



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 16 OF 2019

REPUBLIC.....APPLICANT

VERSUS

DOYO GALGALO.....1ST ACCUSED

GALMA GUYO GALGALO alias MAKAYANGU.....2ND ACCUSED

BOKAYO DIDA BORU alias WARABO.....3RD ACCUSED

SOMO HUKA KANCHORO.....4TH ACCUSED

RULING

[1] After hearing one witness in camera on 25th day of February 2019, Mr. Anyega, learned legal counsel for the 1st, 2nd and 4th accused persons made an oral application seeking that the identity of witnesses under witness protection program to be disclosed to the accused persons. He gave his reasons. First, that failure to disclose the identity of the witnesses is detraction from the fair trial. Second; that the order of hearing the case in camera is not to be a blanket one as to exclude the accused person from meeting their accusers. Third, that the accused are denied an opportunity to; observe the demeanor of the witnesses; tell whether the witnesses are genuine or for hire or are competitors out to settle score etc. Mr. Kiget posed a specific question; whether the protection should include hiding the identity of witnesses even to the accused. He was more categorical; that the witnesses herein will still be under protection after the hearing and so there is nothing of worry in disclosing their identities. The defence cited the following cases in support of their standpoint herein:-

a. R v Davies [2008] UKHL 36

b. Republic v Speaker of the National Assembly & 4 others Ex-Parte Edward R.O.Ouko [2017] eKLR

c. Alex Otieno Onyango v Director of Public Prosecutions & 2 others [2016] eKLR

[2] The DPP opposed the application and relied on **Article 50 (8) of the Constitution** which allows protection of witnesses in need of protection for being vulnerable. M/S Nyamosi argued that the reason for placing the witnesses under witness protection program was because the witnesses were under threat from the members of the community as well as the accused persons. She urged the court to reject the request to disclose the identity of the witnesses under protection to the accused. She cited the following cases in support of her position in the matter:

a. NBI MISC. APP. NO 77 OF 2018

b. HOMABAY MISC CRI. APP, NO 1 OF 2018

c. MSA MISC CR. APP 74 of 2014

d. KSM MISC CR. APP NO 17 OF 2014

e. GARISSA MISC CR. APP. NO 31 OF 2013 and;

f. MERU HCCRC NO 16 OF 2019.

ANALYSIS AND DETERMINATION

[3] Of great importance is that protection of witnesses is no longer a matter of statutory expressions only; it now derives from the Constitution. Exclusion of the press or other members of the public from a hearing is now permissible under article 50(8) of the Constitution if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security. See the article below:

(8) 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.

[4] I also find it necessary to state that the Constitution conferred power upon Parliament to enact legislation to provide protection, rights and welfare of victims of offences. This is a milestone and relevant to the subject under discussion for victims may also be witnesses. See article 50(9) of the Constitution below:

(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

[5] Therefore, the constitutional foundations of witness protection cannot be questioned. The purpose of witness protection is not only to protect the witnesses but to ensure due administration of justice to all which is a tenet of justice in a society governed by the rule of law. Notably, the restrictions that may be imposed by the need for protection of witnesses and victims fall under article 50 "Fair Hearing". Accordingly, it is not defensible to state as a general proposition that witness protection is detracting from fair trial.

[6] Witness Protection Act is the substantive statutory law on witness protection as the preamble states:

An Act of Parliament to provide for the protection of witnesses in criminal cases and other proceedings to establish a Witness Protection Agency and provide for its powers, functions, management and administration, and for connected purposes

[7] According to **Section 4 (3) of the Witness Protection Act:-**

“(3) The Agency may request the courts, in support of the programme, to implement protection measures during court proceedings which measures may include but not be limited to—

- (a) holding *in camera* or closed sessions;**
- (b) the use of pseudonyms;**
- (c) the reduction of identifying information;**
- (d) the use of video link; or**
- (e) employing measures to obscure or distort the identity of the witness.”**

[8] The High Court has the power to make a witness protection order by taking into consideration certain factors which are stated in **Section 16 of the said Act** as follows:

“The High Court may make a witness protection order if it is satisfied that-

- (a) the person named in the application as a witness-**
 - (i) was a witness to or has knowledge of an offence and is or has been a witness in criminal proceedings relating to the offence; or**
 - (ii) is a person who, because of his relationship to or association with a person to whom subparagraph (i) applies, may require protection or other assistance under this Act;**
- (b) the life or safety of the person may be endangered as a result of his being a witness;**
- (c) a memorandum of understanding has been entered into by the witness in accordance with section 7; and**
- (d) the person is likely to comply with the memorandum of understanding.”**

[9] The court made protection orders on 21st February 2019 and allowed six witnesses to testify in camera or closed sessions, and using pseudo names, and redaction of statements. The Agency provided a protection box in court which was to ensure the identity of the witnesses is fully obscured as per section 4(3)(e) of the Witness protection Act. This has caused the argument by the defence that complete obscurity of the identity of the witnesses under protection to the accused persons is a violation of their right to fair trial because the accused are entitled to meet their accuser. Some aspects of the protection order herein were dealt with in a masterly manner by by Lenaola J (as he was then) in the case of **In the Matter of Application for orders for Witness Protection [2014] eKLR** that:-

“The redacting of Witness Statements to exclude the witnesses' personal details such as the name, address and other personal particulars does not in my view amount to a contravention of the provisions of Article 50(2)(j). The Accused persons will have the substance of the evidence to be adduced at the trial which is the tenet of protection accorded by this provision.

As to the use of pseudonyms during the trial, I am also satisfied that it does not in any way, violate the provisions of Article 50 of the Constitution.”

[10] 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;

[11] Therefore protection of witnesses entails inter alia safety of the witness. From the prescriptions of and words used in the Constitution and the law, if the concealing of the identity of a witness is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, it is justifiable measure, and therefore, not a violation of right to fair trial. The prosecution has maintained in these proceedings as well as in the protection proceedings that the very reason for placing these witnesses under protection is to protect them from harm by the accused and the members of their community. This matter is weighty and it is not lost to this court the security situation amongst communities living within the scene of crime. Consequently, protective measures such as those granted here including obscurity of witness identity by testifying inside a protection box fits the exceptional circumstances of this case. The assessment of the type of protection measure that should be accorded to a witness is done on a case-by-case basis taking into account whether the measure; (1) is necessary in light of an objectively justifiable risk; and (2) is proportionate to the rights of the accused. I say so because the accused also have rights including right to know the person making the accusation or testifying against him. The prosecution emphasized that the Agency carried out an assessment of the needs of the witnesses and prescribed the appropriate protection measure herein. On the basis of the assessment and the safety need of the witnesses, in light of the security situation at home, I am satisfied there are exceptional circumstances which requires an individualized consideration of risk from the members of the Borana Community as well as the accused persons themselves who are said to be of great influence in the Borana community. Therefore, the fact of the security situation in a particular area such as Marsabit where inter clan conflicts are frequent and deadly is a pertinent consideration in relation to the circumstances of these witnesses and case.

[12] Accordingly, it is not far-fetched to state that in this case;

the life or safety of the person may be endangered as a result of his being a witness;

[13] Even in international law and I borrow especially from the Rome statute, safety of witnesses has been declared to be justifiable cause to conceal the identity of witnesses. Again, the security situation of the witnesses and where they come from has been given appropriate proportion of importance in determining the scope and nature of witness protection required. For instance **IN THE CASE OF IHE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG** ICC court stated that

“10. Pursuant to Article 67(1) of the Statute, the accused have the fundamental right to a public hearing. This principle of publicity is further emphasised in Regulation 20 of the Regulations of the Court (the 'Regulations'), which provides that '[a]ll hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber'.

11. The foregoing indicates a general rule. It is subject to exceptions, particularly those provided for in Article 68(1) and (2) of the Statute, which read 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 victims and witnesses' and to hold 'any part of the proceedings in camera'. However, these measures 'shall not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial'. As stressed by Trial Chamber I in the *Lubanga* case, applications for protective measures should not be 'routinely made in the expectation that they will be routinely granted'.

...

13. Consequently, protective measures such as those asked for in the Request, should be granted only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused.

14. The Chamber emphasises that a case-by-case evaluation requires an individualised consideration of risk in each particular case. It does not consider that generalised assertions regarding the degree of domestic support for the trials can be sufficient for these purposes. However, factors such as the security situation in a particular territory may be pertinent when considered in relation to the circumstances of a particular witness. It is equally noted that evidence of prior direct threats to a witness, or his/her family, are not required in order to determine that they face an objectively justifiable risk sufficient to support the granting of protective measures.

...

26. The Chamber considers that it has been provided with sufficient information to support a finding that this witness would face an objectively justifiable risk should [REDACTED] identity be disclosed to the public in a trial before the Court. [REDACTED]. The Chamber is also mindful of the fact that the witness [REDACTED]. Therefore, the Chamber finds that the protective measures sought, specifically the allocation of a pseudonym for use during the trial and face and voice

distortion during testimony, should be granted in this case. [REDACTED].”

[14] The safety of such persons as well as those related to them is important consideration here. It bears repeating that it is not an idle talk that the safety of the witnesses may be endangered by the accused persons. By disclosing their identities to the accused they will be compromising their safety as well as of those related to them. I had observed in my earlier ruling on bond as follows:-

[11] What is not in doubt and the accused persons confirmed this in their affidavits as well as through submissions by legal counsels is that the Council of Elders took the initiative of bringing peace and harmony among the clan members. Genuine and honest initiatives of that kind are welcome. However, if it is aimed at compromising the murder case or persuading or appeasing the family to compromise this case, such becomes an instance of interference with witnesses and evidence in the case; and is a grave matter of perversion of justice. It has been claimed and that is not disputed that the 1st accused person is an elder in the Borana community and wields great influence. Therefore, possibility of use of influence by him to interfere with witnesses through the elders is high.

[14] One other thing which is important is that the accused are from the same community with the victim families. And in light of the manner the crime was executed the family may be intimidated by the presence of the accused. I note that the prosecution has informed the court that some witnesses are already under the witness protection scheme and has intimated to court that it will make appropriate application for the court to adopt such safe and appropriate procedures and lawful methods of taking of evidence as to secure the witnesses. They suggested the matter be heard in camera. This reality is not a trifle; it is a reality of law and an important consideration here. And to avoid any interference with the security of the witnesses or prejudice to the witness protection scheme, and for the sake of probity of these proceedings it is not appropriate to release the accused on bail for now. I am aware that the case shall be heard on 25th February 2019 and upon taking of the vulnerable witnesses testimony the issue of bond will be revisited for the reason to object to bond will have dissipated promptly. Therefore, the prosecution should ensure that all vulnerable witnesses are availed on 25th February 2019 in order to avoid any prejudice to the accused persons who are held in custody for the reason of likelihood of interference with witnesses. The prosecution has shown new zeal of prosecuting cases expeditiously. The court is also ready to deal with the matter expeditiously. I have made myself clear; any delay will be an attack on justice. Case be fast tracked. Accordingly, the accused shall remain in custody for now.

[15] In the upshot, I find that in the circumstances of this case, obscurity of the identity of the witness is necessary and justifiable measure of protection of witnesses, in a free and democratic society such as Kenya. The measure does not violate article 50 of the Constitution. As a consequence, I dismiss the application by the defence to have the identity of the witnesses disclosed to the accused persons. Their right to cross examine has not been limited and it was fully exercised during the hearing of the first witness. The case shall proceed as was earlier agreed amongst the parties and with court's approval. It is so ordered.

Dated, signed and delivered in open court at Meru this 26th day of February 2019

F. GIKONYO

JUDGE

IN PRESENCE OF

M/S Nyamosi /M/s Onunga for state

Sagana/Anyega for 1st, 2nd, and 4th accused

Kiget for 3rd accused

Ndubi watching brief – absent

F. GIKONYO

JUDGE