

TANZANIA / JUDGMENT

RULING DPP vs

COURT
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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA SONGEA SUB-REGISTRY AT SONGEA MISCELLANEOUS CRIMINAL APPLICATION NO. 7498 OF 2025 THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT VERSUS HUSSEIN JUMA KADARI 1ST RESPONDENT ERASTO PHALAX SWAI 2ND RESPONDENT JOSEPH KAMBANGA KOMBA 3RD RESPONDENT ALFRED EDWARD MILINGA 4TH RESPONDENT GRACE MASESE SENSO 5TH RESPONDENT SARAH FABIAN BUNDALA 6TH RESPONDENT ELIZABETH ONESPHORY NDUNGURU 7TH RESPONDENT EX-PARTE RULING 28th March & 3rd April, 2025. KAWISHE, J.: The applicant, the Director of Public Prosecutions (the DPP) filed this application under the provisions of sections 188(1) (a), (b), (c), (d) and (2) of the Criminal Procedure Act (Cap 20, R.E 2022) against the respondents namely; Hussein Juma Kadari, Erasto Phalax Swai, Joseph 1 Kambanga Komba, Alfredy Edward Milinga, Grace Masese Senso, Sarah Fabian Bundala and Elizabeth Onesphory Ndunguru. The applicant is seeking for the following orders:

1. None disclosure of the identity and whereabouts of the prosecution witnesses in respect of Preliminary Inquiry (PI) Case No. 23213 of 2024.
2. None disclosure of the statements and documents likely to lead to the identification of prosecution witnesses in respect of Preliminary Inquiry (PI) Case No. 23213 of 2024.
3. Trial proceedings in respect of Preliminary Inquiry (PI) Case No. 23213 of 2024 to be conducted in camera.
4. Prosecution witnesses in respect of Preliminary Inquiry (PI) Case No. 23213 of 2024 to give their testimony through video conference or any other means.
5. Any other protection measures as the Court may consider appropriate for security of the prosecution witnesses in respect of Preliminary Inquiry (PI) Case No. 23213 of 2024 including but not limited to:
 - a) Prohibition on dissemination and publication of documentary evidence and any other testimony bearing the identity of prosecution witnesses without prior leave of the Court. 2

- b) Prohibition on dissemination and publication of information that is likely to disclose location, residence and whereabouts of the prosecution witnesses or any other close relatives. The application is supported by two affidavits sworn by Mr. Kauli George Makasi, the Regional Prosecution Officer and Superintendent of Police (SP) Essau James Ikamaza, the investigator in Preliminary Inquiry Case No. 23213 of 2024. Also, it has been supported by a copy of the charge sheet stating the offences which the respondents are charged with before the Resident Magistrate's Court of Songea at Songea in Preliminary Inquiry Case No. 23213 of 2024. During the hearing of the application which was heard ex-parte as provided by the law, the applicant was represented by Ms. Generosa Montano, learned Senior State Attorneys and Mr. James Robby, learned State Attorney. At the outset, Ms. Generosa Montano craved for the leave of the court for the contents of the two affidavits sworn in support of the application to be adopted to form part of her submission. Apart from the contents of the affidavits, she added that, in this application the respondents are relatives and have close blood relationship. She amplified that, the second respondent (Erasto Phalax Swai), third respondent (Joseph Kambanga Komba) and the seventh respondent (Elizabeth Onesphory Ndunguru) are siblings of the same mother while 3 the first respondent (Hussein Juma Kadari) is the husband of the sixth respondent (Sarah Fabian Bundala). He added that, the fifth respondent (Grace Masese Senso) is the biological mother of the sixth respondent (Sarah Fabian Bundala). Ms. Generosa Montano, submitted further that, the deceased, Marwa Masese Senso as shown in the charge sheet attached in this application, is the brother of the 5th respondent while the other deceased John Marwa Masese @ Haji Mohamed Chimika was an employee to the 1st respondent's mother. She added that, in their investigation it has been revealed that the witnesses in this matter are close relatives to the respondents and they know each other. She contended that, by sharing the witnesses' statements will enable the respondents to identify the witnesses who are at threat. She averred that, as at the time being, one among the potential prosecution witnesses has encountered a mysterious death. In such circumstances, she prayed for the witnesses to be protected as they are about to file the information before this court. That, for the security of the prosecution witnesses, their statements and other documents not to be served to the respondents on the ground that they will reveal their identities and defeat the interest of justice. Finally, Ms. Generosa Montano requested this court to be inspired by its earlier decisions made in applying section 188 of the Criminal 4 Procedure Act (supra) in the case of DPP vs. Faridi Ahmed & 35 Others, Miscellaneous Criminal Application No. 145 of 2020, Dar Es Salaam Registry (unreported), DPP vs. Abdi Sharif Hassan @ Msomali & Another, Miscellaneous Criminal Application No. 19 of 2020 (Mwanza Sub-Registry), DPP vs. Said Adam Said & 10 Others, Miscellaneous Criminal Application No. 94 of 2019 (Mwanza Sub-Registry) and DPP vs. Khalid Almas Mwinyi @ Banyata & Others, Miscellaneous Criminal Application No. 217 of 2020 (unreported). She implored for the prayers made in this application to be granted for the reason that the investigation is complete and the applicant is at the stage of filing information before this court against the respondents. Having heard the submission made by the applicant's learned Senior State Attorney, I had time to go through the affidavits sworn in support of the application, the enabling provisions, cases

referred in the submission and other material relevant to the application at hand in order to make an informed decision. As depicted earlier, this application has been preferred under the provisions of section 188(1) (a), (b), (c), (d) and (2) of the Criminal Procedure Act (supra). Also, it is important to note that, section 188(1) of the Criminal Procedure Act (supra) was repealed and replaced by section 12 of the Written Laws (Miscellaneous Amendments) (No. 02) 5 Act of 2018, which gives this court power to make the orders upon an ex-parte application made by the DPP. The replaced provision reads as hereunder: “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.” Section 188(2) of the Criminal Procedure Act (supra) empowers this court to order for none disclosure of witness statements or documents to the accused during committal or trial where an order for the protection of witness is issued under paragraphs (b) and (c) of subsection (1). Therefore, the law gives the court powers upon an ex- parte application made by the DPP, to order protection measures to witnesses. Protection of witnesses is a worldwide scheme. It is well recognized both under international and domestic laws. The main reason of protecting witnesses is that, they are considered to be the pillars of the court in dispensing justice. In administration of criminal justice, witnesses have no direct benefits except, if not well protected, they can lose their lives or relative’s lives. Thus, witnesses are eyes and ears of justice on the ground that, the court being vested with the mandate to promote and give right, also it has an obligation to protect witnesses. In the instant application, the learned Senior State Attorney’s submission and the affidavits sworn in support of the application indicate that, the intended witnesses are at threat and they are close relatives to the respondents. Thus, disclosing them will jeopardize their lives. Paragraph 24 and 25 of the affidavit sworn by Mr. Kauli George Makasi reads as follows: “24. That, the lives of intended prosecution witnesses in this case and their families are in danger following threats from the organized criminal syndicate in which the respondents belong. Attached herewith is the affidavit of SP Esau James Ikamaza marked DPP2 to form part of this affidavit.
25. That the acts mentioned in paragraph 24 herein above done by a criminal syndicate in which the respondents belong is obstruction of justice.” Also, paragraphs 19, 20, 21, 22 and 23 of the affidavit of SP. Esau James Ikamaza reads as follows: “19. That, due to the seriousness of the respondent’s acts I have since then being engaged in continuous review of security threats towards the intended witnesses in the case against the respondents.

20. That, through the review mentioned in paragraph 19 herein above it has come to my knowledge that the life of witnesses and other persons who appear to give information to law enforcement officers and the judiciary are at high risk due to threats and intimidation from criminal associates of the respondents who are at large.
21. That, other means of investigations and surveillances, names of witnesses and piece of evidence obtained therefrom are highly classified and need to be protected for public interest.
22. That, there has been several attempts by the associates of the respondents to obtain names and identities of persons who are likely to be witnesses and threat them not to cooperate with the law enforcement officers.
23. That, other means of investigation and pieces of evidence obtained therefrom are classified and need not be disclosed to the general public.” The evidence contained in the above quoted paragraphs of the affidavits show that, the lives of the witnesses are in danger. That there has been an attempt of associates of the respondents to obtain the names of the witnesses with an evil mind by threatening them. This may hinder the intended witnesses from cooperating with the law enforcement officers and during trial. Also, it has been stated that their lives are threatened and one among the intended witnesses has died a mysterious death. Speaking on the need to protect witnesses and the community, the Supreme Court of India in *Mahender Chawla & Others vs. Union of India & Others*, Writ Petition (Criminal) No. 156 Of 216 observed that; “as Bentham said, witnesses are the eyes and ears of justice. Hence the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as an eye and ear of justice, the trial gets putrefied and paralyzed, and it no longer can constitute a fair trial ... time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth presented before the court and justice triumphs and the trial is not reduced to a mockery ... The state has to define a role to play in protecting the witnesses ... As a protector of its citizens, it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed.” (Emphasize added). The above quotation calls for a wider scope to protect witnesses and people who volunteer to cooperate with law enforcement officers. It was from that idea that the government moved the legislature in re- enacting the provision of section 188 of the Criminal Procedure Act (supra). The witnesses must therefore be protected, not to be injured or killed. Also, their families have to receive the similar treatment. The 9 court and the state have to take an active role to ensure that the witnesses and their families are protected. Bearing in mind the nature of the offences which the respondents are charged with and considering that the respondents are working under a criminal syndicate, letting the witnesses to testify openly without any protection will expose them to all the dangers planed against them and their families. That may cost their lives or the lives of their beloved family members. In the case of *Director of Public Prosecution vs. Abdi Sharif Hassan @ Msomali & Another*, Miscellaneous Criminal Application No. 19 of 2020 (unreported), this

court sitting at Mwanza observed that: “Openness in judicial proceedings depicts the right to a fair trial which enables the accused persons to prepare and present their defence, and test the prosecution case by cross-examination. However in some cases, it has disadvantage as it may discourage other witnesses to come forward fearing to risk their lives and those of their family members.” Having said all, basing on the evidence provided by the applicant in the affidavits and the submission made during the hearing of the application and having balanced the interests of both parties, I find the need to protect the witnesses in the matter at hand is paramount for the purpose of strengthening the rule of law and fair trial as it was stated in DPP vs. Khalid Almas Mwinyi @ Banyata & Others (supra). 10 Consequently, from the foregoing, I am convinced that prosecution witnesses in the Preliminary Inquiry Case No. 23213 of 2024 due to the circumstances presented require protection as deposed in the affidavits. Therefore, the application has merit and I proceed to grant the orders sought in this application in accordance to the powers conferred unto this court under the provisions of sections 188(1) (a), (b), (c), (d) and (2) of the Criminal Procedure Act (supra). I order as follows:

1. The identity and whereabouts of the prosecution witnesses in respect of Preliminary Inquiry (PI) Case No. 23213 of 2024 which is pending before the Resident Magistrate’s Court of Songea at Songea be withheld during committal and trial proceedings.
2. There shall be none-disclosure of the statements and documents likely to lead to the identification of prosecution witnesses during trial in respect of Preliminary Inquiry (PI) Case No. 23213 of 2024.
3. Trial proceedings in respect of Preliminary Inquiry (PI) Case No. 23213 of 2024 to be conducted in camera.
4. No dissemination and publication of documentary evidence and any other testimony bearing the identity of prosecution witnesses without prior leave of the court. 11
5. No dissemination and publication of information which are likely to disclose location, residence and whereabouts of the prosecution witnesses or any other close relatives.
6. The prayer that prosecution witnesses in respect of Preliminary Inquiry (PI) Case No. 23213 of 2024 to give their testimonies through video conference, in my opinion this prayer should be put before the trial judge after the information has been filed in the High Court and assignment has been done. Thus, the trial judge will determine the prayer as he will deem fit to order.
7. For the interest of justice, the respondents during the trial shall be supplied with a summary of the facts and evidence to be adduced against them without disclosing the names, identity or whereabouts of the prosecution witnesses so that they may know the case levelled against them and prepare for defence and cross examination. So much said and done, the application is allowed to the extent stated above. It is so ordered. DATED and DELIVERED at SONGEA this 03rd day of April, 2025. 12 E. L. KAWISHE JUDGE COURT: This ruling is

delivered in the presence of Ms. Wande Hamis Kachima, learned State Attorney for the applicant and in the absence of the respondents. E. L. KAWISHE JUDGE 03/04/2025 13

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