



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. E103 OF 2021**

**ASIF AMIRALI JETHA ALIBHAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Appellant Asif Amiral Jetha Alibhai was accused in Shanzu CMC CR. Case No. 598 of 2019 where he was charged and convicted with the offences of Trafficking in persons contrary to Section 3(1)(d) as read with Section 3(5) of the Counter Trafficking in persons Act No. 8 of 2010.
2. He was also charged with and convicted for the offence of interfering with travel documents contrary to Section 8(a) of the Counter Trafficking in persons Act No. 8 of 2010 & sentenced to serve 10 years imprisonment in Count 3.
3. In Count 4, he was charged and convicted for the offence of being in possession of proceeds of crime contrary to Section 4(i) as read with Section 16(1)(a) of the proceeds of crime and Anti-money Laundering Act where he was fined Kshs.1,000,000/= or serve one year imprisonment.
4. In Count 9 he was charged & convicted for the offence of Engaging in Business without work permit contrary to Section 53(1) (M) as read with Section 53(2) of the Kenya Citizenship and Immigration Act 2011 where he was fined to pay a fine of Kshs.100,000/= or serve 6 months jail term.
5. In Count 10, Applicant was charged with offence of unlawfully employing foreign nationals contrary to Section 45(1)(a) as read with Section 60 of the Kenya Citizenship & Immigration Act 2011 where he was fined Kshs.100,000/= or serve 6 months imprisonment.
6. Applicant/Appellant was dissatisfied and aggrieved by the said conviction and sentencing and he filed appeal herein concurrently with application dated 8<sup>th</sup> February 2022 seeking to be admitted to bail pending appeal.
7. The application was supported by the grounds on the face of the application and supporting affidavit sworn by the Appellant on 8<sup>th</sup> February 2022 and opposed by the Replying Affidavit of the Respondents sworn by Lilian Kambaga sworn on 21<sup>st</sup> March 2022 and grounds of opposition dated 28<sup>th</sup> February 2022 filed on even date.
8. The Application was canvassed by way of written submissions of the Appellant filed on 7<sup>th</sup> of March 2022 and the Respondent's submissions filed on 21<sup>st</sup> March 2022.
9. In the case of *Charles Owanga Aluoch v Director of Public Prosecutions* [2015] eKLR, it was held that:-

**“The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court’s discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:**

**“(1) The principle consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.**

(2) If it appears prima face from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

(3) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

Also, in the case of *Dominic Karanja v Republic (1986) KLR 612* stated that:-

“(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;

(b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;

(c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal”

10. I have perused the detailed judgment of the trial Magistrate, I have equally considered the appellant’s grounds of appeal, the application and the grounds thereto as well as the supporting affidavit and the Appellant’s submissions. I have also considered the grounds of opposition and Replying Affidavit together with the Respondent’s submissions and it is clear that the Applicant has not satisfactorily proved that his appeal has any chances of success.

11. The 67 page Judgment has analyzed in details both the prosecution and the defence evidence and arrived at the conclusion that the Appellant was guilty as charged. Applicant is not a Kenyan and there’s no prove that he applied for Kenyan citizenship. He was convicted for the offence of working in Kenya without a work permit. Certificate of birth produced by Applicant indicates he was born in 1986 when he said he had stayed in Kenya for 25 years and was born on 14/12/1968 and is 53 years old. The trial Magistrate properly found that the exhibit was wanting.

12. The prosecution witnesses No. 1 – 12 are indicated as Nepalese girls some of whom were underage and they were brought into the country by the Appellant on visitor’s visa, but he took them to his club to dance for patrons at a pay without work permit. They are said to have overstayed contrary to terms and conditions of their visas. The Applicant in his defence admitted that the Nepalase girls referred to him as their employer. He also admitted that he picked them from the airport and had daily interactions with them upto the night that the police raided his club and arrested him together with the foreigners.

13. The Applicant annexed several medical documents to show he has been suffering from diabetes, lumbar spine injury for which the trial Magistrate made an order that the applicant should be taken for treatment immediately. In *Dominic Karanja v Republic (1986) KLR 612* it was held that **Ill health per se would not constitute an exceptional circumstance where there existed medical facilities for prisoners**

14. This court hereby orders that whenever the applicant requires to be accorded any special treatment that cannot be found at the GK Prison and Coast General Teaching & Referral Hospital he should apply through the Officer Incharge GK Prison Shimo La Tewa or any other prison facility where he is detained for the court to issue appropriate orders for his treatment at a facility of his choice subject to the provisions of the Prisons Act.

15. The Applicants application dated 8<sup>th</sup> of February 2022 seeking bail pending appeal is therefore dismissed for lack of merit.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24<sup>TH</sup> DAY OF MARCH 2022**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**

**In the presence of: -**

Ogwel- Court Assistant

Mr. Chacha Advocate together with Mr. Magolo Advocate for Appellant/Applicant

Mr. Ngiri for State/Respondent

Accused – present in person

**Hon. Lady Justice A. Ong’injo**

**Judge**

**Order**

Mention – 1/4/2022 for Appellants submissions.

**Hon. Lady Justice A. Ong’ino**

**Judge**