



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO.77 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RAPHAEL MUOKI KALUNGU.....1<sup>ST</sup>  
ACCUSED**

**JOSEPH MUTUKU**

**KATIVI.....2<sup>ND</sup> ACCUSED**

**RULING**

The 1<sup>st</sup> Accused, Raphael Muoki Kalungu filed an application pursuant to **Articles 21(1), 49(1)(h) and 50(2)** of the **Constitution** and **Section 123** of the **Criminal Procedure Code** seeking orders from this court to admit him on bail pending trial. The application is supported by the grounds stated on the face of the application and by the annexed affidavit of the Accused. The Accused states that the trial in this case has been scheduled for 11<sup>th</sup> and 12<sup>th</sup> of May 2015. He was not certain if the trial would come to an end on those scheduled dates taking into consideration the number of witnesses that the prosecution intends to call. He stated that, under the **Constitution**, he was presumed innocent until proved guilty by the court. He therefore urged the court to release him on bail pending trial. He asserted that he was not a flight risk because he was married with three (3) children and was a resident of Syokimau and Mulolongo areas of Machakos County. He was unlikely to abscond or jump bail. He insisted that he would not interfere with prosecution witnesses as shown by his cooperation with the police during investigations. In essence, it is the 1<sup>st</sup> Accused's case that there were no compelling reasons for this court not to release him on bail pending trial.

The application was opposed. Clement Mwangi, one of the investigating officers in the case, swore a replying affidavit in opposition to the application. He stated that, upon conclusion of investigation, it was established that the 1<sup>st</sup> Accused was involved in the death of the deceased. The 1<sup>st</sup> Accused was charged with the offence. Since being charged with the offence, the prosecution alleged that the 1<sup>st</sup> Accused has threatened the witnesses, particularly the family of the deceased. It was upon this apprehension that the 1<sup>st</sup> Accused was interfering with the witnesses that the prosecution made an application before this court (Muchemi J) seeking the protection of the witnesses. Muchemi J in her Ruling delivered on 5<sup>th</sup> September 2014 directed the 1<sup>st</sup> Accused, either by himself or through proxies to desist from interfering with witnesses. It was therefore the prosecution's case that there were compelling reasons for this court to deny the 1<sup>st</sup> Accused bail pending trial.

In response to the above allegations by the prosecution, the 1<sup>st</sup> Accused swore a further affidavit in which he claimed that the dispute between him and the family of the deceased was in relation to the custody of the minor children born of the deceased. He denied the allegation put forward by the prosecution that he in any way was connected with the threatening calls made to the family of the deceased. He urged the court to find in his favour in the application.

During the hearing of the application, this court heard oral rival submission made by Mr. Kariu for the 1<sup>st</sup>

Accused and by Mrs. Mwaniki for the State. The issue for determination by this court is whether the 1<sup>st</sup> Accused made a case for this court to release him on bail pending trial. That the 1<sup>st</sup> Accused is entitled to be considered for bail pending trial as provided under **Article 49(1)(h)** of the **Constitution** is without doubt. However, the court must be satisfied that there exist no compelling reasons to deny him bail. Among the compelling reasons to be considered by the court include: the nature of the offence, the strength of the evidence which supports the charge, the gravity of the punishment in the event of conviction, the previous criminal record of the applicant, the probability the accused may present or surrender himself for trial, the likelihood of further charges being brought against the accused, the likelihood of the accused interfering with witnesses or to procure the suppression of evidence that may incriminate him, the probability of finding the accused guilty as charged, the detention for protection of the accused and the necessity to procure medical or social report pending final disposal of the case (see **Republic –vs- Milton Kabulit & Others Criminal Case No.115 of 2008 (Nakuru)** – unreported). The above reasons are not by any means exhaustive. The court hearing the case will have to determine each case based on its merits and circumstances.

In the present application, it was clear that the prosecution put forward a compelling case for this court to deny the 1<sup>st</sup> Accused bail pending trial. From the evidence placed before court by way of affidavit, it was clear that attempts have been made to interfere with the prosecution witnesses. Although the 1<sup>st</sup> Accused denies involvement in the intimidation of the witnesses, the question that comes to this court's mind is for whose benefit were the threatening calls made if it was not for the 1<sup>st</sup> Accused? The 1<sup>st</sup> Accused argued that the prosecution did not place sufficient compelling evidence connecting him with the threats made to prosecution witnesses. At this stage of the proceedings, this court does not require the prosecution to establish compelling reasons to the required standard of proof beyond reasonable doubt. What the prosecution is required to establish is the likelihood that the 1<sup>st</sup> Accused, if released on bail pending trial, he would interfere with witnesses. This court appreciates that part of the differences between the 1<sup>st</sup> Accused and the family of the deceased relate to custody of children. However, this court is conscious of its duty to protect and preserve the integrity of the judicial process. Taking into consideration the entire facts and circumstances of this application, it is clear that the release of the 1<sup>st</sup> Accused on bail pending trial would impede the just trial of the case.

In the premises therefore, this court holds that the prosecution established compelling reasons to deny the 1<sup>st</sup> Accused bail pending trial. The application for bail pending trial is therefore dismissed. The 1<sup>st</sup> Accused shall remain in custody pending the hearing and determination of the case. It is so ordered.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF DECEMBER 2014**

**L. KIMARU**

**JUDGE**