IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & ASIKE - MAKHANDIA, JJ.A)

CRIMINAL APPEAL NO. 191 OF 2017

BETWEEN

ABDULKADIR ANOD DOLE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nanyuki (Mary Kasango, J.)

delivered on 4th October, 2017) in HCCR No. 45 of 2017 Consolidated with HCCR No. 46 of 2017)

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JUDGMENT OF THE COURT

On 4th October, 2017, the High Court in its appellate jurisdiction confirmed both the conviction and sentence of the appellants by the Nanyuki Chief Magistrate's Court for, in the first place, the offence of being in possession of government trophy, namely: two rhinoceros horns and one piece of elephant ivory weighing 2.5 kilogram all with a street value of Kshs.1,985,900. It was alleged that the appellants had no certificate of ownership of these trophies contrary to **section 42(1)(b)** as read with **section 52(1)** of the Wildlife (Conservation And Management) Act. They were further charged with being in possession of implements of forgery namely, five colour printer cartridges and one paper cutter without lawful authority contrary to **section 367(b)** of the Penal Code. Finally they faced a third charge, that they were in possession of forged 2,260 pieces of 100 denomination Ethiopian Birr notes and 1,560 pieces of 50 denomination Ethiopian Birr notes contrary to section 367(e) of the Penal code.

Both appellants were convicted and sentenced to 3 and 4 years on both counts, which sentences were ordered to run consecutively.

In confirming the conviction and sentence the High Court, (Kasango, J) noted that, although the appellants were charged with 6 others, their co-accused persons were either discharged, died or acquitted, leaving the appellants to face the law alone. She found too that it was common factor that on 9th July, 2011 at Olpajeta, a carcass of a rhino was found with its two horns missing; that with information from an informer a motor vehicle registration No. KAT 263 Z (RAV4) suspected to be transporting rhino horns was tracked to Nanyuki-Nairobi road; that on the same day at a police road block on Thika Road; that apart from fresh blood stains at the back of the driver's seat, there was nothing to link the only occupant, the driver, who was the 7th accused person, with the killing of the rhino. Subsequently, on 13th July, 2011, further information was received from an informer that there were suspicious characters at a house in South C in Nairobi. Following this information, the police and the Kenya Wildlife Service (KWS) intelligence officials raided the house in South C Estate where they met the 1st and 2nd appellants together with the 3rd to 6th accused persons. Upon conducting a search, Kshs.1,985,500 in cash was discovered from a cupboard in a room in the house together with two rhino horns. From the ceiling of an adjacent empty room, which was dusty with cobwebs, a sack containing Ethiopian currencies, a printing machine, incomplete printed paper, some paper printed with Ethiopian currency, some cotton and an elephant tusk were retrieved. Upon examination by the document examiner the notes were found to be fake and simply pieces of paper while the horns and the tusk were found to be trophies that must have come from a rhino and an elephant.

The 1st appellant in denying all the charges told the trial court that he was in the business of mining in Moyale and was not anywhere near Laikipia on 9th July, 2011 though on that day he was in Nairobi as he was on leave. He denied trading in animal trophies or having in his possession any trophy. He also denied that Ethiopian currency notes were recovered from his house. He stated that some police officers went to his house where he was entertaining his visitors and conducted a search; that in the process of searching the house, the officers came by and took some money belonging to him and he loudly protested and struggled with them but was subdued. Regarding the Ethiopian currency, the 1st appellant explained that the currencies were recovered from a house he had rented out to an Ethiopian national. He produced a tenancy agreement between himself and one Getu Diriba which was for 3 years and expired 1st April, 2011.

For her part, apart from confirming that the police took her Kshs.1,985,900, the 2nd appellant insisted that the only reason why she was charged was her persistent that the money was hers and that the officers actually wanted to steal it. She denied knowledge of the Ethiopian currency, the elephant ivory and rhino horn, which she maintained was seeing for the first time in court. She denied knowledge of the tenancy agreement.

At the conclusion of the trial, the magistrate acquitted all, but the appellants herein, as explained at the beginning of this judgment.

The appellants who challenged that decision in the High Court were unlucky again as their appeal was rejected. In dismissing the appeal, the learned Judge was convinced that the key prosecution witness, PW 6 was credible and gave her credit for the manner in and the keenness with which she went about collecting evidence, from the killing of a rhinoceros at Olpajeta to tracing some horn and ivory in the appellants' house. She found no evidence of any ulterior motive on the part of PW 6 against the appellants; and that the search was lawful in terms of **section 22(1)** of the **Criminal Procedure Code, section 49** of the **wildlife (Conservation and Management) Act** (now repealed but was in force at that time) and **section 20** of the **Police Act Cap 84** (repealed but applicable then).

On the constitutionality and legality of the search, the Judge came to the conclusion that both the police officers and KWS officers had reasonable ground to believe that a crime had been or was about to be committed in the appellants' house; that there was no evidence that the officers used excessive force in carrying out that search; and that there were exceptional circumstances that justified the search.

On the recovery of Ethiopian currency, implements of printing and the elephant tusk in an adjacent extension room to the appellants' main house, which the appellants claimed to have leased out, the learned Judge found, as a matter of fact, that the alleged lease for 3 years from 1st May, 2009 to 1st April, 2011 had expired on 1st April, 2011, by the time those items were found in that room; that as a consequence of that conclusion, the room was under the control of the appellant. At any rate, the Judge observed that the lease agreement upon which the 1st appellant relied related to a house in Akiba phase 2, yet the property where the search was conducted was in Mugoya Estate (or South C). In addition, the 2nd appellant, who is the 1st appellant's wife was categorical that she was not aware of the existence of the lease agreement; and that the room in question remained locked and was opened by the 1st appellant.

Having satisfied herself that each succeeding magistrate complied with **section 200(3)** of the Criminal Procedure Code, the learned Judge dismissed the ground challenging the procedure under that section; and that due to passage of considerable period of time, the course of justice would not have been served by directing the trial to start *de novo*.

Dealing with the sentence, the Judge expressed satisfaction with the consideration by the trial court on this question adding, only that the argument that the trial court ought to have considered the age of the appellants was not relevant when dealing with the question of a suitable sentence.

However, the only concern expressed by the Judge was the order that the sentences of 4 and 5 years to run consecutively. She observed that the offences in the two counts arose from one and the same transaction; the recovery of counterfeit Ethiopian currency and of printing implement and therefore the sentences ought to have run concurrently.

The appellants were aggrieved and lodged the two appeals which were consolidated and heard as one.

Although the two appeals were brought on a total of 15 grounds, learned counsel, Prof. Nandwa and Mr. Wandugi representing the appellants argued only 3 grounds both in their written submissions and in their oral highlights of those submissions before us.

They argued, first, that the charges were not proved beyond any reasonable doubt or at all. According to them, the search conducted by PW6 was illegal as it violated the provisions of **Article 31(a)** of the Constitution which guarantees an individual's right to privacy; that section **49(2)(b)** of the repealed Wildlife (Conservation And Management) Act similarly enjoined any person wishing to conduct a search in a dwelling house to do so only with a search warrant and, in the absence of a search warrant, only where exceptional circumstances existed; and that no such circumstances were shown to exist in this case. To buttress the illegality and unconstitutionality of the search, the case of **Standard Newspapers Limited & Another vs. Attorney General & 4 Others** (2013) eKLR.

They further argued on this ground that the offences against the appellants were not proved to the required standard.

On the second ground, it was contended that the element of ownership, demonstrated by a certificate, in count 3, was not proved contrary to the clear provisions of **section 43(1)(b)** of the Wildlife (Conservation and Management) Act. This, according to counsel, was critical for the determination of the appropriate penalty; that there was no proof that the appellants owned the trophies; that this section must be distinguished from **section 39(3)(a)** and **(b)** which specifically creates the offence of "possession" and failure to report an offence under the Act; and that in any case, it was impractical to find both appellants to have been in possession of the trophies, against the decision in the case of **Jean Wanjala Songoi vs. R**. (2015) eKLR. As such, they urged, the trial magistrate was mistaken in assuming that the offence the appellants faced was brought under **section 39(3)(a)** and **(b),** and that the Judge in turn likewise fell into a similar error.

Finally, on the third ground, the appellant has submitted that the sentence imposed was harsh and did not take into consideration the fact that the appellants were first offenders and old.

The conviction and sentence were supported by the respondent, who, through Mr. Ondimu, the Principal Prosecution Counsel, urged us to reject the appeal arguing that the prosecution proved the charges beyond any reasonable doubt; that possession of trophies and fake foreign currencies by the appellants was proved through the evidence that demonstrated beyond doubt that the house in which the trophies and the fake Ethiopian currencies were found belonged to the appellants; that the search was conducted in accordance with the Constitution and the law; and that the principles of sentencing were adhered to.

Being a second appeal, and as the Court has repeatedly said pursuant to **section 361** of the Criminal Procedure Code, we are concerned only with matters of law and cannot interfere with the decision of the trial court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law. See **Karani vs. R** [2010] 1 KLR 73.

We reiterate that what is before us in this appeal is the confirmation by the High Court of appellants' conviction and sentence for the offences we have set out earlier.

We start our consideration of the first ground with **Article 50 (2) (a)** of the Constitution which is to the effect that an accused person is presumed to be innocent until the contrary is proved. The burden of proving the guilt of an accused person, therefore, rests solely on the prosecution save where there are admissions by the accused person, or where the law specifically requires the accused person to prove a fact.

Whereas it is common ground that the house in which a contingent of police officers in the company of KWS officials conducted a search and retrieved rhinoceros' horns and an elephant ivory belonged to the appellants, the issue taken by the appellants is that that search violated their rights to privacy guaranteed by the Constitution.

Under **Article 31** of the Constitution, every person is guaranteed the right to privacy, which includes the right not to have "**their person, home or property searched".** Our view is that under **Article 25**, only the following rights and fundamental freedoms, and no other, cannot be limited—

> **"(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;**
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> **(b) freedom from slavery or servitude;**
>
> **(c) the right to a fair trial; and**
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> **(d) the right to an order of habeas corpus".**

Because the right to privacy is not one of those rights which cannot be limited, the search conducted in the appellants' house was authorized by three statutes as follows:

> **Section 22(1)** of the **Criminal Procedure Code**
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> **"1) If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into or is within any place, the person residing in or being in charge of that place shall, on demand of the person so acting or the police officer, allow him free ingress thereto and afford all reasonable facilities for a search therein.**
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> **(2) If ingress to a place cannot be obtained under subsection(1), it shall be lawful in any case for a person acting under a warrant, and in any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity to escape, for a police officer to enter the place and search therein, and, in order to effect an entrance into the place, to break open any outer or inner door or window of a house or place, whether that of the person to be arrested or of another person, or otherwise effect entry into the house or place, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance." (**Our emphasis).

Section 49 of the Wildlife (Conservation and Management) Act which was in force at that time of the offence but now repealed authorized a search;

> **"If an authorised officer has reasonable grounds for believing that any person has committed an offence under this Act or the rules and may-**
>
> **a. ...**
>
> **b. Enter and search, with or without assistance, any land, building, tent, vehicle or boat in the occupation or possession of such person, and open and search any baggage or other thing in the possession of such person:**
>
> **Provided that no dwelling house shall be entered without a warrant except under exceptional circumstances".** (Emphasis ours).

Finally, **Section 20** of the Police Act (also repealed) states that;

> **"20.(1) when an officer in charge of a police station or a police officer investigating an alleged offence, has reasonable grounds to believe that something necessary of the purposes of such investigation is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant as aforesaid enter any premises in or on**

which he expects the thing to be and there search or cause search to be made for, and take possession of, such thing". (our emphasis).

Was **Article 31** of the constitution infringed? The right to privacy and respect for personal property are key principles of the Constitution. Powers of entry and search should be fully and clearly justified before use because they may significantly interfere with an individual's right to privacy. Less intrusive means must be considered before resorting to searching a private dwelling house. To the question we have posed; whether **Article 31** was breached, in view of the law, from what we have set out in the foregoing paragraphs, we think not. There were reasonable grounds to believe that the trophies were in the appellants' house and indeed trophies were found hidden therein. There were also exceptional circumstances that justified the action of raiding the appellants' house.

Under the law reproduced above, we respectfully hold the view that the reasonableness requirement, the appropriateness of every search without a warrant is decided on a case-by-case basis, weighing the accused person's privacy interests against the reasonable needs of law enforcement under the circumstances. In the matter before us, the exigencies of the situation made the course taken to search without a warrant imperative and in the circumstances, permissible.

This ground, for all these reasons, must fail.

To the main substance of the appeal, we now turn to consider; whether there was evidence from which the two courts below could reach a determination of the appellant's guilt. The concurrent findings and conclusions of fact by both courts, that both the main house and its extension were owned by the appellants, was conceded. Similarly, the contention whether the room in which the trophies and the fake currencies were recovered was under the control of the appellants was again resolved by the two courts below when they dismissed the defence that the room had been leased to a third party. These are factual findings that we cannot interfere with as nothing has been shown to us to suggest that the two courts considered irrelevant matters or did not consider relevant matters.

For our part, based on these conclusions, we are satisfied that possession was proved. Although neither the repealed Wildlife (Conservation and Management) Act nor the current Act define the word "*possession*", the courts have, over the years, in numerous cases relied on the definition in **Section 4** of the Penal Code which defines possession to include;

"not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person;

(b) If there are two or more persons and any one or more of them, with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them."

Government trophies were retrieved from the appellants' house and possession as defined above was proved. The appellants led the officers to the rooms where the exhibits were found. There was nothing wrong or impractical in finding the two appellants guilty of being in possession of Government trophies which were found in their house.

The only thing that has caused us some concern is the conviction and confirmation of the conviction for the offence in count 4, of being in possession of implements of forgery without lawful authority contrary to **section 367(b)** of the Penal Code. The implements in question were five colour printer cartridges and one paper cutter. **Section 367(b)** provides that;

"Any person who, without lawful authority or excuse, the proof of which lies on him—

b) makes, uses or knowingly has in his custody or possession any frame, mould or instrument for making such paper, or for producing in or on such paper any words, figures, letters, marks, lines or devices peculiar to and used in or on any such paper."

We are unable to see how, having in one's possession printer cartridges and one paper cutter *per se* can be an offence under the above section. The instrument must be linked, for instance, in this case, to a forgery. Not an iota of evidence was presented to prove this charge and the learned Judge committed an error in failing to so find.

This ground similarly fails, save for our finding on count 4 to which we shall return at the end of the judgment.

All we wish to say on the sentence first is that by dint of **section 361(1)** of the Criminal Procedure Code, we have no jurisdiction to entertain the question of severity of sentence but can only do so if illegality of sentence is alleged.

Secondly, in matters of sentencing, the courts have legitimate jurisdiction to exercise discretion and on appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. See **Bernard Kimani Gacheru v. Republic,** Cr. App. No. 188 of 2000.

We did not find anything to suggest that the discretion in imposing the sentences was improperly exercised.

In the end, we find no merit in this appeal, save for the appeal challenging the conviction and sentence in count 4, which we allow, set aside the sentence and quash the conviction. The rest of the grounds fail and the appeal is accordingly dismissed.

Dated and delivered at Nairobi this 4th day of December, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR