

**IN THE COURT OF APPEAL
AT MALINDI
(CORAM: MURGOR, LAIBUTA & NGENYE,
JJ.A.) CRIMINAL APPEAL NO. E013 OF 2023**

BETWEEN

JOHN MUCHERU NJOGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Garsen (S. M. Githinji, J.) delivered on 1st March 2022

in

***Misc. App. No. E010 of
2022)***

JUDGMENT OF THE

COURT

1. We need to point out right at the outset that the scanty record of appeal before us has regrettably been compiled to exclude such vital documents as the trial court's Judgment and proceedings and the 1st appellate court's impugned ruling delivered on 1st March 2022. The net effect is that, with the contradictory pleadings making up the record of appeal, we are unable to verify: whether the appellant was charged at the Lamu or Voi Law Court; whether the appellant was charged with the

offence of defilement contrary to section 8(1) as read

with section 8 (2), or 8(3) or 8(4) of the Sexual Offences Act, 2006; and whether the appellant was sentenced to 15 years imprisonment, or to life in prison.

2. Be that as it may, we are of the considered view that this is one of those instances where, despite the cumulative effect of glaring, flagrant and inexplicable non-compliance with the Rules of this Court on the preparation of a record of appeal, this appeal should nonetheless be determined on merit.

3. From the record before us, it is evident that the appellant, John Mucheru Njogu, was charged with the offence of defilement under the Sexual Offences Act, 2006.

4. The appellant's trial proceeded and Judgment reportedly delivered on 6th January 2020 whereupon the appellant was convicted of the offence and sentenced.

5. On 24th February 2022, a year and a month later, the appellant filed a Chamber Summons dated 24th January 2022 seeking, *inter alia*, leave to appeal out of time. His application was

premised on four

grounds set out on its face, and more substantively deposed to in his supporting affidavit sworn on 24th January 2022. According to him, after the trial court's decision was delivered, his family intended to instruct an advocate to "take up the matter" but were unable to do so due to financial constrains; that they could not raise the amount charged by the advocate; that he therefore elected to take up his appeal in person; and that his intended appeal has high chances of success if heard and determined.

6. When the application came up for hearing on 1st March 2022, the learned Judge (S. M. Githinji, J.) observed that the impugned judgment was passed on 6th January 2020; that the Chamber Summons before him was filed two years later; and that the reason given for the delay was insufficient. He consequently declined to grant leave thereby sought.

7. Aggrieved by the learned Judge's decision, the appellant moved to this Court on appeal. In his undated memorandum of appeal, the appellant advanced a single ground, namely that the right to appeal

is a fundamental right. He prays that his appeal be allowed and that he be allowed to appeal out of time.

8. In support of his appeal, the appellant filed factual but undated written submissions, which he wholly relied on at the hearing on the Court's virtual platform. He submitted that he did not lodge a timely appeal because he was never provided with the trial court's proceedings and judgment; that he is still desirous of filing an appeal at the High Court; and that no prejudice will be suffered by the State if the extension of time to appeal out of time is granted.

9. In response to the appeal, the learned Prosecution Counsel, Mr.

Martin Kariuki, filed written submissions dated 6th March 2025.

Counsel cited the case of **Nicholas Kiptoo Arap Korir Salat v IEBC**

& 7 Others [2014] eKLR where the Supreme Court observed that, extension of time being a creature of equity, one can only enjoy it if he acts equitably; and that he who seeks equity must do equity. Counsel submitted that since the appellant has not

demonstrated the steps taken to obtain copies of the impugned Judgment or the inability to do so, then this appeal should be dismissed.

10. During the virtual hearing of this appeal on 19th May 2025, counsel took a different position and informed the Court that he was not opposed to the appeal; and that no serious prejudice would be suffered by the respondent if the appeal was allowed.

11. While we take to mind the learned Prosecution Counsel's unreserved concession to the appeal, it would be remiss of us not to pronounce ourselves on the single issue raised in this appeal, namely: whether, in exercise of his discretion, the learned Judge acted judiciously.

12. The discretion of the High Court to extend time to lodge an appeal is expressly provided for in the proviso to section 349 of the Criminal Procedure Code, which reads:

349. Limitation of time of appeal

An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a

copy of the record, within a reasonable time of applying to the court therefor.

13. The ***Black's Law Dictionary*** (Tenth Edition) defines 'judicial discretion' as:

"The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

14. In the same vein, the Supreme Court of Kenya pronounced itself on the Court's discretion to extend time to lodge an appeal in the case of **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet** [2018] eKLR and observed that **"... 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."** [Emphasis ours] See also **Tobiko Ole Sandera v Republic** [2024] KECA 782 (KLR)

15. In addition to the afore-cited authorities, we are mindful of the constitutional edict enshrined in Article 159(2) (d), which enjoins courts to administer justice “... *without undue regards to procedural technicalities*”. The Supreme Court put it more succinctly in the case of **Nicholas Kiptoo Arap Korir Salat v**

Independent Electoral and

Boundaries Commission & 7 Others (supra) where it observed that:

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”

16. The Court proceeded to set out the conditions for extension of time to file an appeal as follows:

“i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court; ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; iii. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis; iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; v. Whether there will be any prejudice suffered by the respondents if the extension is granted; vi. Whether the application has been brought without undue delay; and

vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

17. It is common ground that grant of leave to lodge an appeal out of time is at the discretion of the Court exercisable in favour of the applicant in cases where it is shown that the delay was not unreasonable; that sufficient reasons are given for the delay; and that no prejudice would be occasioned to the respondent by grant of the orders sought.

18. The Prosecution Counsel concedes that no prejudice would be suffered by the State; that the appellant deserves the opportunity to be heard on his intended appeal which, reading from the grounds of appeal, merits this Court's scrutiny. We also take to mind the fact that, although the appellant has not demonstrated that he has requested for a copy of the impugned trial court's judgment, none seems had been supplied to him, neither is one unsurprisingly not included in this record of appeal; that the delay was further contributed to by his family's inability to secure funds to instruct an advocate; and that he was all the while confined in prison and unrepresented by counsel. All these are factors that the learned Judge ought to have taken into consideration.

19. Having carefully considered the appeal, the grounds on which it is anchored, the submissions, the cited authorities and the law, we find that the appeal has merit and is hereby allowed. Consequently, the ruling and orders of the High Court of Kenya at Garsen (S. M. Githinji, J.) dated 1st March 2022 are hereby set aside and substituted for an order that the appellant do lodge his intended appeal within thirty (30) days from the date of supply to him of the impugned judgment. It is so ordered.

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

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR