



REPUBLIC OF KENYA



KENYA LAW
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**Madowo v Republic (Criminal Application E005 of 2025)
[2025] KECA 1775 (KLR) (24 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1775 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPLICATION E005 OF 2025
HA OMONDI, JA
OCTOBER 24, 2025**

BETWEEN

ERASTUS OMWONYA MADOWO APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application seeking to appeal against both conviction and sentence
in the High Court of Kenya at Siaya (Aburili, J.) in HCCRA No. 85 of 2017)*

RULING

1. Erastus Omwonya Madowo was tried, convicted and sentenced to serve 80 years imprisonment, for the offence of Defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No.3 of 2006 *vide criminal case file no. 991 of 2016 at Siaya Law Court*. He appealed against the decision *vide* HCCRA No. 85 of 2017// at Siaya High Court, but the appeal was dismissed at its entirety. He was aggrieved by that outcome and desired to file an appeal, but was not able to do so, for want of record of appeal comprising the proceedings and judgment.
2. Consequently, by an application dated 14th January 2025, he now seeks orders to allow him to file appeal filed out of time; annexed in the supporting, contending that he could not have done so earlier as he was not supplied with the High Court file to enable him me to file an appeal on time. He states that his appeal has high chances of succeeding; and the respondent will suffer no prejudice should he be granted the prayers.
3. In conceding the appeal, the respondent through learned prosecution Counsel, Ms.Munyolo Omusebe-Owuor points out that while there is no legitimate notice of appeal on record lodged and served upon the respondent within a reasonable time, it is significant that the applicant intends to challenge the High Court's upholding of a conviction and sentence of 80 years imprisonment, which cannot be considered as not frivolous. Further, that for an individual who is serving 80 years



imprisonment, consideration must be given to the fact that delay in obtaining from the High Court Judgment was not due to any condition within the applicant's control. This Court is thus urged to exercise its discretion favourably in the matter and grant the application for extension of time.

4. This Court is allowed to exercise its unfettered discretion as provided under rule 4 of the *Court of Appeal Rules* that:

The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

Rule 4 of the *Court of Appeal Rules* does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the *locus classicus*, laid down the parameters as follows:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

5. In *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No.190 of 2019 observed that:

"Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."

6. The delay in this instance was eight (8) years. What was the reason? The applicant being a lay person is incarcerated; and did not have the advantage of easily reaching the courts to monitor the status of his records of appeal. There is no maximum or minimum period of delay set out under the law, however, the reason or reasons for the delay must be reasonable and plausible. For this proposition see *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR,

Under Rule 61 (1):

A person who desires to appeal to the Court shall give Notice of appeal in writing, which shall be lodged in six copies with the registrar of the superior Court at the place where the decision against which it is desired to appeal was given, within fourteen days after the date of that decision, and the notice of appeal shall institute the appeal.

7. I recognize that the notice of appeal ought to have been lodged within 14 days of the delivery of the decision which it seeks to appeal; that did not happen; nor has the applicant filed and served his record



of appeal. I am however satisfied that the reasons already alluded to posed a challenge to the applicant to act in a timely manner; and indeed, the sentence the applicant is challenging is a long one which if his prayer is denied will occasion him great prejudice.

8. The upshot is that the application is merited and is allowed.

The applicant is granted extension of time to file and serve the notice of appeal out of time within fourteen (14) days of today's date. The applicant shall file and serve the respondent with the record of appeal within thirty (30) days upon service of the Notice of Appeal.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER, 2025.

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

