

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISC CRIMINAL APPLICATION NO E108 OF 2025

SAMSON

KIPTUM

TOO.....APPLICANT

VERSUS

REPUBLIC.....

RESPONDENT

Coram: Before Justice R. Nyakundi

M/s Sidi for the State

RULING

1. Before this court is Notice of Motion expressed to be brought under Section 349 of the Criminal Procedure Code in reliance to Article 48 of the constitution of Kenya 2010, dated on 15th day of July 2025 seeking the following orders:
 - a. *That the delay to file my appeal was not deliberate.*
 - b. *That I now pray to be granted leave to appeal out of time*
 - c. *That my appeal has high chances of success.*
2. In support of the application is the annexed affidavit of Samson Kiptum Too who deponed as follows:
 - a. *That I am a male adult Kenyan citizen of sound mind capable of swearing affidavit.*
 - b. *That I know of my own knowledge that I was convicted and sentenced to 15 years imprisonment for the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006.*
 - c. *That I know of my own knowledge that I was informed of my right to appeal within 14 days.*

- d. That I did not lodge an appeal within a stipulated time due to my brother promised to hire for me an advocate hence ended in vain.
- e. That I now pray to be allowed to appeal out of time because my delay was deliberate.
- f. That I have knowledge that my appeal has high chances of success.

Decision

3. This is an application for extension of time for an applicant who ran out of time. The applicable provision is Section 348 & 349 of the CPC. There is also constitutional imperative under Article 48 on access to justice of our very own constitution. It is also well settled that a right of appeal is Constitutional as is provided in the Constitution. The right being Constitutional therefore, it stands to override most other negative principles aimed at its fore closing. The rider also stands clear that the exercise of this right is only permissible within limit as provided by law. In other words, the right is lost outside the prescribed statutory period allowed but will only be exercisable by leave of court; hence the reason seeking an order for leave and extending the time within which to appeal. While the Constitutional right cannot be extended if the applicant fails to adduce good and substantial reason for obliging the application, the court will not also hesitate to exercise its discretion in favour thereof provided sufficient materials and reason are contained in the affidavit to justify the exercise. The applicant must depose to facts on the affidavit which ought to state sufficient reasons explaining the delay. **See E.F.P. Co. Ltd. V. N.D.I.C. (2007) 9 NWLR (Pt.1039) P.216." Per OGUNBIYI, J.S.C. (P.16.paras. A-F)**
4. In accordance to the principles of **Paul Wanjohi Mathenge Vs Duncan Gichane Mathenge [2013] eKLR** the questions which must be answered before extension of time is granted are clearly laid down as follows:

*"The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In **Henry Mukora Mwangi v Charles Gichina Mwangi-Civil Application No. Nai 26 of 2004**, this Court held;*

*"It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in **Mwangi Vs Kenya Airways Ltd [2003] KLR 486** in which this court stated: -"Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in **Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi-Civil Application No Nai. 255 of 1997 (unreported)**, the Court expressed itself thus: -*

"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. The law is also trite and well settled that the discretion vested in a court is required to be exercised judicially and judiciously as it entails application of legal principles to relevant facts/materials to arrive at a just/equitable decision as rightly submitted by the learned counsel for the appellant. Discretion is thus not an indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by the law or the equitable decision.
6. In summary therefore there is sufficient cause to grant the applicant extension of time to file an appeal out of time. The Deputy Registrar shall henceforth supply the record of appeal within 30 days from today's date. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 16TH
DAY OF MARCH 2026**

.....
**R. NYAKUNDI
JUDGE**