



**Mbako v Republic (Criminal Application E051 of 2025)
[2025] KECA 1873 (KLR) (10 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1873 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E051 OF 2025
PM GACHOKA, JA
NOVEMBER 10, 2025**

BETWEEN

DAVID MBAKO APPLICANT

AND

REPUBLIC RESPONDENT

(An application for leave to appeal out of time against the conviction and sentence of the High Court of Kenya at Nakuru (Prof. Ngugi, J.) delivered on 30th April 2020 in HCCRA No. 96 of 2017)

RULING

1. In his Notice of Motion dated 28th April 2025, the applicant seeks leave of this Court to appeal out of time from the conviction and sentence upheld by the Nakuru High Court in HCCRA No. 96 of 2017. The applicant was charged alongside another in Nakuru CM (SO) Case No. 583 of 2016 with the offence of gang rape contrary to section 10 of the *Sexual Offences Act*. The trial court convicted him as charged and was sentenced to 10 years imprisonment. The appellant appealed before the Nakuru High Court. In his judgment dated 30th April 2020, Prof. Ngugi, J. (as he then was) dismissed his appeal on conviction and enhanced the appellant's sentence to 20 years imprisonment.
2. The applicant is aggrieved by those findings. In support of his application, the applicant annexed his supporting affidavit sworn on 28th April 2025. He stated that after the dismissal of his appeal he and his co accused lodged an appeal in this Court. However, during the hearing of that appeal it was revealed that his appeal was not properly filed and admitted.
3. The respondent did not oppose the application. Through Senior Assistant Director of Public Prosecutions Mr. Omutelema, it filed written submissions dated 3rd November 2025. It was argued that a satisfactory explanation for the delay had been advanced by the applicant. He was therefore deserving of the exercise of the discretionary powers donated to this Court.



- 4. The discretion set out in rule 4 of the Court of Appeal Rules 2022 is wide and discretionary. The guiding principles are not exhaustive but exercise of the discretionary power a judge must take into account factors like: the length of delay involved, the reasons for delay, possible prejudice on any party, the conduct of the parties, the need to balance competing interests, the need to protect a party's opportunity to fully litigate his or her dispute and the chances of succeeding.
- 5. I have considered the reason advanced by the applicant, the respondent's written submissions and the law. The applicant has stated that after the dismissal of the first appeal he and his co- accused lodged an appeal in this Court, and he only learnt at the hearing that his appeal was not properly lodged. With this explanation, I am satisfied that the application has met the threshold for the exercise of discretion by this Court as the delay had been satisfactorily explained. Accordingly, the applicant shall file his notice of appeal within 14 days from the date of this order. Thereafter, the record of appeal shall be filed and served within 30 days.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF NOVEMBER 2025.

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

