



REPUBLIC OF KENYA



KENYA LAW
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**Magiri v Republic (Criminal Application E056 of 2025)
[2025] KECA 2092 (KLR) (28 November 2025) (Ruling)**

Neutral citation: [2025] KECA 2092 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPLICATION E056 OF 2025
S OLE KANTAI, JA
NOVEMBER 28, 2025**

BETWEEN

NICHOLAS MWITI MAGIRI APPLICANT

AND

REPUBLIC RESPONDENT

*(An application for leave to appeal out of time appeal against the
Judgment of the High court of Kenya at Kerugoya (D.K.N. Magare,
J.) delivered on 9th May, 2024 in H.C. CRA. No. E015 of 2023)*

RULING

1. The applicant, Nicholas Mwiti Magiri moves the Court by Motion dated 26th September, 2025 for an order that he be granted leave to lodge an appeal out of time against the judgment of the High Court at Nyeri delivered on 9th May, 2024 in Criminal Appeal No. E015 of 2023; that he be allowed to prosecute the appeal as a pauper due to his indigence and inability to pay court fees and that draft Memorandum of Appeal be deemed duly filed upon waiver of court fees. The application is supported by grounds on the face and by his supporting affidavit where it is stated that he was charged with the offence of defilement contrary to “section 8(1)(2)” of the *Sexual Offences Act* where he was sentenced to imprisonment for life; that in his first appeal to the High Court conviction was upheld but sentence substituted to 40 years imprisonment; that delay in filing a second appeal was occasioned by lack of legal advice and failure to promptly access the judgment and proceedings while in custody; that he is a pauper currently serving sentence at Nyeri Maximum Prison and that he cannot afford any fees; that the intended appeal raises weighty and arguable grounds of “law and fact” with high chances of



success; that no prejudice will be occasioned to the respondent if I allow the application. Further, that delay in filing an appeal was not deliberate but was due to factors beyond his control; that:

“...the intended appeal raises serious questions of law and fact, including whether the prosecution proved its case beyond reasonable doubt and whether the sentence imposed was harsh and excessive...”

2. Attached to the application is a copy of the judgment in High Court at Nyeri Criminal Appeal No. E015 of 2023 where Magare, J. on 9th May, 2024 upheld the conviction but reduced sentence to 40 years imprisonment. There is no draft Memorandum of Appeal.
3. I have not seen any response from the respondent which office was served with hearing notice on 11th November, 2025 at odppnyeri nyeri@odpp.go.ke where parties were notified of the hearing date and required to do certain things within stipulated timelines. Neither side filed written submissions.
4. The principles that govern grant or refusal to grant leave were well set out in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application No. NAI 255 of 1997 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 stated 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. The applicant gives various reasons why he did not appeal on time. A copy of judgment and proceedings of the High Court were not availed to him on time; he says that he cannot afford services of a lawyer; he is a convict in prison and could not take relevant steps to pursue an appeal on time.
6. I note that judgment of the High Court was delivered on 9th May, 2024; the application is dated 26th September, 2025. In circumstances where the applicant is a convict, unrepresented and says that he is a pauper I am prepared to hold that the delay is not so inordinate as to refuse the applicant an opportunity to pursue a second appeal. On whether the appeal has chances of success I note that the High Court substituted a life imprisonment with a sentence of 40 years imprisonment and if the appeal on conviction fails the appellant may very well be prejudiced in view of the position taken by the Supreme Court of Kenya on the issue of minimum sentences but let the applicant cross that bridge when he gets to it.
7. I allow the Motion. Let Notice of Appeal be lodged within ten (10) days and Record of Appeal twenty-one (21) days thereafter. I hereby waive court fees – documents to be received from the applicant as a pauper.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF NOVEMBER, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

