



REPUBLIC OF MALAWI
THE JUDICIARY
IN THE SUPREME COURT OF APPEAL
MISCELLANEOUS CRIMINAL APPLICATION No. 5 OF 2026
(being an application from the ruling of the High Court, Principal Registry,
Criminal Division, Misc. Criminal Application No. 4 of 2026)

BETWEEN:

THOKOZANI TEBULO

APPLICANT

AND

THE REPUBLIC

RESPONDENT

RULING

(nyaKaunda Kamanga, SC, JA. 7th September 2026)

1. The Applicant, Thokozani Tebulo, filed an *ex parte* notice of motion seeking an order from this Court granting him leave to appeal out of time (also referred to as an application for extension or enlargement of time), against the conviction and sentence passed by the Mulanje Senior Resident Magistrate's Court. The lower court's judgment of 25th September 2023 followed a full trial, and the Applicant was convicted of attempted robbery contrary to section 302 of the Penal Code. The offence was committed on 28th May 2023 in Chimwaza Village in Mulanje District. He was sentenced to sixteen (16) years' imprisonment with hard labour. The Applicant's four co-accused were found not guilty and acquitted. At the time of filing this application, the offender was thirty-three (33) years of age.

Procedural issues

2. The procedural history of this matter shows that the Applicant previously made an *ex parte* application before the High Court of Malawi on 27th April 2026, seeking to appeal out of time. The High Court dismissed that application on 29th April 2026 because it had been delayed for over two years. The court found it to be an inordinate and unreasonable lapse of time. Further, the High Court held that the Applicant had failed

to show any good cause justifying his failure to lodge his appeal within the prescribed statutory limits.

3. Dissatisfied with the High Court's decision, the Applicant sought leave to appeal against the dismissal. On 25th May 2026, the High Court granted the Applicant leave to appeal to the Supreme Court of Appeal. Pursuant to that leave, the Applicant's new legal practitioner, Mr. P. J. Mpesi, filed the present *ex parte* notice of motion before this Court. The application relies on section 7 of the Supreme Court of Appeal Act, Order I Rule 18 of the Supreme Court of Appeal Rules, and the inherent jurisdiction of this Court.
4. Counsel Mpesi filed an affidavit in support of the motion, which contains several factual assertions and legal arguments. The deponent states that following the Senior Resident Magistrate's judgment, the Applicant sought to appeal but was swindled. The Applicant allegedly engaged an individual he believed to be from the Legal Aid Bureau to commence his appeal, paid for the “services”, and discovered later that the individual was an impersonator and not a lawyer. Paragraph 9 of the affidavit states that the Applicant was under the mistaken impression that this 'lawyer' was active on his appeal, leading to the expiration of his statutory time to appeal. The Applicant further states that upon discovering the fraud, he engaged another legal practitioner, who unfortunately passed away before completing the application. To substantiate these steps, the Applicant exhibits a previous notice of application for leave to appeal out of time issued by the Registrar on 18th February 2025, supported by a sworn statement commissioned on 6th February 2025 (marked as exhibit 'PJM 1'). The exhibit was filed some 17 months after the judgment and fails to render support to the Applicant's claims and arguments. Additionally, the High Court order of 25th May 2026 granting leave to appeal to this Court is exhibited as 'PJM 2'.
5. Before proceeding to the merits, this Court notes a serious procedural irregularity in the Applicant's affidavit. Paragraph 15 of the affidavit deposes 'THAT the Honourable Court can exercise its power under section 7 of the Supreme Court of Appeal Act, as read with Order I Rule 18 of the Supreme Court of Appeal Rules to hear the Application for leave to appeal out of time in terms of section 349(4) of the Criminal Procedure and Evidence Code'. This type of drafting is deplored. A fundamental rule of practice is that affidavits must strictly contain facts and not legal arguments: *State (on the application of Chunga and Kazembe) v Administrator General and Kazembe (nee Zigowa)* (High Court, Lilongwe District Registry, Family and Probate Division, Judicial Review Cause No. 28 of 2022) [2022] MWHCFam 7 (7 November 2022). Depositing to legal arguments and statutory interpretations in an affidavit is an irregularity: *Malawi College of Health Sciences Board of Governors v Blantyre City Council* (High Court, Principal Registry, Revenue Cause No. 59 of 2021) [2022] MWHC 27 (18 February 2022). Under Practice Direction 1 of 2010, legal arguments must be reserved for and filed as skeleton

arguments rather than incorporated into affidavits. It is also highly improbable that the Applicant, a layperson, could have known and dictated such precise legal arguments to his lawyer.

Issues for determination

6. The present application requires this Court to determine the following key legal issues:
 - a. Whether the Applicant has demonstrated a 'good cause' or satisfactory reason under the law to justify the inordinate delay of over two years and seven months in attempting to appeal his conviction and sentence.
 - b. Whether sections 15 and 349(1)(a) of the Criminal Procedure and Evidence Code were invoked.
 - c. Whether the Applicant has demonstrated a *prima facie* arguable appeal with prospects of success to warrant the exercise of this Court's discretion in his favour.

The legal framework governing enlargement of time in criminal appeals

7. In Malawi, the legal framework governing criminal appeals from subordinate courts to the High Court is provided by the Constitution, the Criminal Procedure and Evidence Code (CPEC) and case law. International and regional human rights conventions and common law principles buttress these. Section 42(2)(f)(viii) of the Constitution provides that an accused's fair trial rights include the right to appeal or review their case to a higher court than the first instance court. The Constitution confers alternative rights of appeal and review, and both may be brought before the High Court in its appellate jurisdiction: *Republic v George, Kahova, Gwaza & Erick* (High Court, Principal Registry, Confirmation Case 290 of 2013) [2015] MWHC 521 (21 April 2015). The appeal process is set out in sections 346 to 356 of the CPEC, while criminal reviews are provided for under sections 15, 360 and 362 of the CPEC and sections 25 and 26 of the Courts Act.
8. The statutory limitation period for filing an appeal is strict. Under section 349 of the CPEC, an intended appellant must file a Notice of Appeal within ten (10) days of the date of the decision and enter a petition of appeal within thirty (30) days of the judgment being appealed against. However, recognising that convicts, like the Applicant, are frequently incarcerated and unrepresented, the legislature enacted section 349(1)(a) of the CPEC. This provision creates a vital statutory window: an imprisoned, unrepresented convict satisfies the strict requirements if they deliver a handwritten notice or petition of appeal to the Officer in Charge of the prison in which they are held, for onward transmission to the High Court. This statutory mechanism does not require the services, intervention, or expense of a legal practitioner. Additionally, it can prevent

dishonest individuals from taking advantage of a prisoner's vulnerability to defraud them.

9. Where an appellant fails to lodge their appeal within the statutory timeframes, they must apply for leave to appeal out of time, also referred to as an application for enlargement of time. The power to extend time is recognized under section 349(4) of the CPEC (which grants the High Court statutory discretion to admit an appeal out of time for 'good cause' or where the 'interests of justice' demand it), as well as under Order IV Rule 5 of the Supreme Court of Appeal Rules and the Court's inherent power. This statutory discretion is not exercised as a mere formality. Because statutory limitation periods provide the State, the victims of crime, and the public with a legitimate expectation of finality, the burden of proving 'good cause' rests squarely upon the Applicant: *Kassim Ligomeka v Rep* [2012] MLR 229. In *Chiumbu v Rep* [1978-80] 9 MLR 87, the court adopted the principles from *R v Lesser* [1939] 27 Cr. App. R. 69, emphasising that a person who has failed to appeal within the statutory limits has lost their right of appeal, and extensions are not granted as a matter of course. In *R v Cullum* (1942) 28 Cr. App. R. 150, the court reaffirmed that extensions are refused where no specific merits are brought to the court's attention to justify the extension.
10. Therefore, the foundational rules stem from historical precedents of *R v Lesser* and *R v Cullum*. The principles have been clarified in *R v Hughes* [2009] EWCA Crim 841 and *R v Thorsby* [2015] EWCA Crim 1. The judicial test for exercising this discretion requires the court to balance: (a) the length of the delay; (b) the reason for the delay; (c) the apparent merits of the intended appeal (prospects of success); and (d) any prejudice to the administration of justice. This four-factor test is discussed in the English criminal case of *R v James* [2018] EWCA Crim 2181. The principles are similar to those established by this Court in civil cases, as civil procedure influences the jurisprudence. *Tratsel Supplies Limited v Mwakalinga* (1987-89) 12 MLR 72 holds that what constitutes a sound or satisfactory explanation for delay is entirely a question of fact to be determined on a case-by-case basis.
11. Crucially, if an Applicant fails to clear the first hurdle of showing a satisfactory reason for the delay, the Court is entitled to refuse the application outright without even assessing the prospects of success: *Republic v Chaponda* (Criminal Appeal 15 of 2018) [2020] MWHC 10 (2 June 2020) at paragraph 52. This principle was also firmly established by the Supreme Court of Appeal in the civil case of *Proprietary Engineering Co Ltd v Dwangwa Cane Growers Trust* [2008] MLR 249. However, in *Republic v Chaponda*, the court held that the merits of the grounds of appeal could still be evaluated in criminal proceedings in the public interest. This approach offers a holistic balancing exercise among the length and reasons for the delay, the case's merits, and the interests

of justice. This is important because the ultimate tests for any criminal appeal in preventing substantial injustice are the safety of the conviction, whether the sentence is manifestly excessive, or whether it is wrong in principle: section 3 of the CPEC.

12. As the delay increases, the threshold for condonation also rises. A delay of several months or years requires exceptional and compelling circumstances to trigger judicial intervention. In *Kassim Ligomeka v Rep*, a ten-month delay was held to be inordinate, and because the Applicant failed to show good cause, the application was dismissed. Similarly, in *Republic v Richard Chuma* (Criminal Appeal No.14 of 2021) [2021] MWHC 122 (17 September 2021), an unexplained eight-month delay led to the refusal of leave. Most authoritatively, in *Kuthawe and Another v Republic* (Malawi Supreme Court of Appeal, Miscellaneous Criminal Appeal No. 8 of 2015) [2015] MWSC 471 (29 September 2015), this Court held that an unexplained two-year delay is inordinate and fatal to an application for enlargement of time.

International and regional human rights conventions on post-trial rights

13. Offenders can draw on both United Nations-level treaties and African regional instruments when advancing human rights arguments against criminal convictions and sentences. The International Covenant on Civil and Political Rights (ICCPR) is the primary UN treaty relevant to criminal appeals, with Article 14 of the ICCPR guaranteeing the right to a fair trial for defendants. The treaty has been ratified and domesticated in Malawi. The ICCPR sits alongside the Universal Declaration of Human Rights as part of the international bill of human rights that underpins fair-trial guarantees across member states. The African Charter on Human and Peoples' Rights (the Banjul Charter) is the principal regional human rights treaty for the continent. Fair trial protections are primarily found in Article 7. The African Commission's *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa* (1999) reinforce fair trial arguments in domestic proceedings.
14. The African Court on Human and Peoples' Rights, as the enforcing body of the Banjul Charter, has developed progressive jurisprudence on access to a fair appeal process as a fundamental component of the right to a fair trial under Article 7 of the African Charter. The African Court has handled several fair trial challenges against Tanzania, including *Abubakari v United Republic of Tanzania* Application 007/2013; *Ally Rajabu and others v United Republic of Tanzania* Application no. 007/2015 (29 November 2019) and *Lucien Ikili Rashidi v United Republic of Tanzania* Application no. 009/2015 (28 March 2019) where it emphasised that a defendant dissatisfied with a judgment has the right to appeal or review before a higher body as article 7(1)(a) of the African

Charter identifies the right to appeal as the first safeguard in ensuring a defendant's cause is heard.

15. Further, the African Commission has established foundational precedents on the right to appeal. In *Devendranath Hurnam v Mauritius*, Communication 459/13 (May 2023) and *Law Offices of Ghazi Suleiman v Sudan*, Communication 222/98 and 229/99 (May 2003), the Commission found a violation of Article 7, determining that the right to appeal is an absolute component of a fair trial. Furthermore, *Hassan Bundala Swaga v United Republic of Tanzania* Application no. 014/2017 (7 November 2023) holds that the African Court has interpreted Article 7(1)(c) in light of Article 14(3)(d) of the ICCPR and determined that the right to defence for an individual charged with a criminal offence includes the right to be provided free legal assistance if the interests of justice so require. The human rights instruments and decisions interpreting the provisions have a significant impact on defendants in Malawi through law reform and judicial decisions.

The legal framework undermined in practice

16. Applying law to the facts of the present case, this Court finds that the Applicant's motion is devoid of merit and must be dismissed. The decision is principally based on three fatal shortcomings: the failure to explain the inordinate delay of over two years and seven months, the failure to utilise the available statutory mechanism under sections 15 and 349(1)(a) of the CPEC, and the failure to establish an arguable defence. The analysis demonstrates that despite progressive laws and rules, serious implementation challenges make it difficult to allow the case to proceed to appeal and fully protect and uphold the prisoner's human rights.
17. The length of delay before instituting an appeal in this case is staggering. The Senior Resident Magistrate rendered the judgment on 25th September 2023. The Applicant prepared the applications for leave to appeal out of time to the High Court in February 2025 and on 27th April 2026. This represents a delay of 17 months, and more than two years and seven months, respectively. Guided by this Court's decision in *Kuthawe and Another v Republic*, such delays are inordinate. To overcome this hurdle, the Applicant was required to provide a compelling, highly credible, and fully substantiated explanation accounting for the entire duration of the delay: *Bennett v R* [2023] EWCA Crim 795. The Applicant has failed to do so. The allegations in Mr. Mpesi's affidavit—that the Applicant engaged a nameless impersonator on an undisclosed date at an undisclosed venue, and that a subsequent lawyer passed away—are entirely unsupported by any independent proof. There is no evidence showing that the Applicant

instructed this alleged impersonator within the initial ten-day or thirty-day statutory appeal periods. A court cannot act on bare, unproven assertions in an irregular affidavit, particularly where the delay is as immense as it is here.

18. Scholarship reveals that lack of legal representation is one of the barriers to appeal preparation: Anderson (2006), “Justice delayed in Malawi’s criminal justice system: paralegals vs lawyers,” *International Journal of Criminal Justice Sciences* 1(1). The Applicant argues that challenges with legal representation are the causes of the delay. In *Kassim Ligomeka v Rep*, the High Court observed that even where a convict is unrepresented or illiterate, such circumstances do not prevent them from appealing. Malawian law does not require a criminal appeal to be initiated through a legal practitioner. Section 349(1)(a) of the CPEC promotes the right to appeal and enhances the effectiveness of the appeal procedure for *pro se* litigants. The process promotes prisoners’ post-trial rights as they have recourse to a simple, cost-free, and straightforward statutory alternative to timely institute an appeal. The offender only needs to deliver a written notice of appeal to the Officer in Charge of the prison, who is duty-bound to remit it to the High Court. Scholarship also reveals that paralegals provide primary legal aid services, including advising on appeals: Schonteich (2012) “A powerful tool of justice: Paralegals and the provision of affordable and accessible legal aid services”, *South African Crime Quarterly* 2012(42):21-27. The copy of the warrant of commitment shows that, after sentencing, the offender was in custody at Mulanje Prison, where he was serving another sentence imposed by a First Grade Magistrate for robbery. The Officer in Charge stamped the warrant of commitment on 9 October 2023. He has not explained, nor have his legal practitioners, why he failed to invoke this straightforward statutory option. Did he communicate his intention to appeal to the Officer in Charge at Mulanje Prison, or did he seek assistance from paralegals to appeal? After failing to utilise the simple prison-to-High Court transmission mechanism, he cannot heap all the blame on unscrupulous individuals or subsequent lawyers for a delay. He could have expressed his intention to the prison authorities by simply handing a written notice of intention to appeal.
19. According to section 15 of the CPEC, the High Court must review and confirm certain sentences imposed by magistrates. The case law demonstrates that the supervisory process is a vital safeguard that promotes access to criminal justice by correcting judicial errors: *In re: Criminal Case No 42 of 2013 and related matters; Ex parte People’s Trading Centre Ltd: S v Attorney General (The First Grade Magistrate Anthony C. Banda)* [2013] MLR 96; ensuring sentencing consistency: *Rep v Gomani* [1997] 2 MLR 77; assisting in prison management and overcrowding: *Rep v Kholoviko* [1996] MLR 355; and protecting unrepresented defendants: *Rep v Muhamed Abdul Ibrahim* [2010] MLR 311. The Applicant’s case could have been disposed of swiftly

because the court-driven review mechanism does not require recourse to legal assistance, which the Applicant claims to have been struggling with: section 363 of the CPEC; *Rep v Genti* [2000–2001] MLR 383. After rendering the 16-year sentence of imprisonment, the Magistrate was mandated under section 15(1)(b)(i) of the CPEC to “immediately” transmit the case file to the High Court for review of the sentence: *Republic v Genti* [2000–2001] MLR 383; *Republic v Munthali* (High Court, Principal Registry, Confirmation Case no. 647 of 1999) [2000] MWHC 22 (21 August 2000). Especially in the circumstances of the Applicant, who was unrepresented during the trial. The Applicant and the Officer in Charge at Mulanje Prison could also have prompted the confirmation process. The affidavit and record of the case do not explain why this was not done.

20. The Applicant has also failed to demonstrate that his intended appeal has any prospects of success. The affidavit contains no proposed grounds of appeal regarding the merits of the case, let alone any that show a *prima facie* arguable case. Under the principle in *Proprietary Engineering Co Ltd v Dwangwa Cane Growers Trust*, while the Court could refuse this application solely on the failure to explain the delay, the lack of demonstrated merit further seals the Applicant's fate. The State would be unjustly prejudiced, the administration of criminal justice would be undermined, and the legitimate public expectation of finality in criminal trials would be defeated if a late appeal was allowed after a lapse of nearly three years without any legal merit or reasonable excuse. After all, *Kuthawe and Another v Republic* holds that if an appellant fails to prove sufficient good cause under section 349(4) of the CPEC, a court cannot exercise its discretion to condone the delay. Accordingly, the Applicant's motion for enlargement of time to appeal is hereby dismissed.

DATED and DELIVERED at BLANTYRE this 7th day of September 2026.



Dorothy nyaKaunda Kamanga
JUSTICE OF APPEAL

Mr. Mpesi
Mrs. Mthunzi

Legal practitioner for the Applicant
Law Clerk