



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISC. CRIMINAL APPLICATION NO.1 OF 2018

IN THE MATTER OF ARTICLE 50 OF THE CONSTITUTION

IN THE MATTER OF THE WITNESS PROTECTION ACT

IN THE MATTER OF THE WITNESS PROTECTION RULES, 2015 AND IN THE MATTER OF APPLICATION FOR ORDERS FOR WITNESS PROTECTION

REPUBLIC APPLICANT

RULING

1. KEVIN OUMA ODHIAMBO and 4 others face a charge of murder contrary to **Section 203** as read with **204 Penal Code** – the victim being **MOSES OTIENO OUMA** alias **OJUANG’**.

2. By a chamber summons dated 5th January 2018 supported by the affidavit of **JOSHUA LOPONET**, the State seeks order for witness protection in respect of Witness in **High Court Criminal Case No.1 of 2017** which is scheduled for hearing before the High Court in Homa Bay. The prayer sought is for the witness to testify in camera and the witness statements be redacted before being supplied to the accused persons.

2) Further that at the hearing, the witness be allowed to use pseudonymous when giving his testimony as to ensure his identity is protected.

From the prayer also urges the court to grant orders for the evidence of the protected witnesses to be heard in the High Court at Kericho, Kisii or Kakamega.

3) The basis for these prayers is that the State has under its protection a crucial witness in the said case whose life is in danger as a result of the evidence he has agreed to give in support of the prosecution case, and unless the orders sought are granted, there is a high risk of the witness being threatened, intimidated and/or harmed. A memorandum of understanding under Section 7 of the Witness Protection Act, between the witness and the Witness Protection Agency has been signed.

3. In the supporting affidavit of **JOSHUA LOPONET** (a Protection Officer attached to the Witness Protection agency [WPA]), he deposes that upon receiving a referral for protection from the Director of Public Prosecutions in Siaya, dated 3rd October 2017, he conducted a risk assessment on the protected person,, and established that his life was in danger as a result of the evidence he had agreed to give in support of the prosecution case.

4. The letter (JL1) dated 3rd October 2017 is signed by **JOSEPH TUKSHO** (the Homa Bay Sub County

Criminal Investigation Officer) reads as:-

“this matter was reported at Homa Bay police station where a group of political goons within the area clashed with an opponent group align (sic) the sitting governor of Homa Bay where the deceased was seriously injured and later succumbed to injuries while undergoing treatment at Homa Bay referral hospital the same day.

Investigations were conducted where the suspects were arrested and charged for the offence of murder. During the time of hearing the witnesses who hails (sic) in Siaya declined to appear for the hearing dates, fearing for their lives. The issue was raised to the presiding judge who advice (sic). The matter be brought to the attention of your office for assistance.

5. Upon receipt of the referral, a risk assessment established that indeed his life was in danger as per the annexed form JL2. The officer established that the accused are private security guards popularly referred to as **“MEN IN BLACK”** working for one **OYUGI MAGWANGA** were in police custody, and the witnesses has crucial information concerning the events that happened prior to and during the act of murder, which he witnessed and can positively identify the perpetrators.

6. The protection officer also established that the attack and murder were politically instigated and the environment in Homa Bay appears to be hostile for the prosecution witness. This is what makes the witness apprehensive about testifying against the accused persons. The witness has however agreed to testify on condition that he is assured of his safety and be accorded protection measures. Further, that to enable the protection agency carry out its mandate of providing security to the witness officially then it strongly recommends that the hearing of the protected witness’ evidence be taken at a different court station and a politically neutral ground such as Kericho, Kisii or Kakamega.

7. In a replying affidavit sworn by **KEVIN OUMA ODHIAMBO** (the 1st accused person in **criminal case No.1 of 2017 – R. –vs- KEVIN OUMA ODHIAMBO alias WAUWAU and 4 others** has deposed on behalf of himself and his co-accused that the claims about an endangered witness are dishonest and none of them provide security for HM Magwanga as they are each engaged in economic activities which are very strained by this case due to the time court sessions.

They are opposed to a witness using pseudonymous, saying it is prejudicial to them and will infringe on their constitutional rights. They also oppose redaction of witness statements.

8. The accused laments that they have used resources and incurred serious losses due to attending court sessions and transferring this case to another location will only create further financial burdens on them and may result in loss of employment for some of them who have received warnings due to absenteeism.

9. They fear that in allowing their relocation they too may be harmed.

10. When the murder trial came up for hearing before this court the prosecution informed the court of the difficulty police were having in getting witnesses to attend court – it was stated that the witnesses were apprehensive about their security and infact at the last session the prosecution had wanted to withdraw the case not for want of evidence, but due to reluctance of witnesses to attend court on account of their personal security. It was due to this indication that the court advised the prosecution to explore the use of the Witness Protection Agency. So that application is not just a breath of hot air – it arises from real concerns.

Section 4 of the Witness Protection Act (Cap 79) provides that:-

“The witness protection agency may request the court to hold proceedings in camera/closed sessions, use pseudonymous on the witness, reduction of identity information of witness use of video link or distort the identity of a witness.”

11. The considerations the High Court must take into account in a prayer of this kind are set out in

Section 6 include inter alias that the person named in the application as a witness has knowledge of an official:-

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

b) A memorandum of understanding has been entered into by the witness in accordance with Section 7 of the Act. All these have been fulfilled on.

12. Under **Article 50 (1) (d)** the right to a fair trial includes **inter alia**, a public trial.

However this provision is not to be read in isolation but alongside **Article 50(8)** which envisages a section for protection of witnesses or vulnerable persons. This is the kind of scenarios obtaining here.

13. It is not disputed that the incident was as a consequence between two rival political groups in Homa Bay, each aligned to certain individuals within the Orange democratic Movement Party (ODM).

14. I take judicial notice that the ODM party has a huge following within the Nyanza region, particularly in Homa Bay, Kisumu and Migori, which is why the protection agency has not suggested these other areas as options for court reasons. For purpose of clarity as provided under **Section 24 (3)** no question shall be asked in the proceedings which would give information leading to the disclosure of the protected identity of the witness on his place of abode.

15. I am satisfied that the apprehension is real and I allow the prayer. The witness evidence shall be heard in camera at Kericho High Court on 8th April, 2018.

16. By a copy of this ruling the Deputy Registrar Homa Bay is directed to transmit the information to the Deputy Registrar Kericho for purposes of administrative arrangements regarding sitting arrangements. In so doing the Deputy Registrar Kericho must liaise with officials from the Witness Protection Agency so as to get the relevant details necessary to ensure adequate protection of the witness.

17. None of the accused persons has annexed any letter from their employer warning them about frequent absenteeism, but to be fair to them, I direct the OC County Commander Homa Bay to avail a vehicle to transport accused persons to Kericho for hearing on 8th April, 2018.

Delivered and dated this 5th day of February, 2018 at Homa Bay

H.A. OMONDI

JUDGE

Mr. Obach for Respondent

Miss Ongeti for State