

**IN THE COURT OF
APPEAL AT
ELDORET**

**(CORAM: GACHOKA, J.A - IN
CHAMBERS) CRIMINAL APPLICATION NO.
E011 OF 2025**

BETWEEN
JOHNSTONE EKAI.....APPLICANT
AND
REPUBLIC

.....
RESPONDENT

(An application for leave to appeal out of time against the conviction and sentence of the High Court of Kenya at Eldoret (Mukira, J.) delivered on 26th March 2023)

in

HCCRA No. E097 of 2022)

RULING

1. In his Notice of Motion dated 20th April 2025, the applicant seeks leave of this Court to appeal out of time from the conviction and sentence upheld by the Eldoret High Court in ***HCCRA No. E097 of 2022***. The applicant was charged in ***Eldoret CM (SO) Case No. 179 of 2019*** with the offence of incest contrary to section 20 of the Sexual Offences Act. The trial court convicted him as charged and sentenced to life imprisonment. The appellant appealed before the Eldoret High Court. In his judgment dated 20th March 2023, *Mukira, J.* dismissed his appeal on both

conviction and sentence.

2. The applicant is aggrieved by those findings. In support of his application, the applicant annexed his supporting affidavit sworn

on 30th April 2025. He urged this Court to allow his application. The applicant did not annex a memorandum of appeal but in this supporting affidavit and grounds in support of the application. He attributes the delay to the failure to be supplied with the High Court Judgment and states that the intended appeal has a high chance of success.

3. The respondent did not oppose the application. Through S.G Thuo, Principal Prosecution Counsel, it filed written submissions dated 3rd February 2026. It was submitted that the applicant's explanation was plausible and that the applicant's continued incarceration lends weight to that explanation. He was therefore deserving of the exercise of the discretionary powers donated to this Court.
4. The discretion set out in rule 4 of the Court of Appeal Rules, 2022 is wide and discretionary. The guiding principles are not exhaustive. However, the Court is urged to take into account the length of delay involved, the reasons for delay, possible prejudice on any party, the conduct of the parties, the need to balance competing interests, the need to protect a party's opportunity to fully litigate his or her dispute and the chances of succeeding. (See

Henry Mukora Mwangi vs. Charles Gichina Mwangi, Civil Application No. Nai. 26 of 2004.)

5. I have considered the reason advanced by the applicant, the respondent's written submissions and the law. The applicant states that up to now, he has not been supplied with copies of the proceedings. I note that the delay in filing the application is about 2 years. In my view, the explanation given by the applicant is plausible.
6. In the interest of justice, I am satisfied that the application has met the threshold for the exercise of discretion by this Court. Let the applicant have his day in Court. Accordingly, the applicant shall file his notice of appeal within 14 days from the date of this order. Thereafter, the record of appeal shall be filed and served within 45 days.

Dated and delivered at Eldoret this 20th day of February, 2026.

M. GACHOKA C.Arb, FCI Arb.

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR