**Mwangi and others v Republic**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 13 November 1974

**Case Number:** 79/1973 (120/74)

**Before:** Spry Ag P, Law Ag V-P and Musoka JA

**Sourced by:** LawAfrica

**Appeal from:** High Court of Kenya – Simpson and Muli, JJ

*[1] Criminal Practice and Procedure – Minor offence – Unlawful conversion of vehicle – A complete*

*minor offence in relation to robbery – Criminal procedure Code s.* 179 (*K.*)*.*

*[2] Evidence – Witness – Hostile – Evidence admissible but of little value – Might cast doubt on guilt.*

**JUDGMENT**

The considered judgment of the court was read by **Spry Ag P:** The three appellants were, with others, charged in the court of the resident magistrate at Nairobi on two counts of robbery with violence, contrary to s. 296 (2) of the Penal Code. On the first count, they were found not guilty of robbery but guilty of the unlawful conversion of a motor vehicle, an offence under s. 294 of the Penal Code. They were found guilty on the second count. They were convicted and each was sentenced to six months’ imprisonment on the first count and twenty years’ imprisonment with hard labour and thirty strokes of corporal punishment on the second. They appealed to the High Court, but their appeals were dismissed. On 6 November 1974 we heard and dismissed their appeals. We were fully satisfied that there were no grounds which would justify us, on a second appeal, interfering either with the convictions or the sentences. [The court considered the case against the appellants and continued.] Certain questions raised by Mr. Otieno, who appeared for all three appellants, require further attention. On the first count, Mr. Otieno submitted that it was wrong in law, on a charge of robbery, for the magistrate to have invoked s. 179 of the Criminal Procedure Code and convicted of unlawful conversion of a vehicle, as a lesser, cognate, offence. With respect, we saw no merit in this submission. Robbery is an aggravated form of stealing, with the additional element of actual or threatened violence. Stealing is an unlawful taking of anything with intent permanently to deprive the owner of it. The offence created by s. 294 of the Penal Code is committed by an unlawful taking without that intent. The offence created by s. 294 is therefore constituted by one of the essential elements of robbery: we think the offence is clearly both minor and cognate to robbery. On the second count, Mr. Otieno complained that the magistrate had not expressly considered the evidence of a witness who was treated as hostile, but whose evidence, if believed, might have tended to show that the offence committed was simple theft, not robbery, because of connivance on the part of the bank official concerned. Mr. Otieno suggested that the evidence of a hostile witness should be treated differently where it supported the defence from where it supported the prosecution. Mr. Sehmi, who appeared for the Republic, submitted that a hostile witness is one who has been shown to be unreliable and the evidential value of whose testimony is therefore negligible. He submitted that it was immaterial whether that testimony favoured the prosecution or the defence. We may say at once that we are satisfied that in the present case the magistrate acted entirely properly. He only found the witness hostile after due consideration; he referred in his judgment to the effect of the evidence being negligible and he went on, almost immediately, to consider the issue in relation to which that evidence was relevant. Although he did not expressly refer to the evidence in relation to the issue, we are satisfied that he must have had it in mind. The question raised by Mr. Otieno is, however, one of general importance. In *Alowo v. Republic*, [1972] E.A. 324, this court said: “the basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.” Reference was made in that case to two English cases, *Leonard Harris* (1927), 20 Cr. App. R. 144 and *R. v. Golder*, [1960] 1 W.L.R. 1169. In those cases, the evidence of a hostile witness was described as “negligible” and “unreliable” respectively, and in the former, reference was made with approval to the then current edition of Archbold, in which it was said that where the earlier statement was unsworn, the evidence “should not have much weight” and where the earlier statement was made by the witness on oath, the contradiction “is almost conclusive against his credibility”. Again, in *Batala v. Uganda*, [1974] E.A. 402 this Court said at p. 405: “The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight.” All these cases show that the fact that a witness is declared hostile is a matter that goes to the weight or value to be attached to his evidence. The position is entirely different from that where evidence is inadmissible. Such evidence cannot be looked at for any purpose. The evidence of a hostile witness is, on the other hand, evidence in the case, although generally of little value. Obviously no court could found a conviction on the evidence of a hostile witness, because his unreliability must itself introduce an element of reasonable doubt. On the other hand, in a particular case, the trial magistrate or judge may believe a hostile witness to have been truthful in some part of his evidence, particularly if he has been consistent as regards that part of his evidence and if it is easily severed from the part where he has been inconsistent. If the effect of evidence so believed is to cast a serious doubt on the guilt of the accused person, the magistrate or judge would be justified in relying on it to acquit. However, as we have said, that does not arise here. The evidence of the accomplice witness concerned the planning of the crime. According to him, the initial project was to steal money from the railways. During the trial, objection was taken to this evidence and the magistrate ruled it inadmissible. In this, we think, with respect, that he was wrong. We think that any evidence as to the planning and preparation for the crime was relevant and it makes no difference that the plan was changed from time to time. Mr. Otieno objected to a reference to this evidence in the magistrate’s judgment but since we thought the evidence was properly admissible under s. 8 of the

Evidence Act, it followed that this objection failed.

*Appeal dismissed.*

For the appellant:

*SM Otieno*

For the respondent:

*RS Sehmi* (Senior State Counsel)