

**IN THE COURT OF APPEAL OF
KENYA AT KISUMU**

(CORAM: OMONDI, JA (IN CHAMBERS))

CRIMINAL APPLICATION NO. E049 OF

2025 BETWEEN

JAMES ODHIAMBO OTIENO.....APPLICANT

AND

REPUBLIC.....RESPONDENT

*(Being an application to appeal out of time against
the judgment of the High Court of Kenya at Kisumu
(F. Ochieng, J.) dated 10th June 2020*

in

HCCR Case No. 23 of 2018)

RULING

1. James Odhiambo Otieno, the applicant herein was charged in Ksm. High Court Criminal Case No. 2 of 2018 with the offence of murder contrary to section 203 as read with section 204 of the Penal Code and sentenced to thirty years imprisonment. He was aggrieved by the decision; and ought to have lodged his appeal within 14 days of the outcome, but he did not.
2. Dissatisfied by that outcome, the applicant wishes to appeal to this Court, but realises that the time within which

to file his

appeal has lapsed, so he has now filed the Notice of Motion dated 22nd May, 2024, seeking leave to file and serve the appeal out of time. He explains that he tried to lodge his appeal several times without success and the delay was due to the fact that he was not furnished with the High Court proceedings and judgment in a timely manner as to enable him file his appeal.

3. Learned Principal Prosecution Counsel, Mr. Mwangi on behalf of the respondent points out that the power to extend time is a discretionary one, which is only exercisable by the Court upon a satisfactory reason being given; that the entire period of delay has to be stated and reasonably explained to the satisfaction of the court; and that in considering whether to extend time, the Court is obliged to also consider whether the intended appeal is arguable and has chances of success, hence not frivolous.
4. While contending that there has been inordinate delay in the period within which the appeal ought to have been filed, counsel nonetheless acknowledges that the applicant is incarcerated, representing himself and given the nature of the

sentence being served, to wit imprisonment for conviction of Murder, he does not oppose the application.

5. In this matter, the decision sought to be appealed was delivered on 27th May, 2021, which is about 3 years, prior to filing this application. Is there any reason to warrant the Court's favourable discretion? This court is allowed to exercise its unfettered discretion as 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.

6. 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.”

7. Some of the considerations 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. This was extensively discussed in the case of the case of ***Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees Application No.190 of 2019***

[2020] eKLR

8. The delay in this instance is 3 years (three); and the reason is that the applicant a lay person is incarcerated; and did not have the advantage of easily reaching the courts to establish the status of his records of 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. See for instance the case of **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR.**

9. Under Rule 61 (1) of this Court's Rules:

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.

Undoubtedly, the appeal ought to have been lodged within 14 days of the delivery of the decision which it seeks to appeal; that did not happen. I am however satisfied that the reasons already alluded to posed a challenge to the applicant to act in a timely manner.

11. The upshot is 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 13th day of February, 2026.

H. A. OMONDI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR