



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO.77 OF 2015
IN THE MATTER OF ARTICLE 50 OF THE CONSTITUTION
IN THE MATTER OF THE WITNESS PROTECTION ACT
IN THE MATTER OF THE JUDICATURE ACT AND
IN THE MATTER OF APPLICATION FOR ORDERS FOR WITNESS PROTECTION
REPUBLIC.....APPLICANT

RULING

This is an *ex parte* application made by the Director of Public Prosecutions pursuant to the provisions of **Article 50** of the **Constitution**, **Sections 4(3)(a)(b)(c)** and **16** of the **Witness Protection Act** and **Sections 4(1)(c)**, **5(1)(a)** and **8(1)(2)** of the **Victim Protection Act** seeking orders from this court for certain witnesses in **Milimani Law Courts Criminal Case No.145/26/2014 CF No.1055 of 2014** to be accorded protection under the **Witness Protection Act** to secure them before giving their testimony in court. The application is supported by the annexed affidavit of Patricia Mulwa, a Protection Officer attached to the Witness Protection Agency (the Agency). She states that a request has been made by the investigators in the case regarding the security of certain witnesses in the case. The Agency conducted a risk assessment of the said witnesses and came to the conclusion that the apprehension the said witnesses have regarding their safety pending their adduction of evidence in court was justified. She requests the court to place the said witnesses under the Kenya Witness Protection Agency for their protection pending their testimony in court. The application further seeks an order from this court to direct that the court that will hear the case takes the testimony of the said witnesses in camera. They also request that the witness statements of the witnesses identified to be protected be redacted so as not to disclose their identity. In this regard, they have also asked for the witnesses to be allowed to use pseudonyms during their testimony. All these measures have been requested by the prosecution to enable it secure the security and safety of the identified witnesses pending their testimony in court.

During the hearing of the application, this court heard oral submission made by Ms. Kithiki for the Director of Public Prosecutions. She essentially reiterated the contents of the application together with the annexed affidavits. **Article 50(8)** of the **Constitution** allows the court to exclude the press and other members of the public from court proceedings if it is necessary in a free and democratic society to protect witnesses or vulnerable persons, morality, public order and national security. Where an application is made by the prosecution to secure the protection of a witness under the **Witness Protection Act**, the High Court is required to take the following factors into consideration as provided under **Section 16** of the **Act**:

“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.”

In the present application, the prosecution established that the witnesses it seeks to place under protection recorded statements with the police clearly indicating that they are crucial witnesses in the case facing the accused persons in the criminal case. The court has also taken into consideration the nature of the charges that have been brought against the accused persons in that case. One of the charges relate to attempted commission of terrorist act. The said witnesses have expressed fear for their lives or safety on account of the fact that they have offered to testify in the case against the accused persons. In particular, the said witnesses do not wish their identity to be published. This is because, should their identity be known, the accomplices or associates of the accused persons will put their lives or health in harm's way. The prosecution annexed to the affidavit in support of the application a memorandum of understanding executed by the said witnesses. Crucially, they have undertaken to testify in court when they shall so be required. There is no reason for this court to doubt that the said witnesses sought to be protected will not abide by the terms of the memorandum of the said understanding.

In the premises therefore, this court holds that the prosecution has established a case for the said witnesses to be placed under Witness Protection. In that regard, the application dated 4th March 2015 is allowed. The said identified witnesses are hereby granted protection orders. They shall testify in camera or closed sessions. Their witness statements shall be redacted, to conceal their identity, before the witness statements are given to the accused persons. The said witnesses shall be allowed to use pseudonyms during their testimony in court. The orders issued in this case shall apply in a similar manner to **Nairobi High Court Criminal Case No.78 of 2015**. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF MARCH 2015

L. KIMARU

JUDGE