

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: OMONDI, JA, (IN CHAMBERS))

CRIMINAL APPLICATION NO. E116 OF

2024 BETWEEN

NOAH OKOTH ODHIAMBO.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Being an application for leave to file appeal out of time against the conviction and sentence of the High Court of Kenya at Kisumu (Cherere, J.) dated 13th October 2022

in

HCCRA No. 45 of 2018)

RULING

1. The applicant was convicted in the magistrate's court at Kisumu for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, and sentenced to serve life imprisonment on 17th April 2018. He was aggrieved by that outcome, and appealed to the High Court at Kisumu in High Court Criminal Appeal No. 45 of 2018 (Cherere, J.), but the appeal was dismissed on 7th March 2019.

2. He was dissatisfied with the outcome and his family undertook to engage an advocate to pursue a second appeal. The applicant ought to have filed his appeal within 14 days of the last decision made, but he failed to do so as his family only informed him after the expiry of time, that they were unable to raise funds for legal fees. He has now filed the Notice of Motion dated 3rd day of July 2024 seeking leave to file and serve the appeal out of time. He explains that the situation was further compounded by the fact that he has to date not received the record of appeal, to enable him file his appeal.
3. There is no response to this application.
4. Under rule 4 of the Court of Appeal Rules this Court is allowed to exercise its unfettered discretion as provided in the following terms:

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.

5. 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 vs. 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."

6. How long was the delay in this instance? 6 years (six). What was the reason? The applicant is a lay person incarcerated; and did not have the advantage of easily reaching the courts to ensure that his appeal was filed in a timely manner. 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 instance, in **Andrew Kiplagat Chemaringo vs. Paul Kipkorir**

Kibet [2018] eKLR, *this Court stated:*

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

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. 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 persuaded that the reason already alluded to posed a challenge to the applicant to act in a timely manner; and also, as pointed out by the respondent, the sentence the applicant is challenging is a long one which if his prayer is denied will occasion him great prejudice.
8. Ultimately, I find 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. By a copy of this ruling, the Deputy Registrar is directed to ensure the applicant is served with certified copies of proceedings and judgment from Kisumu High Court Criminal Appeal No. 45 of 2019.

Dated and delivered at Kisumu this 19th day of December, 2025.

H. A. OMONDI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR