Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO. 108 OF 2006- COURT OF APPEAL OF TANZANIA AT DODOMA- MUNUO, J, A., KAJI, J, A., AND KIMARO, J, A.	**SOSPETER LULENGA Vs. THE REPUBLIC** (Appeal from the Ruling of the High Court of Tanzania at Dodoma- Misc. Criminal Application No. 22 of 2005- Mjasiri, J.)	**Whether petition of appeal was lodged in time-** judgment was delivered on 27/12/2004, the 45 days required within which to file the petition of appeal accrued from the date when the copy of judgment was received, that is, on 20/3/ 2005. Thus, when the appellant lodged his petition of appeal on 31/3/ 2005, it was still in time in terms of the proviso to section 361 (1) (b) of the Criminal Procedure Act 1985.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CORAM: MUNUO, J, A., KAJI, J, A., AND KIMARO, J, A.

CRIMINAL APPEAL NO. 108 OF 2006

SOSPETER LULENGA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Dodoma)

(Mjasiri, J.)

dated the 15th day of October, 2005
in
Misc. Criminal Application No. 22 of 2005

JUDGMENT OF THE COURT
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12 & 22 June, 2007

KAJI, J, A.:

On 27th December, 2004, the appellant, Sospeter Lulenga, was convicted of the offence of cattle theft, contrary to Section 268 (1) of the Penal Code Cap 16. He was sentenced to 8 years imprisonment. This was in criminal case No. 74 of 2004 in the District Court of Mpwapwa at Mpwapwa. He was aggrieved. However he thought he was late to lodge the notice of intention to appeal and the petition to appeal within the time prescribed by section 361 (1) (a) and (b) of the Criminal Procedure Act [Cap 20 R. E. 2002]. He applied for extension of time. But his attempt to have the period within which to lodge his notice of intention to appeal and his petition of appeal by the High Court failed. The High Court (Mjasiri, J.) held that the appellant failed to give good cause for the delay. He was aggrieved; hence this appeal.

Before us the appellant appeared in person. Mr. Vicent Tangoh learned State Attorney, represented the respondent Republic.

The appellant preferred two grounds of appeal, more or less resembling the ones he had presented before the High Court and were rejected by the High Court. He had deponed in his affidavit in

the High Court that, immediately when he was whisked into prison at Mpwapwa, he expressed his intention to appeal and signed the same within time and handed it over to the officer Incharge of Mpwapwa Prison. Later he was transferred to Isanga Central Prison where he was informed that there was nothing in his file suggestion that he had expressed his intention to appeal. The appellant had further deponed that he failed to lodge his petition of appeal in time because when he received the copy of judgment, time had already elapsed. The learned judge held the view that those grounds were not sufficient cause for the delay. Before us the appellant submitted in more or less the same line, although with some modifications on the first ground of delay. One of them is that, the trial magistrate did not explain to him the period within which he was required to give notice of his intention to appeal and to lodge his petition of appeal as required by section 359 (1) of the Criminal Procedure Act, 1985. The learned state attorney did not oppose the appeal as, in his view, the appellant had shown good cause for the delay.

We have carefully considered the appellant's grounds of appeal and the ruling by the learned judge.

Admittedly, the first ground of appeal is rather confusing. On one hand the appellant appears to be blaming the officer Incharge of Mpwapwa Prison for failing to forward to the Registrar of the High Court his notice of intention to appeal which he says he expressed and signed in time. On the other hand he appears to be blaming the trial magistrate for failing to explain to him the period within which he was required to lodge his notice of intention to appeal. All the same, the later blame appears to be an afterthought, because it was not raised before the learned judge, and there is no finding on it. Thus we have decided to consider the former blame which was raised by the appellant before the learned judge who considered it and found it to be insufficient cause for the delay.

Admittedly, it would have been a good idea for the appellant to secure an affidavit from the alleged officer Incharge of Mpwapwa who is alleged to have failed to forward his notice of intention to appeal to the Registrar. But practically this would not have been an easy task. Firstly, being a prisoner he had little or no opportunity to cause the said officer swear to an affidavit. Secondly, assuming the said officer had really neglected to do his obligation, he would hardly admit to an act which could adversely affect his prospects. But what is more important is that, after the appellant had raised this in his

affidavit in the High Court, if the learned state Attorney who prosecuted that application had some doubts about it, he would have countered it by filing a counter affidavit, and possibly by securing an affidavit from the alleged official. He was freer to do so than the appellant who was a prisoner. But for unexplained reason or reasons, he neither countered it by an affidavit nor filed an affidavit from the alleged official. Under the circumstances, we are of the view that, the appellant should be given the benefit of doubt that he expressed his intention to appeal in time as deponed. We are satisfied that, had the learned judge considered this ground in this line, she would have found this ground to be good cause for the delay and that the appellant is not to blame.

As far as the ground for delaying to file the petition of appeal in time is concerned, there is ample evidence by the officer Incharge of Isanga Central Prison at the bottom of the petition of appeal in the High Court (pages 24 – 25 of the record of appeal) indicating that the date of conviction was on 27/12/ 2004. On the following day, that is, on 28/12/ 2004, the copy of judgment was applied for. It was never supplied till more than a year later, that is, on 20/3/ 2005. 11 days later, that is, on 31/3/ 2005, the appellant lodged his petition of

appeal. Thus, although judgment was delivered on 27/12/2004, the 45 days required within which to file the petition of appeal accrued from the date when the copy of judgment was received, that is, on 20/3/ 2005. Thus, when the appellant lodged his petition of appeal on 31/3/ 2005, it was still in time in terms of the proviso to section 361 (1) (b) of the Criminal Procedure Act 1985, which provides as follows:-

> "….. save that in computing the period of forty five days the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded."

This probably escaped the mind of the learned judge. Had she considered it properly she would have found that the petition of appeal was lodged in time.

As observed earlier on, the learned State Attorney did not oppose the appeal, and, in our view, rightly so.

Since the appellant expressed his intention to appeal immediately after being whisked into Mpwapwa Prison as deponed to

in his affidavit which was not countered by the respondent Republic, and since the appellant lodged his petition of appeal in time as demonstrated *supra*, we are of the settled view that this appeal is meritorious.

For the foregoing reasons we allow the appeal, quash the decision of the High Court and direct the appeal to be filed, heard and determined in the High Court on merits.

DATED at DODOMA this 22nd day of June, 2007.

E. N. MUNUO

JUSTICE OF APPEAL

S. N. KAJI

JUSTICE OF APPEAL

N. P. KIMARO

JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)

DEPUTY REGISTRAR