

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION 46 OF 2017

MICHAEL OGADA OKUMU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By Notice of Motion dated 16th February, 2017, brought under Sections 114 and 123 of the Criminal Procedure Code, Article 22 of the Constitution and other enabling provisions of the law, the Applicant makes a main prayer that he be admitted to bail on such reasonable terms as the court may deem fit pending his arrest and or charge. He also asks the court to restrain the Inspector General of Police or any other officer acting on his authority or directions from arresting him. Upon such admission to bail, he asks that the court directs that he appears in court at any time he may be required.

The application is premised on grounds that a complaint on assault was made against him at Embakassi Police Station and the police were intending to arrest him at any time. Further that the alleged report was made by his political detractors but the persons who carried out the assault were his political supporters. He cannot therefore carry any criminal responsibilities on their behalf. Accordingly, the intended arrest and prosecution against him is malicious, politically motivated and calculated to embarrass and intimidate him.

The application is supported by the affidavit of the Applicant sworn on 16th February, 2017. The gist of the affidavit is that the Applicant is the current member of the County Assembly (MCA) for Embakassi Ward. On 14th February, 2017 he was called by a Police Officer from Embakassi Police Station who informed him that one, Martin Oduor Phiri had made a complaint of assault against him. The complaint was to the effect that he had been assaulted on 11th February, 2017 at 1.00 pm by the Applicant's supporters. The complainant in that report is a political aspirant for Embakassi Ward and therefore his potential opponent. The Applicant alleges that on the said date, he was attending a workshop at Sawela Lodge in Naivasha and has annexed a list of participants in the seminar for both 10th and 11th February, 2017. His case is that he returned to Nairobi on 12th February. It is therefore clear that he was not with his supporters when the alleged assault took place. Any prosecution would be motivated by nothing else but malice. Furthermore, being a leader he was not a flight risk.

The Respondent in opposing the application filed Grounds of Opposition dated 23rd February, 2017. Briefly, the grounds are that the application is an abuse of the court process and is intended to delay or defeat the ends of justice. Further that the police are doing their duties of investigating any crime as they are mandated by **Section 24 of the National Police Service Act**. Finally, that the orders sought by the Applicant are unavailable as he has not demonstrated that the Respondent has harassed, intimidated or infringed on his fundamental rights.

The application was canvassed before me on 6th March, 2017. Learned counsel Mr. Gikunju was on record holding brief for Mr. Ngala for the Applicant. Learned Sate Counsel Ms. Nyauncho represented the Respondent. Both counsel relied on the application and the supporting affidavit and the grounds of opposition respectively.

I have accordingly considered the application, the Supporting Affidavit and the Grounds of Opposition. As I have severally held before, it is now settled law that anticipatory bail will only issue where the Applicant demonstrates that there exists circumstances of serious breaches of a citizen's right by a State organ. In that respect, the court must address itself in this application on whether the Applicant's fundamental rights have been breached by the threat to arrest and charge him.

In his Supporting Affidavit in Paragraph 3, he deposes that the assault case was reported at Embakassi Police Station vide OB No. 36/11/2/2017 at 13:54 hrs. His contention is that on the said date, 11th February, 2017 he was attending a workshop and Sawela Lodge in Naivasha. Indeed, his name appears as one of the participants in the workshop on the list of participants annexed to the Supporting Affidavit. That being the case, the court would be convinced that the assault case reported at Embakassi Police Station specifically mentioned him as the suspect if he had exhibited a copy of the OB extract. That way, the court would be convinced that the intended prosecution against him is malicious or politically motivated. I say so because in the Supporting Affidavit, he alludes that in the OB report, the perpetrators of the assault were his political supporters. But again, the court has nothing at hand with which to verify that allegation. In the circumstances, I am unable to deduce that any call was made to him by the police with an intention of either arresting or charging him. It follows then that the Applicant has not demonstrated that any of his fundamental rights has been breached or infringed on.

In the result, the application lacks merit and the same is hereby dismissed.

Dated and Delivered at Nairobi this 8th day of March, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. No appearance for the Applicant*
- 2. M/s Nyauncho for the Respondent.*