

IN THE COURT OF

APPEAL AT

ELDORET

**(CORAM: GACHOKA, J.A - IN
CHAMBERS) CRIMINAL APPLICATION NO.
E034 OF 2024**

BETWEEN

JOAB ISIELA MALWENYI.....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 (H. Omondi J.) delivered on 20th February, 2019.

in

HCCRA No. 14 of 2018)

RULING

1. In his Notice of Motion dated 6th June 2024, 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. 14 of 2018***. The applicant was charged in ***Eldoret CM (SO) Case No. 2404 of 2012*** with the offence of defilement contrary to section 8(1) as read with 8(2) 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 her

judgment dated 20th February 2019, *Omondi, J.* (as she then was) 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 unsworn supporting affidavit. He urged this Court to allow his application. He annexed a notice of appeal dated 6th June 2024 though the date of filing is not shown and it is not clear whether it was filed in Court. He also filed a homemade memorandum of appeal raising 3 grounds.
3. The respondent did not oppose the application. Through Senior Principal Prosecution counsel Mr. S.G Thuo, it filed written submissions dated 3rd February 2026. While conceding that the applicant had not specified any grounds for the delay, the respondent nonetheless urged this Court to treat his continued incarceration as a plausible reason for the delay and to exercise its discretion in his favour.
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 impugned judgment was delivered on 20th February 2019. This application was filed on 6th June 2024, culminating in a delay of over five years. The applicant is silent on what occasioned this prolonged inaction, and the Court is left to speculate. While the applicant has filed a notice of appeal indicating an intention to appeal, this does not explain the delay. Intention is merely a starting point. I take judicial notice that the applicant is currently serving a life sentence and I am alive to the difficulties that this brings. But many inmates do pursue their appeals and the law does not exempt a prisoner from the basic obligation of demonstrating diligence in pursuing his appeal. The applicant could have written to the court registry bespeaking proceedings or petitioned the Officer in Charge of his prison for assistance, or sought help

from a legal aid organisation. He has not demonstrated that any of these avenues were attempted.

6. Accordingly, the application is dismissed.

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

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

