



**Katu v Republic (Criminal Appeal E065 of 2023)
[2025] KECA 1295 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1295 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL E065 OF 2023
SG KAIRU, AK MURGOR & KI LAIBUTA, JJA
JULY 18, 2025**

BETWEEN

WILLY MAUNDU KATU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Ruling and Orders of the High Court of Kenya at Malindi
(S. M. Githinji, J.) dated 23rd August 2022 in Criminal Revision No. E033 of 2022)*

JUDGMENT

1. The appellant, Willy Maundu Katu, was charged in the Principal Magistrate's Court at Mariakani in Criminal Case No. 26 of 2020 at the conclusion of which he was convicted and sentenced to 25 years for the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) (the Act).
2. Dissatisfied with the trial court's judgment of S. K. Ngii, PM, delivered on 25th March 2021, the appellant filed an undated Miscellaneous Application No. E033 of 2022 in the High Court of Kenya at Malindi on 22nd July 2022 seeking leave to appeal out of time. His Notice of Motion was supported by his affidavit sworn on an undisclosed date essentially deposing to the single ground that he was not able to obtain a copy of the judgment in good time to enable him lodge the intended appeal, hence the 1 year and 4 months delay.
3. From the scanty record as put to us, we are unable to ascertain whether the appellant's Motion was opposed. Neither does the record contain a copy of the proceedings, except for the order of S. M. Githinji, J. issued on 23rd August 2022 declining the Motion for leave to appeal out of time.



4. Aggrieved by the learned Judge’s decision, the appellant moved to this Court on appeal vide his undated notice of appeal lodged sometime in July 2023, and subsequent to which he filed his undated memorandum of appeal on 16th October 2024 faulting the learned Judge for:

“Failing to consider that: Article 241 of *the Constitution* of Kenya 2010 and Section 24 of the *National Police Service Act* were violated by convicting the appellant on poor and shoddy investigations; the exhibits produced never met the requirements of Sections 74, 77 and 111 of the *Evidence Act*; the burden of proof was shifted onto the appellant; and there were contradictions, inconsistencies and uncorroborations in the witness evidence.”

5. We understand the foregoing to be the grounds then intended to be advanced in the appellant’s petition of appeal, but which the learned Judge was faulted for not considering when determining the appellant’s Motion for extension of time.
6. In support of his appeal, the appellant filed written submissions in which he states that he was convicted and sentenced during the COVID-19 pandemic and held at Kaloleni Prison where there were no paralegals to help him write his appeal; that he is an illiterate person not conversant with the law, and that that is why he did not appeal during the stipulated period; that he “... begged the High Court to appeal out of time which application was declined” and that he now “begs this honourable court to reconsider the same and allow his application”.
7. Although Miss. Nyawinda, Principal Prosecution Counsel, did not file any written submissions, she made oral submissions opposing the appeal at the hearing on the Court’s virtual platform on 25th February 2025.
8. We hasten to observe that the appellant’s conviction and sentence took place at the height of the COVID-19 pandemic with all the appurtenant restrictions on movement and lock-down; and that, the appellant was at all material times serving his prison term without access to paralegals to aid in his intended appeal.
9. Section 349 of the *Criminal Procedure Code* contemplates circumstances under which an appellate court may admit an appeal out of time. That section 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.

10. We take to mind the fact that all the appellant needs to establish is “good cause” for the delay, and that he or she was unable to “... obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time.”
11. It is not lost on us that the law does not set any minimum or maximum period of delay to warrant the court’s discretion in determining whether to extend time to lodge an appeal. The Supreme Court of



Kenya pronounced itself on the question of extension of time in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR and stated as follows:

“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]

12. Likewise, the Supreme court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR stated as follows:

“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.” [Emphasis added]

13. In appreciation of the appellate court’s discretion in this regard, this Court in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA held that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary.”

14. In our considered view, the reasons advanced by the appellant for extension of time, to wit, the onset of COVID-19 pandemic; his incarceration; lack of paralegals to assist in his bid to appeal; and, most important, the delay in obtaining a copy of the judgment from which he intended to appeal, sufficiently explained the delay. In our respectful view, the reasons given to the learned Judge were valid, clear, plausible and satisfactory. They called for the exercise of the learned Judge’s judicial discretion in the appellant’s favour.

15. 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.”

(See also *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A and *Joseph Lendrix Waswa v Republic* [2020] eKLR).

16. Having considered the record of appeal as put to us, the grounds on which it is anchored, the rival submissions, the afore-cited authorities and the law, we reach the conclusion that the appeal succeeds and is hereby allowed. Consequently, the order of the High Court of Kenya at Malindi (S. M. Githinji, J.) issued on 23rd August 2022 is hereby set aside and substituted for an order that the appellant do file his petition of appeal within fourteen (14) days from the date hereof. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR



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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

