

**IN THE COURT OF APPEAL  
AT NAIROBI**

**(OKELLO, JA. (IN CHAMBERS))**

**CRIMINAL APPLICATION NO. E041 OF**

**2025 BETWEEN**

**ALEX MULI KANYILI.....APPLICANT**

**AND**

**REPUBLIC**

.....

**RESPONDENT**

*(An application for extension of time to file an appeal out of time against the conviction and sentence in of the High Court of Kenya at Makueni (C. Kariuki, J.) delivered on 27<sup>th</sup> July, 2017*

*in*

***HC.CR.A. No. 106 of 2017)***

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**R U L I N G**

1. By a Notice of Motion dated 22<sup>nd</sup> June, 2025 the applicant, applied for leave to file the Notice and Memorandum of Appeal out of time against the judgment delivered on 27<sup>th</sup> July, 2017 in High Court Criminal Appeal No. 106 of 2017 at Makueni.
2. The matter came up for hearing by way of written submissions on 20<sup>th</sup> April, 2026. However, there were no written

submissions filed

by both parties. There was proper service effected on 13<sup>th</sup> April, 2026.

3. The applicant's case is premised on the grounds stated on the face of the application and the supporting affidavit of the applicant herein. The respondent did not file any response to the application.
4. In the application and the supporting affidavit therein, the applicant avers that he was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, 2006 and was sentenced to life imprisonment. The applicant avers that he be allowed to file the appeal out of time that he has been trying to appeal without success. He has deposed the same grounds in his supporting affidavit and further prays that being a pauper, he be exempted from any court fee that may apply in this application. The applicant has attached a draft Notice of Appeal, draft memorandum of appeal and the judgment from the High Court. The applicant is therefore seeking for extension of time on a second appeal.

5. He further deposed that since he had expressed his intention to appeal, he be granted leave to file his appeal out of time.
6. The application is not opposed by the respondent.
7. Rule 4 of the Court of Appeal Rules provides:

*“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.”*

8. Under Rule 4 of the Court of Appeal Rules, 2022, an extension of time is a discretionary power grantable on well settled principles. In **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi [1991] eKLR**, the Court set out the principles to include the length of the delay, the reason for the delay, the chances of the appeal succeeding, the degree of prejudice to the respondent, and the conduct of the parties. The principles that guide this Court in determining whether to extend time pursuant to Rule 4 of the Rules of this Court were rehashed in **Mwangi vs Kenya Airways [2003] KLR 486 at page 489**

the Court stated thus:

*“Over the years, the Court has set out guidelines on what a single judge should consider when dealing with an application for extension of time under Rule 4. For instance, in **Leo Sila Mutiso v Rose Hellen***

***Wangari Mwangi, (Civil Application No. Nai. 255 of 1997)**, the Court expressed itself thus: It is now well settled that the decision whether to extend the time 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 appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”*

9. The principles enunciated are the principles I proceed to apply in the instant case in determining whether the prayers sought by the applicant in the Notice of Motion dated 17<sup>th</sup> February, 2025 should be granted. The applicant’s prayers are that the Honourable Court extend time and grant leave to allow the applicants file notice of appeal and the Memorandum of Appeal out of time against the judgment dated 27<sup>th</sup> July, 2017 in Makueni HCCRA No. 106 of 2017, and that the notice of appeal be deemed as duly filed and further that the applicant be allowed to file the memorandum of appeal out of time. The

applicants further pray that the cost of this application be in the cause.

10. Having considered the application, the supporting affidavit, the law, this Court is now called upon to determine whether the application meets the threshold for enlargement of time.

**11.** The Supreme Court of Kenya pronounced itself in the question of extension of time in the case of **Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR**, and stated thus:

*“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”*

12. Noting that the notice of appeal ought to have been filed on or before **10<sup>th</sup> August, 2017** and that the application for leave to file an appeal out of time has been filed eight years after the said date, and further that no satisfactory explanation and justification has been given, I find that the delay is inordinate and undeserving of this Court’s discretion to extend the time.

13. Therefore, having considered the application, the supporting

affidavit and the law, Rule 61(1) of the Court of Appeal Rules, 2022 provides that a person who desires to appeal to the Court

shall give notice 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. The judgment the subject of appeal was delivered on **27<sup>th</sup> July, 2017** while the instant application is dated **17<sup>th</sup> February, 2025**, which is eight years after the delivery of the High Court judgment. This Court cannot countenance the applicant's indolent.

14. On the reason for delay, the applicant, deposed in his supporting affidavit sworn and filed on **17<sup>th</sup> February, 2025** that the delay in filing the notice and record of appeal was attributed to the fact that he has been trying to lodge an appeal in vain. He has however not produced an iota of evidence to show these alleged attempts to appeal.
15. He concludes in his affidavit by stating that he is a pauper hence applying that he be exempted from any court fee that might apply in this application. He closes his averment by praying for leave to file appeal out of time due to his earlier intention to appeal.

This prayer has been granted and that is why this matter is before this Court.

16. On whether there are chances of success, I have to consider whether there is a single arguable ground that has been raised by the applicant. This being a second appeal, this Court is restricted to matters of law. Be that as it may, I have had the occasion of perusing the grounds of appeal as provided on the face of the draft memorandum of appeal and the judgment of the superior court and I'm persuaded that this appeal is not arguable.
17. Finally, on the degree of prejudice, the applicant is praying for leave to appeal against conviction and sentence on the offence of defilement contrary to Section 8(1)(4) of the Sexual Offences Act, 2006. The offence was committed on 22<sup>nd</sup> December, 2011, that is fifteen years ago. Litigation has to come to an end and resurrecting this matter is definitely prejudicial to the respondent and the public at large.

18. The upshot of this is that the applicant has not persuaded this Court that his application is deserving. This Court therefore, finds no merit in the notice of motion dated 22<sup>nd</sup> June, 2025.

**19. CONSEQUENTLY, for the reasons stated, the notice of motion dated 22<sup>nd</sup> June, 2025 is dismissed.**

**Dated and delivered at Nairobi this 30<sup>th</sup> day of April, 2026.**

**DR. J. O. OKELLO**

.....  
**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR.**

