

**IN THE COURT OF
APPEAL AT KISUMU**

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

CRIMINAL APPLICATION NO. EO26 OF

2025 BETWEEN

JAMES MUHIRI MWITA alias NYABOBE.....APPLICANT

AND

REPUBLIC.....RESPONDENT

*(Being an application seeking extension of time within
which to file an appeal against the conviction and
sentence against the judgment of the High Court of
Kenya at Migori
(Mrima, J.) dated 7th February, 2020*

in

HCCR NO. 21 of 2018)

RULING

1. James Mwihiri Mwita alias Nyabobei, the applicant herein, was charged of the offence of Murder contrary to section 203 as read with section 204 of the Penal Code vide HCCR. Case File No. 21 of 2018. After the trial, he was convicted and sentenced to suffer death by Mrima, J on 7th February, 2020 at Migori High Court. However, this sentence was commuted

to life imprisonment by the President of the Republic in the year 2023.

2. He then filed an application Migori HCCR Misc. Application No. E060 of 2024 seeking leave to file appeal out of time, but the same was dismissed in its entirety. Since then, the applicant has tried filing a notice of appeal to this Court but he has not been able to get any response from the court; that the applicant has tried to lodge his application several times but was not furnished with the judgment on time to enable him file his appeal; furthermore, he was relying on his relatives who had promised to hire an advocate for him to pursue the appeal, but this came to nought. The applicant believes that his appeal has high chances of succeeding.
3. The respondent, through the written submissions filed by learned prosecution counsel Ms. Ikol Esaba, does not oppose the application, and urges that the applicant be allowed to file a substantive appeal within reasonable timelines.
4. This Court's unfettered discretion is provided under rule 4 of the Court of Appeal Rules as follows:

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.

Although Rule 4 of the Court of Appeal Rules does not provide for factors to be considered in an application for extension of time, appropriate principles have evolved through various judicial pronouncements which courts have applied in achieving a 'just' decision in the circumstances of each case. The locus classicus case of **Leo Sila Mutiso vs. Hellen Wangari Mwangi [1999] 2 EA 231**, 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."

5. The applicant is a lay person incarcerated; and did not have the advantage of easily reaching the courts to establish the status of his appeal. 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.

6. 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.

7. 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.

Dated and delivered at Kisumu this 30th day of January, 2026.

H. A. OMONDI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR