



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Madan, Law & Miller JJA )**

**CRIMINAL APPEAL NO. 132 OF 1981**

**BETWEEN**

**OGARO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from the High Court at Kisumu, Scriven J)**

**JUDGMENT**

The appellant who was employed in the public service was convicted by the resident Magistrate, Kisumu, of stealing one income tax file value Kshs 1, the property of Kenya Government, contrary to section 280 of the Penal Code. His appeal to the High Court against conviction was dismissed. The prosecution failed to prove the value of the file at the trial. The finding of the appellate judge of the High Court that to support a charge of theft economic or pecuniary loss need not be proved has come under strong attack before us. Under section 267(1) of the Penal code, every inanimate thing whatever which is the property of any person, and which is movable is capable of being stolen. A file is capable of being stolen. The omission to prove the value of the thing stolen is not fatal to the charge inasmuch as section 137 (c) (i) of the Criminal Procedure Code provides that if the property is described with reasonable clearness in a charge or information it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property. We can and do take judicial notice that a file is worth at least Kshs 1.

The appellant took the income tax file which was capable of being stolen from the office of the income tax department. He had no claim of right to it. Mr Owino for the appellant submitted that the appellant did not take the file fraudulently under section 268 of the Penal code because he intended to take it to its owner the father of PW 5 whose income tax file it was; that PW 5 was an accomplice as regards his evidence that the receptionist at the income tax office who came to see him with the appellant demanded Kshs 600 to assist PW 5 which the latter said he refused to pay. We do not see how in the circumstances PW 5 was cast in the role of an accomplice. If PW 5's evidence is accepted, we see no reason to reject it, the appellant took the file fraudulently with the object of making money out of it corruptly. The magistrate who presided over the appellant's trial began his judgment by relating that the appellant said in his unsworn statement of defence that he took leave for two days because he had lost a box, that walking fast he went through several streets passing at the rear of a Mosque and arrived at Railway quarters where

he met his two

colleagues – PW 2 and PW 3 who not finding anything on him left in a *matatu*; that he had a yellow sweater; a 999 car apprehended him; that PW 2 and PW 3 accused him of stealing a file, and though the police found nothing on him he was taken to his department’s office and then to the police station; that the appellant denied stealing a file. DW 1, a friend and tribesman, testified that he saw the appellant at 9.00 am on that day at the Railway quarters walking at a normal pace carrying a yellow sweater; two people met and accused him of stealing a file but no file was found on the appellant. The magistrate said that as against the strong evidence of the prosecution witnesses (which he had not scrutinized or related yet), he rejected the defence of the appellant denying stealing the file. Although he had not yet scrutinized the prosecution evidence it is obvious that the magistrate had already made up his mind to convict the appellant. Having reached his decision it was then quite unnecessary to relate the prosecution evidence which he did running into more than three foolscap pages, to decide a second time to convict the appellant. The learned appellate judge said in his judgment:

“The form the trial magistrate’s judgment took was, as is inevitable, his own art form. No one is going to dictate a standard form... of judgment, but it is not always the length which spells the strength and I must say I find it surprising that on page 3 the magistrate who still has 4 pages to write says:

‘Further I find no merit in the submission of the learned advocate for the defence which he put forward so ably’, and then in his concluding remarks he says,

‘I have considered, evaluated and weighed the evidence as a whole very carefully and find the accused is guilty as charged and convict him thereof.’

It is unfortunate that with that careful statement the magistrate has not said that he is satisfied beyond all doubt, and the absence of such words must indicate the possibility of a latent misdirection.”

The learned judge referred to *Okethi Okale v R* [1965] EA 559, an authority which we again bring to the magistrate’s notice. We have no objection to a judgment taking the art form of the judicial officer concerned so long as the basic rules are observed. It is a fundamental principle in our courts that an accused person must not be convicted of a criminal offence unless the court is satisfied that his guilt has been proved beyond reasonable doubt. A first appeal takes the form of a rehearing. The learned first appellate judge was fully aware of all the short-comings in the magistrate’s judgment, and he put them right. On a proper direction the learned judge had no doubt that the appellant’s guilt had been proved beyond doubt, and we agree with him. We dismiss the appeal, and it is so ordered.

**Dated and Delivered at Kisumu this 2nd day of December 1981.**

**C.B.MADAN**

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**JUDGE OF APPEAL**

**E.J.E.LAW**

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**JUDGE OF APPEAL**

**C.H.E.MILLER**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**