

**IN THE COURT OF APPEAL
AT NAIROBI
CRIMINAL APPLICATION NO. E037 OF 2025
(CORAM: ONGU'DI, JA (IN CHAMBERS))**

BETWEEN
REPUBLIC.....APPLICANT

AND

DAVID NJAU WAMBUGU.....1ST
RESPONDENT MARK PHILIP
WAMBUGU.....2ND RESPONDENT SAMUEL
MUITA NJAU.....3RD RESPONDENT
CHRISTINE WANJIKU NJAU.....4TH
RESPONDENT JANET WANJIKU
NJAU.....5TH RESPONDENT POLYCHEM
EAST AFRICA LIMITED.....6TH RESPONDENT

(Being an application for leave to appeal out of time against the judgment of (Mwita, J) delivered on 10th March, 2026

in
High Court Judicial Review Petition No. 2019 of 2024)

RULING

1. This ruling is in respect of the Notice of Motion dated 10th May 2025 and filed by the Director of Public Prosecution (DPP). The application is brought under Rule 4 and Rule 44 of the Court of Appeal Rules 2022; Article 159 of the Constitution and all other enabling laws. The Applicant seeks the following orders:

(a) That this honourable court be pleased to grant leave to the applicant to file the notice of appeal annexed to the applicant's affidavit out of time.

(b) Any orders that are meet and just in

the circumstances.

2. The application is premised on the grounds on its face plus

the applicant's supporting affidavit. The 1st to 6th

Respondents filed a replying affidavit sworn by David Njau Wambugu (1st Respondent) opposing the application. The 7th and 8th Respondents plus the interested party did not file any responses though served.

3. The Applicant is the Office of the Director of Public Prosecutions. The application is supported by the affidavit of Peter Mailanyi, a prosecution counsel sworn on 20th May, 2025. It is the Applicant's case that the impugned judgment has prohibited its office from pursuing investigations and prosecution of the 1st to 6th Respondents in **Nairobi**

**Magistrate's Court Criminal Case No. 391
of 2019,**

Republic Vs. David Njau Wambugu & Others.

4. The Applicant has referred to the factual findings by the Hon. Judge in respect of HCC No. 310 of 2017 to the effect that the said Civil Case was the basis of the Criminal Case whose proceedings the High Court had by the impugned judgment stopped. In the supporting affidavit the deponent has explained the confusion that arose after service of the Notice of Appeal by the Interested Party at the applicant's office. He deponed that their record

showed that they had filed the Notice of Appeal which was not the case. This was only

discovered when he was working on the grounds of appeal. He averred that this was the main cause of the delay.

5. Additionally, the Applicant has annexed to the application its proposed grounds of appeal dated 20th day of May 2025. In total there are eight (8) proposed grounds raised. Also annexed is a draft Notice of Appeal. The Applicant thus avers that it has raised arguable grounds of appeal with high chances of success.
6. The 1st Respondent filed a replying affidavit on his own behalf and on behalf of the 2nd to 6th Respondents with their authority. The said affidavit was sworn on 19th February 2026. He averred that on 22nd May 2025 when the present application was filed, it was seventy three (73) days since the delivery of the impugned judgment. That this was outside the 14 days period for filing a Notice of Appeal. Referring to the supporting affidavit he averred that no documentary evidence was availed to support the averments therein. Furthermore, that Mr. Mailanyi admitted having been aware of the omission to file the Notice of Appeal 30 days after judgment and so there was no good reason as to why this application was filed on 22nd

May 2025.

7. The 1st Respondent further deponed that lapses in the applicant's office was not sufficient reason for this court to exercise discretion under t Rule 4 of the Court of Appeal Rules. It is his position that the delay is inordinate and inexcusable and allowing the application would be unjust and prejudicial to the 1st to 6th Respondents. Finally, that it had not been shown that the intended appeal raises arguable grounds or has reasonable prospects of success nor any prejudice it would suffer if the application is declined.
8. The Applicant's submissions were filed by Ms. Njoki Keng'aara, Principal Prosecution Counsel and are dated 17th February 2026. Counsel reiterated its grievances as set out in the grounds and affidavit in support of the application as well as the proposed grounds of appeal. She submitted that it would be in the interest of justice for this Court to determine the issues raised at the intended appeal especially on the proper application of section 193A of the Criminal Procedure Code. Finally, that the intended appeal is brought in public interest in line with the Applicant's function under Article 157(II) of the Constitution, which transcends the interest of the

Respondents and Interested Parties herein.

9. The 1st to 6th Respondents' submissions were filed by Iseme, Kamau and Maema Advocates and are dated 19th February 2026. Counsel in reference to Rule 77(2) and Rule 4 of the Court of Appeal Rules, 2022 submitted that it is settled law that extension of time is a discretionary and equitable remedy and is only available to a deserving applicant. He went ahead to set out the governing principles as he referred to the cases of: **Salat Vs. IEBC & 7 Others (Application No. 16 of 2014)** and **Leo Slla Mutiso Vs. Hellen Wangari Mwangi [1999] 2 EA, 231.**
10. On whether the Applicant has provided a reasonable explanation for the delay, counsel referred to ground 1 of the application and paragraph 3 of the supporting affidavit. He argued that no documentary evidence was produced to support the allegations. See, **Nicholas Kiptoo Arap Korir Salat Vs. IEBC & Others (Civil Appeal No. 228 of 2013) KCCA 113 (KLR)(Civil) 22nd November 2013)** Ruling. He submitted that internal disorganisation and administrative lapses was not sufficient reason to justify delay.
11. Counsel, further contended that a delay of 73 days in the absence of any cogent explanation was manifestly

unreasonable. He relied on **MSA Vs. KMKA (Civil**

Application No. E123 of 2024) [2024] KECA, 1222 (KLR

(20th September 2024) (Ruling) to support this contention. He further submitted that the respondents would suffer prejudice if the application is granted as they are entitled to certainty and finality in litigation.

12. Finally, Counsel submitted that the Applicant had failed to set out a case to warrant this Court's exercise of discretion. He called for the dismissal of the application.
13. Having carefully considered the application, affidavits and both submissions, I find the main issue for determination to be whether the said application has merit. In evaluating a request for leave to file appeal out of time there are clear laid down principles in several decisions which must be considered by the court. In the case of **Nicholas Kipto Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 Others [2014] KESC, 12** the Supreme Court clarified that extension of time is a discretionary power based on reasonable justification for delay, rather than an automatic right with the burden of proof on the applicant. Therefore, the principles for consideration are:

- **Length of the delay.**

- **The reason for the delay.**
- **Whether the appeal is arguable.**

- **Whether the respondent will be prejudiced if the application is allowed.**

14. There is no dispute that the Applicant did not comply with Rule 77 (2) of the Court of Appeal Rules, 2022 which requires a Notice of Appeal to be filed within fourteen (14) days after the date of the impugned decision. In this case the decision sought to be appealed against was delivered on 10th March 2025. The application seeking extension of time is dated 20th May 2025 and was filed on 22nd May 2025. This was a delay of 58 days. Has this delay been satisfactorily explained as required? From the grounds and the supporting affidavit filed it is clear that the mistake was as a result of carelessness in the Applicant's office. The said office became aware of the error 30 days after the lapse of the 14 day period. No action was taken until after 18 days which I find to be an irresponsible state of affairs for a distinct office as that of the Applicant.

15. However, moving onto the issue of an arguable appeal, I have read the impugned judgment and the proposed grounds of appeal. The main grounds touch on the interpretation of Section 193A of the Criminal Procedure Code, Section 273 of the Penal Code, and on the findings by the Court based on

the facts presented before it.

These can not be said to be minor issues, which should be overlooked by this Court. I therefore find the intended appeal to be arguable and fit for full hearing by the Court.

16. The Respondents will not be prejudiced if leave is granted, the reason being that it is in their own interest and that of others that the issues on the interpretation and application of the above stated provisions is made clear. It is thus a matter which has an element of public interest. The above being the position, I find merit in the application dated 20th May 2025 which I allow and grant the Applicant leave to file appeal out of time.

17. The Notice of Appeal annexed to the application is not dated.

I therefore grant the applicant seven (7) from today's date to file and serve a proper Notice of Appeal.

It is so ordered.

Dated and delivered at Nairobi this 13th day of March 2026.

H. ONG'UDI

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JUDGE OF APPEAL

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

Signed

DEPUTY
REGISTRAR.