



REPUBLIC OF KENYA



**Makayo v Republic (Criminal Application E152 of 2024)
[2025] KECA 1052 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1052 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPLICATION E152 OF 2024
MSA MAKHANDIA, JA
JUNE 13, 2025**

BETWEEN

BARASA NAKITARE MAKAYO APPLICANT

AND

REPUBLIC RESPONDENT

(Being an Application for leave to file Appeal out of time from the Judgment of the High Court at Bungoma, (Mbogholi, J.) dated 24th September 2009. in HCCRA No. 276 of 2009)

RULING

1. The application before me is undated. Nonetheless, it seeks that Barasa Nakitare Makayo, “the applicant”, be granted leave to file an Appeal out of time from the Judgment of the High Court at Bungoma, (Mbogholi, J., as he then was) dated 24th September, 2009.
2. The application is supported by the grounds on its face as well as the applicant’s own affidavit deposed on 2nd October, 2024. In short, the applicant seeks to invoke the Court’s discretion for extension of time on the following pleaded facts:

The applicant was charged, tried and convicted by the Chief Magistrate’s Court at Bungoma for the offence of robbery with violence contrary to Section 296(2) of the [Penal Code](#). Upon conviction he was sentenced to death which sentence has since been commuted to life imprisonment. His appeal against both conviction and sentence in the High Court of Kenya at Bungoma was dismissed by Mbogholi J., on 24th September, 2009.

3. Desirous of lodging a second and perhaps last appeal to this Court, the applicant was prevented from doing so on account of the strict statutory timelines set by the Rules of this Court. He has now approached this Court under Rule 4 of our rules, seeking that the time limited for the filing of an appeal under our rules be enlarged, to enable him file his intended appeal.



4. The applicant in his affidavit in support of the application claims that immediately after the dismissal of his first appeal, and whilst at Bungoma prison, he lodged an appeal to this Court. However, the documentation office at the said facility did not transmit the appeal to this Court's registry. He only came by this information a year later, having been transferred to Kakamega main prison. At this facility, he was once again assisted to lodge an appeal but he later realised the same was not registered. The next stop was at Kamiti Maximum Prison where he was successfully assisted to lodge the instant application.
5. The Court issued directions on 6th May, 2025 directing parties to file submissions before the interpartes hearing of the application. Whereas the applicant fully complied with the directions, the respondent did not. Instead, it filed written submissions in respect of Criminal Appeal (Application) No. E0157 of 2024, *James Sosi Chemosit Alias Jesbi v Republic*, which has nothing to do with the instant application. It is also noteworthy that the respondent did not even bother to file any papers in opposition to the application. As it is therefore, the application is unopposed.
6. I have considered the application, the supporting affidavit and the applicant's written submissions. It is evident that there has been a delay of almost 16 years in filing the intended appeal against the judgment of the High Court. The applicant posits that the delay was occasioned by factors beyond his control despite his diligent efforts. His various attempts to lodge the appeal from various prison facilities he was held at were frustrated by the documentation centres in those facilities that failed to register and transmit the appeal to this Court's registry.
7. The Supreme Court of Kenya has severally pronounced itself on the issue of extension of time. In such one case being *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the Court rendered itself thus:

“ ... The law does not set out any minimum or maximum period of delay. All it states is that the delay should satisfactorily explained. A plausible and satisfactory explanation for the 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 ”
8. Invoking the above guidelines in the circumstances of this application, and more so since the application is unopposed, and considering further that the applicant had initially been sentenced to death, which sentenced has since been commuted to life imprisonment, I am inclined to exercise my unfettered discretion in his favour. Accordingly, I allow the application and direct that within the next sixty (60) days from the date of this ruling, the applicant file and serve on the respondent the Notice of Appeal as well as the Record of Appeal.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar

