



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**MISC. APPLICATION NO 31 OF 2013**  
**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**

The State has brought this application *exparte* under Article 50 of the Constitution, Section 16 of the Witness Protection Act and Section 19 Rule (3) (2) of the Judicature Act. The application is seeking the following orders:

- i. That the honourable court be pleased to certify this application as urgent and be heard *exparte* in the first instance
- ii. That this honourable court be pleased to grant witness protection orders for the witness to testify in camera or closed session
- iii. That witness statement be redacted before being given to the accused persons
- iv. That the witness use pseudonyms during testimony
- v. That the honourable court be pleased to grant any such orders it deems fit in the circumstances

The application is supported by the grounds found on the face of the application and on the supporting affidavit of Philsmon Biwot, a Protection Officer attached to Witness Protection Agency. Briefly the applicant is a witness in Criminal Case No 511/256/2013 CF; 987/2013; that a risk assessment has been conducted and as a result it was established that the applicant's life is in danger due to alleged involvement of the accused person in the criminal case in question with the Al-Shabab organization; that there are likely threats from the organization; that the witness has entered into a Memorandum of Understanding with the Kenya Witness Protection Agency and that he has been admitted to a protection programme with the Agency. The State seeks to protect the witness for fear of endangering his life due to the evidence he is likely to give.

Counsel for the applicant, Mr. Allen Mulama, submitted that the Witness Protection Agency will make arrangements to enable the in camera/closed session hearing.

I have carefully considered this application. Section 16 of the Witness Protection Act provides the criteria to be met before the court can grant the orders sought. It states 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.**

To determine whether the above criterion has been met, I have considered the Risk Assessment Report dated 29<sup>th</sup> February 2013 prepared by the Protection Officer. I am satisfied by the Report in so far as the risks and danger involved not granting the orders sought. While making this finding I am alive to the fact that every accused person is presumed innocent until the contrary is proved and at this stage the orders of this court are not in any way an indication that the accused in the criminal case in question has been adjudged guilty. I am also alive to the fact that the rights to protection of the witness are to be carefully balanced with those of the accused person.

**Article 50** of the Constitution 2010 guarantees an accused persons rights to a fair hearing. These rights include right to a public hearing before a court of law; right to be informed in advance of the evidence the prosecution intends to rely and right to have reasonable access to that evidence (**Article 50 (2) (d) and (j) respectively**). The same Constitution under Article 50 (8) states as follows:

**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.**

I have satisfied myself that by granting the prayers sought in this application the rights of the accused person as enshrined in the Constitution and especially the sub-articles I have highlighted will not be contravened. I am satisfied that by placing the witness in the protection programme, by redacting the witness's statements and by the witness using pseudonyms, the accused person will not be prejudiced. I am aware that our courts are not fitted with the infrastructure conducive for conduction proceedings in camera or closed sessions but given that the learned state counsel has reassured this court that this is workable I will leave matters to the Kenya Witness Protection Agency to make all necessary arrangements to make the court room conducive enough to enable the trial court conduct proceedings in a way that protects the witness from any possible threats. In view of this I hereby grant the prayers sought in the application as follows:

- a. Witness protections orders are hereby granted by this court as prayed
- b. The witness shall be under the Kenya Witness Protection Agency for as long as he is required to be under such protection
- c. The witness statements shall be redacted as necessary for the effectual protection of the witness and care shall be taken to avoid prejudicing the rights of the accused person to a fair trial
- d. The witness shall use pseudonyms; again care shall be taken to avoid prejudicing the rights of the accused to fair trial.

I make orders accordingly.

**S.N MUTUKU**

**JUDGE**

Signed, dated and delivered this 4<sup>th</sup> day of November 2013.