

**IN THE COURT OF APPEAL
AT KISUMU**

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

CRIMINAL APPLICATION NO. E052 OF

2024 BETWEEN

DAVID ONGASIA.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Being an application for leave to file an appeal out of time against the judgment of the High Court of Kenya at Kakamega (Obaga, J.) dated 2nd February, 2008

in

HCCRA No. 54 of 2008)

RULING

1. David Ongasia, the applicant was convicted of robbery with violence and sentenced to life imprisonment; aggrieved by the outcome he appealed to the High Court, but the appeal was dismissed via a judgment delivered on 2nd February, 2008 (Obaga, J). He was aggrieved by the outcome but failed to file his appeal. He has now lodged a Notice of Appeal in 2024, which was evidently out of time. The applicant by an application dated 10th December 2024, seeks leave to appeal

out of time, saying there was delay in availing to him the record of appeal.

2. The respondent in opposing the application states that judgment having been delivered in 2008, the delay in filing the Notice of Appeal is inordinate given that no sufficient reasons have been adduced to support the application.
3. I have considered the application, the grounds in support thereof, submissions filed by the respondent; and bearing in mind that in an application of this nature, the court is allowed to exercise its discretion. The issue for determination is whether the applicant is deserving of the orders sought. The discretion that I am called to exercise in the determination of this application is unfettered and is provided under rule 4 of the Court of Appeal Rules which provides 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.

4. 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."

5. In **Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees, Civil Application No.190 of 2019** observed that:

"Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, 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.”

6. How long was the delay in this instance? Seventeen (17) grand years, with no evidence of even a request for the proceedings and judgment, not even an attempt in good faith to file the Notice of the appeal albeit without the record. What reason would the Court have in exercising a favourable discretion in the applicant's favour I find none.
7. Consequently, I hold that the application lacks merit and is dismissed.

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