



**JWM v Republic (Criminal Application E059 of 2025)
[2025] KECA 1882 (KLR) (11 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1882 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E059 OF 2025
PM GACHOKA, JA
NOVEMBER 11, 2025**

BETWEEN

JWM APPLICANT

AND

REPUBLIC RESPONDENT

(An application for leave to appeal out of time against the conviction and sentence by the High Court of Kenya at Naivasha (Mwongo, J.) delivered on 29th October 2020 in HCCRA No. 40 of 2017)

RULING

1. The applicant has invoked the provisions of rule 4 of the Court of Appeal Rules 2022 in his Notice of Motion dated 11th June 2025 seeking leave to appeal out of time against his conviction and sentence upheld by the Naivasha High court in HCCRA No. 40 of 2017.
2. The applicant was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* in Engineer Criminal Case (SO) No. 9 of 2017 and Criminal Case (SO) No. 10 of 2017. By judgment of the trial court, the appellant was convicted of the offence and sentenced to life imprisonment. The appellant appealed before the Naivasha High Court in HCCRA No. 40 of 2017. He also appealed before the Naivasha High Court in HCCRA No. 45 of 2022. Both appeals were dismissed. The appeal in question, that is HCCRA No. 40 of 2017, was dismissed on 29th October 2020.
3. The application is aggrieved by those findings hence the application. It is supported by his supporting affidavit sworn on 11th June 2025. The applicant has urged this Court to allow the application for the reason that he opted to wait for the outcome in HCCRA No. 45 of 2022 in order to pursue both appeals before this Court. He also lamented that he was not furnished with the proceedings and judgment in good time to enable him pursue an appeal. He also seeks consolidation of the two appeals.



4. The application was heard on the basis of the parties' written submissions. The applicant filed written submissions dated 28th October 2025. He explained that the circumstances of the delay were beyond his control and therefore not deliberate. This is because after HCCRA No. 40 of 2017 was heard on its merits, he was directed to appeal against the decision in Criminal Case (SO) No. 10 of 2017. He lodged HCCRA No. 45 of 2017. He contended that however, since it was transferred to Nyandarua High Court, it was summarily dismissed for non-attendance of the hearing.
5. The applicant persuaded this Court to grant the reliefs sought for the reason that no prejudice would be occasioned to the respondent if the application is allowed. Conversely, if denied leave, he would be seriously prejudiced since he was sentenced to life imprisonment. Furthermore, a denial of the application was tantamount to an infringement of his right to be heard under Article 50 (2) (q) of *the Constitution*.
6. He submitted that since the delay was explained and the appeal raised serious questions of law and procedure, the interest of justice tilted towards allowing the application rather than dismissing it. In support of that argument, he relied on rule 4 of this Court's rules, Fahim Yasin Twaha vs. Timamy Issa Abdalla & 2 Others [2015] eKLR, Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR and Leo Sila Mutiso vs. Republic [1997] eKLR.
7. The respondent filed written submissions dated 3rd November 2025 through Senior Assistant Director of Public Prosecutions Mr. Omutelema. He was of the view that the delay of 5 years was inordinate and inexcusable since no sufficient reasons were advanced to urge this Court to extend time to appeal out of time. He prayed that the application be dismissed.
8. The discretion donated to extend time under the Rules was enunciated by this Court in Henry Mukora Mwangi vs. Charles Gichina Mwangi Civil Application No. Nai. 26 of 2004 thus:

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi v Kenya Airways Ltd. [2003] KLR 486 in which this Court stated:

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus: “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: firstly, 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.”
9. I have considered the reason advanced by the applicant as set out in the application and his written submissions, the respondent's written submissions and the law. The applicant has succinctly explained the reasons for his delay in lodging the appeal. I am persuaded that it is in the interest of justice that the application be allowed. As for whether the two appeals ought to be consolidated, that decision can only be determined before a full bench. In light of the above circumstances, the Notice of Motion dated 11th June 2025 is allowed to the extent that the applicant shall file his notice of appeal within 14 days. Thereafter, the record of appeal shall be filed and served within 30 days.



DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF NOVEMBER 2025.

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

