IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJ A)

CRIMINAL APPEAL NO 75 OF 1979

BETWEEN

PAUL NJAGI MUGAMBI.................................APPELLANT

AND

REPUBLIC..RESPONDENT

(Appeal against the dismissal by Trevelyan and Hancox JJ on 23rd November 1978 High Court Criminal Appeal No 206 of 1978)

JUDGMENT OF THE COURT

On 16th March 1977, at the Ministry of Information offices in Meru, a member of the administration police called Gitonga was on guard duty when, according to him, he was approached by three men, one of whom hit him on the head with a stone. Gitonga fell down, his rifle containing ten rounds of ammunition was picked up by one of the three men and all three men ran away with the rifle. According to Gitonga, the man who struck him with a stone was one Frederick Mbae, and the man who picked up the rifle and ran off with it was the appellant; and he deposed that he knew both men personally. Both Frederick and the appellant were charged with robbery, contrary to section 296(2) of the Penal Code, in the Court of the Resident Magistrate at Meru. Both were convicted, and sentenced to death. They appealed to the High Court. There it was appreciated for the first time that Gitonga had told his fellow constable Superiano, who was on the scene very soon after the alleged robbery, that he did not know any of the three men before. This evidence, which was overlooked by the trial magistrate, contradicted the evidence of Gitonga that he knew Frederick and the appellant personally, and cast grave doubts on the reliability of Gitonga's evidence identifying these two men. The High Court judges allowed Frederick's appeal, as there was no evidence against him other than Gitonga's purported identification of him which was unreliable. They dismissed the appellant's appeal, and he has now appealed to this Court.

It seems clear that Gitonga did not in fact tell anyone that he knew the appellant before the robbery, as the appellant was not arrested until 10th April, twenty-four days later, and then only on information supplied by persons whose shop was raided on 24th March by a gang armed with a rifle. One shot was fired in the course of this raid. When the appellant was arrested, he led the police to a place where a rifle containing nine rounds was found buried. It was Gitonga's rifle. On 15th April, the appellant made a "charge and caution" statement to Ins Narangwi, which he retracted at his trial, but which was held to have been made voluntarily and was admitted in evidence after a trial within trial. In the course of this statement, the appellant is recorded as having said:

When we passed the old Court and after passing the road going to the post office, we saw one

> *askari* standing on the upper side of the road. He did not speak to us. After passing him near the barbed wire we saw another *askari* standing. He told us, “Stop come here”. When we went he started asking for identity cards. First he asked Joseph for his, but Joseph said he had none. He told him to sit down. He asked me and when I missed [sic] he told me to sit down. He then asked [Frederick] for his. Then [Frederick] jumped on him and the *askari* threw the gun in the side where we were:
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> [Frederick] told us to take the gun. I took the gun and I went with it. We ran with it in company with Joseph Mungatia leaving [Frederick] with an *askari* as we were running towards Kathita [Frederick] overtook us at the back of Kathita. All of us went to hide gun near maize control. We dug it in the earth … On 10th April 1977, while I was sleeping in the home of Julius Gikundi police came and arrested me. They asked me where the *bunduki* was. I then led them to where we had hidden it with [Frederick].

At the trial, the appellant adopted a different line of defence, disclosed in his cross-examination of prosecution witnesses and in an unsworn statement in which he adopted an unsworn statement made by his then co-accused Frederick. This was to the effect that Gitonga had sold them the rifle. This defence was rejected by both courts below, and we see no reason to differ from these concurring findings. What is left? There is the evidence of the discredited witness, Gitonga, that he was approached by three men, one of whom (Frederick) struck him with a stone, whereupon he (Gitonga) fell to the ground, dropping his rifle which was then picked up by the appellant who ran away with it. To much the same effect is the appellant’s “charge and caution” statement that it was Frederick who “jumped on” Gitonga, causing the latter to throw away his rifle, whereupon the appellant ran away with it. Both accounts are thus in agreement that it was Frederick and Frederick alone who used violence. The appellant can only be held responsible for that violence if he had formed a common intention with Frederick that violence should be used against Gitonga (see section 21 of the Penal Code), or if he aided and abetted Frederick in this respect (see section 20(1) of the Penal Code). This aspect of the case against the appellant was not considered in either court below. In our view, the evidence on record does not point to the appellant having formed a common intention with Frederick to use violence against Gitonga, nor does it indicate that he aided and abetted Frederick in this respect. In our view there must be, on the evidence, a reasonable possibility that Frederick’s attack on Gitonga was an independent act on his part, not contemplated by the appellant, and that the appellant took advantage of Gitonga throwing away his rifle to steal it and run away with it. Senior State attorney, Mr Muttu, was of the same opinion. He informed us that he was unable to support the conviction of the appellant on the charge of robbery (contrary to section 296(2) of the Penal Code) and he invited us to substitute a conviction for stealing from the person (contrary to section 279(a) of the Penal Code). In all these circumstances, we are of opinion that the conviction of the appellant on the charge of robbery cannot stand. We set it aside, and quash the sentence of death passed on the appellant; and we so order.

The question now arises whether this Court has jurisdiction to impose a substituted conviction for a minor offence; and, if so, for what offence. The offence of robbery is constituted by two elements, stealing and the use of violence at, or immediately before, or immediately after the time of stealing; see section 295 of the Penal Code. In this case we have held that the element of violence has not been established as against the appellant, but the element of stealing has been established. By section 179(2) of the Criminal Procedure Code:

> When a person is charged with an offence, and facts are proved which reduce it to a minor offence he may be convicted of the minor offence …

The corresponding Tanganyika subsection, which is identical with Kenya’s, was considered by Spry J in *Ali Mohamed Hassani Mpanda v The Republic* [1963] EA 294. The judge held, after consideration of the relevant East African authorities, that for the subsection to apply the substituted conviction must be for an offence which is both minor and cognate to the offence charged. Stealing is obviously a minor offence to robbery, and in our opinion it is cognate to robbery, being one of the two constituent elements of that offence. Accordingly, we are of opinion that it is open to us to substitute a conviction for stealing. We do not think that a conviction for stealing from the person contrary to section 279(a) of the Penal Code will

lie, because according to the authorities summarised at 10 *Halsbury's Laws of England* (3rd Edn) paragraph 1542 to constitute stealing from the person, the property stolen must have been completely removed from the person of the complainant. In this case, the rifle was not on the person of Gitonga when the appellant stole it. It had been dropped or thrown down, and was picked up by the appellant, and not removed by him from Gitonga's person. We can accordingly only convict the appellant of theft (contrary to section 275 of the Penal Code) and we order that he be so convicted. As the appellant is a first offender, he cannot be dealt with under section 285 of the Penal Code. Theft of a rifle from an administration policeman is, however, a very serious matter and, notwithstanding the appellant's previous good character, we sentence him to the maximum sentence prescribed by section 275 of the Penal Code, which is three years' imprisonment, and we so order.

Order accordingly.

Dated and delivered at Nairobi this 13th day of March 1980.

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR