



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**HIGH COURT CRIMINAL CASE NO 55 OF 2016**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**BRYAN WILLIE MARENDES**

**Alias RASTA alias BRAYO .....ACCUSED**

**RULING**

1. The Applicant **BRYAN WILLIE MARENDES** alias **RASTA** alias **BRAYO** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code the particulars of which were that on 3<sup>rd</sup> June, 2016 at Umoja Estate at Hornbill Pub parking lot within Nairobi County with another not before the court jointly murdered JOHNSON MBUGUA NJENGA.
2. He pleaded not guilty to the charges and by Notice of Motion dated 11<sup>th</sup> July, 2016 under certificate of urgency applied to be granted bond/bail pending hearing. The application was supported by his annexed affidavit in which he deponed that he had been advised by his Advocate that he has a qualified constitutional right to be released on bond or bail on reasonable conditions and that he was not aware of any compelling reasons as to why he should not be released on bond or bail.
3. It was deponed further that his continued detention pending conclusion of the trial gravely undermines, devalues and contravenes his unqualified constitutional right to be presumed innocent until contrary is proved and that the continued deprivation of his liberty and freedom of movement amounts to being punished before a finding of guilty is made by a competent court of law.
4. On 15<sup>th</sup> August, 2016 he filed a supplementary affidavit in which he deponed that he has a fixed abode in Umoja II house No. C226 where he has resided for the past seven (7) years. He further stated that he is married to one MARY MUTHONI GAKURE who works in their salon business known as Brymas Mail Spar and also has a rural home in Emusire location Vihiga County where his mother EVALYNE JANE MARENDES resides and that his father in law HARRISON GAKURE was willing to stand surety for him.
5. In opposition to the said application the family of the deceased filed a replying affidavit sworn by CHARITY NJENGA a sister in which she deponed that from the police covering report several people witnessed the accused assaulting the deceased in the company of his girlfriend after he complained that the deceased had blocked his car and that the accused resides in the same area with witnesses and there was therefore a likelihood of interference if he is released on bail.

6. It was deponed further that the accused girlfriend has never been arrested and therefore it is highly likely that the accused may interfere with witnesses and frustrate the effort to trace his accomplice.

7. When the matter came up for hearing, Mr. Magoma for the State indicated that he did not wish to oppose the application for the release of the accused on bond and taking into account the affidavit filed by the victim's family and in compliance with Bond and Bail Policy Guidelines and Victim Protection Act, the court ordered for pre-bail report which has now been filed.

8. It was stated in the said report that the applicant operates his own company called PRO-EM and was well known in Umoja Locality and at Ebushikhale sub location in Vihiga County. It was reported that the family of the victim were still hurting and were afraid that if granted bail he might ensure that his accomplice is not arrested and he will interfere with the said person who is alleged to be a witness and a perpetrator of the alleged crime.

### **SUBMISSIONS**

9. On behalf of the Applicant, Mr. Wamwayi submitted that the family of the victim were apprehensive that if the accused was granted bond he may interfere with a certain witness/accomplice whose name is not given and whose whereabouts is also not disclosed. He submitted that the court had not been told of any effort made to arrest the same. He further submitted that the accused has a fixed abode and that the accused has been in custody since June without any evidence presented of his interference with witnesses.

10. Mr. Jomo on behalf of the family of the victim submitted that they felt that the accused should not be released on bail since his accomplice had not been arrested while Mr. Mwenda on behalf of the State submitted that should the court grant bond to the accused, then stringent terms and conditions should be imposed including a warning not to interfere with witnesses.

### **DETERMINATION**

11. Under Article 49(1)(h) of the Constitution of Kenya, 2010 bail is now a Constitutional Right of every accused person which can only be limited where there are compelling reasons advanced by the State. Whereas the Constitution does not define what constitutes compelling reasons, the courts have defined what they are and the same have been produced in The Judiciary Bond and Bail Policy Guidelines to guide the courts in making a decision on whether to grant bond as follows:-

- a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused is found guilty.
- b) The strength of the prosecution case.
- c) The character and antecedents of the accused person
- d) Failure of the accused person to observe bail or bond terms.
- e) Likelihood of interfering with witnesses.
- f) The need to protect the victim of the crime
- g) The relationship between the accused person and potential witnesses.
- h) If child offenders, their best interest
- i) Whether the accused person is gainfully employed.
- j) The need to preserve public order, peace or security

k) Protection of the accused person.

l) The likelihood of the accused absconding trial.

12. In this matter, whereas the State had offered no compelling reasons, the victim's family in exercising their rights under the following provisions of Victim Protection Act, 2014:-

***Section 2(b) "Every victim is as far as possible given an opportunity to be heard and to respond before any decision affecting him/her is taken."***

***Section 9(2) "Where the personal interest of a victim have been affected, the court shall:-***

***(a) Permit the victim's view and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court."***

filed a replying affidavit in which it was stated that there was a likelihood of the accused interfering with witnesses.

13. From the said affidavit, the only alleged compelling reason advanced by the family of the deceased is the possibility of the applicant interfering with an alleged witness who has not been named and who has been at large for the period the accused has been in custody. Confronted with a similar contention, Justice Mureithi in High Court of Kenya at **Machakos Criminal Case No. 44/2015 REPUBLIC v GERALD MUTUKU NYALITA & Others** had this to say:-

***"(5) In considering the likelihood of interference with witnesses as a compelling ground to refuse bail in terms of Article 49(1) (h) of the Constitution of Kenya, the prosecution must in my view, demonstrate a more than whimsical probability of interference. It must be shown that the accused persons are in such close family, filial or other relationship which creates an environment of control and influence of the witness by the accused person such as to interference with the ability of the witness to give evidence before the court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court. The tenderness of age or the mental acuity of the witness may be factors to be considered in the determination as to the likelihood of interference. The nature of the testimony of the witnesses as eye-witness or circumstantial is also relevant."...***

***(10) The State may make provisions for the witnesses to be placed on the witness protection programme to forestall any likelihood of interference by the accused persons, as it is empowered to do under the Witness Protection Act....."***

14. I am in total agreement with my brother Judge's holding herein and wish to point out that the applicant has been in custody since he was arrested and if the State which is under duty to arrest any accomplice has not done its duty, this should not be held against the accused right to bail. I therefore find and hold that no compelling reasons have been advanced to enable the court deny the accused the enjoyment of his constitutional right to be released on bond pending hearing.

15. Taking into account the fact that the primary consideration while granting bond is to secure the attendance of the accused person at the hearing and being alive to the fact that the same is facing a charge of murder where if convicted the only available sentence would be death as to now, I hereby order that the accused be released on bond on the following terms:-

a) Bond of Kshs. One million (1,000,000) with one surety of similar amount.

b) In the alternative cash bail of Kshs.500,000/- with one surety of like amount.

c) The accused to report to the officer commanding Buruburu police station once after every thirty

(30) days until final determination of the matter at a date to be set by the said officer.

**d)** The same **shall not** make any contact in whatever nature to any of the intended prosecution witnesses.

Dated, Signed and Delivered at Nairobi this **24<sup>th</sup>** day of **October**, 2016.

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Magoma for the State*

*Mr. Wamwayi for the Accused*

*No appearance by Jomo for the family of the deceased*

*Accused present*

*Tabitha court clerk*