



**Makwali v Republic (Miscellaneous Criminal Application
E046 of 2024) [2025] KEHC 11691 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CRIMINAL APPLICATION E046 OF 2024**

FN MUCHEMI, J

JULY 31, 2025

BETWEEN

JAVAN KYAYABA MAKWALI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief facts

1. The application for determination dated 5th June 2024 seeks for leave to file an appeal out of time as a pauper.
2. The applicant states that he was convicted of the offence of defilement contrary to Section 8(1) as read with (2) of the *Sexual Offences Act* and sentenced to life imprisonment in Thika CM Criminal Case (SO) No. E085 of 2021. The applicant states that he was unable to raise the required fee to file an appeal as he is a pauper.
3. In opposition to the application, the respondent filed a Replying Affidavit and states that the judgment against the applicant was delivered on 30th March 2023. The applicant then filed an application for extension on 5th June 2024, which is about one (1) year and three (3) months after the judgment.
4. The respondent argues that the applicant has not disclosed any good cause to warrant this court to allow the application. It is further argued that applicant has not accounted for or explained the delay in lodging an appeal against the trial court's decision.
5. The respondent states that the applicant has not annexed a draft petition for appeal which clearly demonstrates that the intended appeal is devoid of any arguable issue.
6. The respondent argues that the extension of time is not a right of a party but is an equitable remedy that is only available to a deserving party at the discretion of the court. It is argued further that a party



who seeks extension of time has the burden of laying a basis to the satisfaction of the court, which the applicant has failed to do. The respondent argues that there are no sufficient reasons for the delay to warrant this court to exercise its discretion in favour of the applicant.

7. Parties put in written submissions.

The Applicant's Submissions.

8. The applicant submits that he has sufficiently explained the delay as he promptly lodged an appeal at the High Court in Kiambu following his conviction but he did not receive the certified trial court's proceedings or an appeal number or a hearing date. He further filed an application on June 2023 at the High Court in Kiambu Criminal Miscellaneous Application No. E048 of 2023 seeking leave to appeal out of time but he has not received any feedback. Further, the applicant submits that he wrote a letter to the Deputy Registrar at Kiambu on 13th October 2023 requesting for a hearing date of the application but he received no response.
9. The applicant argues that failure by the court to provide certified proceedings and to schedule the applications for hearing constitutes sufficient cause. Thus he should not be penalized for the court's administrative delays as he took all reasonable steps to pursue his appeal.
10. The applicant argues that he filed an initial petition of appeal at the High Court in Kiambu which remains on record. He further submits that he has an arguable appeal with high chances of success.

The Respondent's Submissions

11. The respondent reiterates what she deposed in her affidavit and further relies on the case of Nicholas Kiptoo arap Korir Salat vs IEBC & 7 Others (2014) eKLR and submits that the applicant has not accounted for the delay in initiating the appeal. Further, the applicant has not annexed a copy of the request for certified copies of the proceedings and judgment. Thus, there are no sufficient reasons for the delay to exercise discretion in favour of the applicant.

The Law

Whether the applicant has made out a case for the grant of an order for leave to file his appeal out of time

12. The court's power to extend time for filing an appeal is provided for under Section 349 of the Criminal Procedure Code as follows:-

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 lapsed, 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.



13. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-by-case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

14. The applicant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with (2) of the *Sexual Offences Act* and was sentenced to life imprisonment. Judgment was delivered on 11th January 2023 and sentence was meted on 30th March 2023. The applicant filed the instant application on 5th June 2024 in the present court. The applicant attributes the delay in filing his appeal to his inability to raise the required fees to file an appeal. Contrary to what the applicant has averred in his submissions that he lodged an appeal in the year 2023 after his conviction and filed a similar application in the High Court at Kiambu, the applicant has failed to produce a copy of the said appeal.

15. Notably, the applicant has not averred that he ever requested for judgment or the record of proceedings. Neither did he annex a copy of the request for certified copies of the proceedings and judgment. The applicant raised the issue of proceedings after the respondent brought it up in the replying affidavit. Thus, the applicant is not being untruthful in that he ought to have raised all the relevant factors in his application. The filing of other similar applications in Kiambu High Court which never proceeded for hearing is also not true. He did not annex copies of such applications to mitigate the delay herein. Similarly for the request of proceedings, no evidence was annexed. The applicant did not produce any letter that he wrote to the Deputy Registrar Kiambu. Additionally, 1 year and 3 months have lapsed since conviction and the explanation provided for the delay is not satisfactory. Thus, the delay is inordinate and therefore inexcusable.

16. The applicant has further not provided a copy of the draft petition of appeal and the petition he alleges to have filed in Kiambu. Access to the Kiambu records by the court did not show existence of such a petition.

17. Accordingly, the applicant has not provided sufficient reasons for the delay for this court to exercise its discretion in his favour.

18. Accordingly, the application dated 3rd February 2025 lacks merit and is hereby dismissed.

19. It is hereby so ordered.



RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 31ST DAY OF JULY 2025.

F. MUCHEMI

JUDGE

