

**IN THE COURT OF
APPEAL
AT NAKURU**

**(CORAM: GACHOKA, J.A - IN
CHAMBERS) CRIMINAL APPLICATION NO.
E075 OF 2025**

BETWEEN

**DAVID WAGENI WANGECI.....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 Nakuru (Wendoh & Ouko, JJ.)
delivered on 20th March 2013*

in

HCCRA No. 336 of 2010)

RULING

1. By Notice of Motion dated 25th August 2025, the applicant seeks leave of this Court to appeal out of time from the conviction and sentence upheld by the Nakuru High Court (Wendoh J & Ouko J, as he then was) in ***HCCRA No. 336 of 2010***. The applicant was charged at the trial court in Nyahururu with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. After full trial, the applicant was convicted and sentenced to death. On appeal,

the High court upheld both the conviction and the sentence.

2. The applicant is aggrieved with those findings. In support of his application, the applicant has attached his supporting affidavit dated 25th August 2025. He urged this Court to allow his application for the following reasons: he initially lodged an appeal but on follow up, he was informed that no such appeal existed; he was unable to follow up owing to incessant prison transfers beyond his control; and no prejudice would be met by the respondent if the orders sought are granted.
3. In the respondent's written submissions dated 10th November 2025, Senior Assistant Director of Public Prosecutions Mr. Omutelema acting for the state did not oppose the application. He urged this Court to take into account the fact that the sentence meted out against the applicant was heavy.
4. Rule 4 of the Court of Appeal Rules 2022 gives this Court discretionary powers to extend time. This Court in **Karny Zahrya & another vs. Shalom Levi** [2018] eKLR stated the following as issues to be considered in an application under rule 4 of this Court's Rules:

“Some of the considerations to be borne in mind while dealing with an application for extension of

time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal."

5. I have considered the reasons advanced by the applicant, the respondent's submissions and the law. It cannot be gainsaid that's the applicant lodged this application a whopping 12 years after the impugned decision was delivered. Certainly, that amounts to inordinate delay. In a quest to explain the reasons why he took long to file the present application, the applicant stated that he was on prison transfers and was unable to follow up when he was informed that his appeal did not exist.

6. What the applicant was invited to do in this application was to demonstrate when he initially filed his notice of appeal and what steps he took to follow up. He ought to have diligently attached the purported notice of appeal that was initially filed. In addition to this, I am not persuaded that the applicant made any follows ups at all to the prison authorities or informed the Court registry about his predicament. The fact that he was on prison transfer did not deter him from making the necessary follow ups.
7. The concern here is that the applicant has taken more than a decade to lodge his appeal. Those reasons are not convicting enough for this Court to exercise discretion in his favor. He ought to have been vigilant. He elected not to do so. He is the author of his own misfortune. If this application is allowed, it would set a very bad precedent of allowing an applicant to sleep on his rights for 12 years and then purport to resurrect the right of appeal without offering cogent reasons. Whereas the exercise of discretion to extend time is not limited, it is a judicious act and not an act of mercy so to speak. Accordingly, I will not hesitate

to find that the application lacks merit. It is hereby dismissed
in its entirety.

**Dated and delivered at Nakuru this 17th day of November
2025.**

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

*I certify that this is a
True copy of the original
Signed*

DEPUTY REGISTRAR

