



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 59 OF 2018

REPUBLIC.....APPLICANT

VERSUS

APC LEAKEY MAINA.....RESPONDENT

RULING

[1] Before me is the Motion dated 9th October 2018 which is expressed to be brought under *Article 50 of the Constitution, Section 4 (2) (a) (b) (c) and Section 16 of the Witness Protection Act*. The motion seeks the following orders:

- 1. THAT the witness statement be redacted before being supplied to the defence counsel**
- 2. THAT the witness statements already supplied to the defence counsel including all other documentary evidence be deemed as properly served**
- 3. THAT the witnesses do use pseudonyms during testimony**
- 4. THAT the Honorable Court be pleased to grant any such orders it deems fit in the circumstances**

[2] The application is premised upon grounds set out in the application and the supporting affidavit of Javas Mutwiri sworn on 9th October 2018. It is contended that the witness statements were duly supplied to the defence and other particulars except particulars of the witnesses were redacted to protect the identity of the witnesses. According to them, the protection is necessary especially because the accused person being a police officer, is likely to manipulate and or interfere with evidence. Most of the witnesses are vulnerable as some are former colleagues of the accused and chances of them being compromised and or intimidated are high. The prosecution is apprehensive that the accused is out on bond, he is likely to make contacts, interfere, intimidate and or influence the witnesses through contacts.

[3] The application was opposed through a replying affidavit of Charles Mwangi Gachichio sworn on 25th October 2018. He argued:-

- i. That the application is an abuse of the court process.**
- ii. That the application is supported by an affidavit sworn a person calling himself an investigating officer but does not disclose his qualifications, rank or employer or on whose behalf he is acting for. Moreover, he shifts from singular person to 'we' without saying to whom the word 'we' refers to. But he knows that he works for Independent Policing Oversight Authority (IPOA) of which 'we' may be referring to the Authority.**
- iii. Consequently, the real prosecutor in this case before the honorable court is IPOA which is contrary to the constitutional provisions.**
- iv. In addition, the documents that were availed to the accused person do not conform with the constitutional rights of the accused person to a fair trial under Article 50 (2) (j) of the Constitution.**
- v. That the DPP is making an application to serve the accused with anonymous witness statements after they have already done so.**
- vi. It is not true that the accused person is a threat to the witnesses as there is no evidence that he has attempted to intimidate threaten or interfere with any witnesses. Therefore, the orders sought have no basis.**

[4] The matter was to be canvassed by written submissions but only the prosecution filed submissions. The Respondent later informed the court that they will not file submissions but relies on the affidavits filed.

Determination

[5] The mandate of the Independent Policing Oversight Authority (Hereafter the Authority), and of the Director of Public Prosecutions (hereafter the DPP) have come into sharp focus in these proceedings. The Authority is established by **the Independent Policing Oversight Authority Act No. 35 of 2011** in section 3. The powers of the Authority are set out in *Section 7 of the Act*. Of importance is that the Authority has the mandate to carry out investigations of misconduct by the members of the National Police Service. Once they complete investigating they may forward the findings together with their recommendations to the DPP for appropriate action

[6] On the other hand, the DPP is established under **Article 157 of the Constitution**. The DPP inter alia has the authority to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. The DPP may also direct the Inspector of Police to carry out investigations on any criminal conduct.

[7] The two offices are independent and have quite distinct independent powers. Except, I see an operational and inextricable inter-dependence between the two offices; the Authority submits the result of its investigations to the DPP for action. This case presents peculiar circumstances because the accused person is a member of the National Police Service and is alleged to have committed a criminal offence in the course of duty. The Authority has mandate to investigate such criminal conduct. Needless to state, that witness statements are recorded by the investigator and form part of investigations. I am also aware that under article 157(4) of the Constitution:

The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

This matter was investigated by IPOA. I have answered the concerns by Mr. Gacicio. There is nothing much that turns on his arguments.

Redaction of statements

[8] The DPP requests for redaction of the witness statements before being supplied to the defence and statements already supplied to be deemed to have been duly supplied. The reasons given are on witnesses' vulnerability; apprehension the accused may take advantage of his position as a police officer to interfere with and intimidate witnesses if they are known to him in advance. Mr. Gacicio took a swipe at the affidavit of Javas Mutwiri, who states that he is an investigating officer and works with IPOA. I have dealt with that concern. He also stated that the documents have already been served to the accused person. Therefore, the allegations made by the applicant are unmerited for they are mere claims without any proof considering the accused has been free on bond.

[9] **Under Section 16 of the Witness Protection Act** this court have power to make a protection order upon being satisfied of matter or matters set out in the section. See the section below:-

“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.”

[10] IPOA, the body in charge of investigation the conduct of members of the National Police Service, of which the accused is part, upon objective assessment are of the considered opinion that *the life or safety of the person may be endangered*. The applicant having the mandate to prosecute has relied on these findings of the Authority and correctly so and has applied for protection of witnesses.

[11] From the assessment, I am satisfied that the witnesses are in danger. The need to protect the lives and well being of the witnesses is important consideration in administration of justice. I am content to state what I said in **MERU HCCRC NO 16 OF 2019 [2019] eKLR** that::

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] Lenaola J. (as he then was) dealt with request for protection measures such as the ones being requested for here. And came to the conclusion that the protection measures in redaction of statements as well as use of pseudo names was not a violation of right to fair trial. See the case of **In the Matter of Application for orders for Witness Protection [2014] eKLR** Lenaola J(as he then was) 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.”

[13] From the foregoing analysis, it is clear the direction the court is taking. In the upshot, I allow the application and more specifically:-

- 1. THAT the witness statement shall be redacted**
- 2. THAT the witness statements already supplied to the defence counsel including all other documentary evidence are deemed as properly served**
- 3. THAT the witnesses shall use and testify in pseudonyms during the trial.**

Dated, signed and delivered in open court at Meru this 5th day of March 2019.

F. GIKONYO

JUDGE

In presence of

Gacicio for accused

Namiti for state

Namiti for Nderitu for IPOA

Isita holding brief – Muchuri holding

Karanku for Kuswa – absent

F. GIKONYO

JUDGE