



**Mohamed v Republic (Criminal Appeal E110 of 2023)
[2025] KECA 927 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 927 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL E110 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MARCH 7, 2025**

BETWEEN

OMAR MOHAMED APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Garsen (S. M. Githinji, J.) dated 1st November 2023 in Misc. App. No. E024 of 2023)

JUDGMENT

1. The appellant, Omar Mohamed, was charged in the Principal Magistrate’s Court at Hola in Sexual Offence Criminal Case No. 13 of 2020 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, 2006.
2. The appellant’s trial proceeded before the Principal Magistrate’s Court at Hola and judgment delivered on 10th April 2021 whereupon the appellant was convicted of the offence as charged and sentenced to life imprisonment.
3. On 16th September 2023, almost two-and-a-half years later, the appellant filed an undated Chamber Summons seeking, inter alia, leave to appeal out of time. His application was premised on two grounds set out on its face, and more substantively deposed to in his supporting affidavit sworn on 16th September 2023. According to him, he was unable to “write” his appeal in time “since the trial court’s judgment was not supplied” to him; and that his intended appeal has high chances of success if heard and determined.
4. When the matter came up for hearing on 1st November 2023, the learned Judge (S. M. Githinji, J.) observed that what was before him was an application for leave to appeal out of time; that the lower court judgment was delivered on 10th April 2021; that a period of two years had passed since then; and



that the delay was not sufficiently explained. He found the appellant's application devoid of merit and declined to grant leave thereby sought.

5. Aggrieved by the learned Judge's decision, the appellant moved to this Court on appeal. In his undated memorandum of appeal, the appellant set out four grounds of appeal, namely that the learned Judge erred in law in: failing to consider that the appellant had given sufficient reason of his inability to obtain a copy of the lower court's judgment within a reasonable time through no fault of his own; failing to appreciate that there was no limitation period provided for inordinate delay; failing to appreciate that the appellant was entitled to constitutional rights under Articles 25(c) and 50(1) and (2) of the *Constitution*; and in failing to consider that the ruling subjected the appellant to discrimination, denial of access to justice, freedom and security of a person and fair administrative action by condemning him to life imprisonment while his appeal has high chances of success. He prays that his appeal be allowed; that the Order dated 1st November 2023 but issued on 16th November 2023 be set aside; and that he be allowed to appeal out of time.
6. In support of his appeal, the appellant filed undated written submissions, which he wholly relied on at the hearing on the Court's GoTo virtual platform. He cited the case of *Natasha Singh v CBI (State) (2013) 5 SCC 741* reproducing a passage from this Supreme Court of India decision where it was held that "a fair trial is the main object of criminal procedure and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner".
7. The appellant further submitted that he applied for a copy of the impugned judgment; that it was and has never been availed; that, owing to the restrictions imposed during the COVID-19 pandemic, it was "difficult accessing the court registry"; that he was transferred from Malindi Prison to Manyani Maximum Prison in 2023, further making access to the court registry challenging; that he eventually managed to file the dismissed Chamber Summons; that the Summons were heard and determined *ex parte*; and that he was condemned unheard.
8. In response to the appeal, the learned Principal Prosecution Counsel, Ms. Ongeti, filed written submissions dated 4th October 2024. Counsel cited the case of *Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA* where this Court held that the decision to extend time was discretionary and thereafter set out the factors that this Court ought to take into consideration in deciding whether to grant extension of time.
9. Counsel submitted that the appellant's two-year delay was extensive; but that the explanation advanced by the appellant was valid; that, considering the nature of the appellant's sentence, he "ought to be given the benefit of doubt"; and that no serious prejudice would be suffered by the respondent if his appeal was granted.
10. While we take to mind the learned Principal Prosecution Counsel's unreserved concession to the appeal, it would be remiss of us not to pronounce ourselves on the single issue raised in this appeal, namely: whether, in exercise of his discretion, the learned Judge acted judiciously.
11. The discretion of the High Court to extend time to lodge an appeal is expressly provided for in the proviso to section 349 of the *Criminal Procedure Code*, which reads:

349. Limitation of time of appeal

An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if



it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.

12. The Black's Law Dictionary (Tenth Edition) defines judicial discretion as:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right.”

13. In the same vein, the Supreme Court of Kenya pronounced itself on the Court's discretion to extend time to lodge an appeal in the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR and observed that “... 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.” [Emphasis ours] See also *Tobiko Ole Sandera v Republic* [2024] KECA 782 (KLR)

14. In addition to the afore-cited authorities, we are mindful of the constitutional edict enshrined in Article 159(2) (d), which enjoins court to administer justice “... without undue regards to procedural technicalities”. The Supreme Court put it more succinctly in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR where it observed that:

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse.

Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”

15. The Court proceeded to set out the conditions for extension of time to file an appeal as follows:

- “i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court; ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; iii. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis; iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted; vi. Whether the application has been brought without undue delay; and vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



16. It is common ground that grant of leave to lodge an appeal out of time is at the discretion of the Court exercisable in favour of the applicant in cases where it is shown that the delay was not unreasonable; that sufficient reasons are given for the delay;

and that no prejudice would be occasioned to the respondent by grant of the orders sought. The Principal Public Prosecution Counsel concedes that no prejudice would be suffered by the State; that the appellant deserves the opportunity to be heard on his intended appeal which, reading from the grounds of appeal, merits this Court's scrutiny. We also take to mind the fact that, although the appellant had requested for a copy of the impugned judgment, none had been supplied; that, all this while, he has been patiently waiting for positive response to his request; that the delay was further contributed to by his transfer to a prison outside the jurisdiction of the trial court; and that he was all the while unrepresented by counsel. All these are factors that the learned Judge ought to have taken into consideration.

17. Having carefully considered the appeal, the grounds on which it is anchored, the rival submissions, the cited authorities and the law, we find that the appeal has merit and is hereby allowed.

Consequently, the ruling and orders of the High Court of Kenya at Garsen (S. M. Githinji, J.) dated 1st November 2023 are hereby set aside and substituted for an order that the appellant do lodge his intended appeal within thirty (30) days from the date of supply to him of the impugned judgment. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL*

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

