stated as hereunder:

"The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement and investigations without fear of intimidation or reprisal is essential in maintaining the rule of law. The objective of this 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 retribution. It aims to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance to criminal law enforcement agencies and overall administration of Justice. Witnesses need to be given the confidence to come forward to assist law enforcement and Judicial Authority with full assurance of safety. It is aimed to identify series of measures that may be adopted to safeguard witnesses and their family members from intimidation and threats against their lives, reputation and property."

In our jurisdiction, 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 affidavits supporting the application depict that Respondent is facing terrorism charges. It is also in the affidavits that, the Respondent acting in collaboration with his 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 impede them from testifying in Court against the Respondent. Considering the particular circumstances of the case, where

the Respondent's 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 Respondent 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 be withheld and in lieu, pseudo names should be used during committal proceedings and trial.
2. Names, particulars, whereabouts or any fact which on the face of it is likely lead to the identity of witnesses shall be deleted from the statements of witnesses and any documentary evidence before the same are read over during committal proceedings and supplied to the Respondent.
3. The committal and trial proceedings shall be conducted in camera.
4. Dissemination and publication of documentary evidence or any other testimony bearing identity of prosecution witnesses and such information that is likely to disclose location, residence and whereabouts of the prosecution witnesses or any of their close relatives is hereby prohibited except with the leave of this Court.

5. 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 can be made during trial, as the proceedings will be unfolding.

It is accordingly ordered.



A handwritten signature in blue ink, appearing to read "I. K. Banzi".

I. K. BANZI
JUDGE
06/07/2022

Delivered in the presence of Ms. Tully Helela, learned State Attorney for the Applicant and Ms. Saida Mwinyimbegu, SRMA in chambers this 6th day of July, 2022.



A handwritten signature in blue ink, appearing to read "I. K. Banzi".

I. K. BANZI
JUDGE
06/07/2022