



REPUBLIC OF KENYA



**Alibhai v Republic (Criminal Appeal E103 of 2021)
[2022] KEHC 15411 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 15411 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E103 OF 2021
A. ONG'INJO, J
OCTOBER 21, 2022**

BETWEEN

ASIF AMIRALI JETHA ALIBHAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the judgment, conviction and sentence of Hon. D
Odhiambo RM delivered on 26th November, 2021 in Criminal case 595 of 2019)*

JUDGMENT

1. The Appellant was arraigned in Shanzu Law Court on 15th April 2019 in Case No 598 of 2019 before Hon D. Odhiambo and was charged with three counts. The counts read as follows; -
2. Count I: 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. Particulars are that on diverse dates between 24th March 2019 and 13th day of March 2019, at Nyali Sub county, within Mombasa County jointly with others not before Court trafficked by harboring twelve Nepalese Nationals for purpose of exploitation by means of deception.
3. Count II: Promoting trafficking in persons contrary to section 5(a) of the [Counter Trafficking in Persons Act](#), No 8 of 2010. The particulars are that on diverse dates between 24th March 2019 and 13th March 2019 at Nyali Sub County within Mombasa County being the occupier and proprietor of Rangeela Bar & Restaurant Amkay Plaza Plot No IMN/822 permitted the same to be used by 12 Nepalese aliens for purposes of promoting trafficking in persons.
4. Count III: Interfering with travel documents contrary to section 8 (a) of the [Counter Trafficking in Persons Act](#), No 8 of 2010. The particulars are that on diverse dates between 24th March 2019 and 13th



- March 2019 at Nyali Sub- county within Mombasa County, the Accused confiscated travel documents namely passports for 12 Nepalese nationals in furtherance of trafficking in persons.
5. On 23rd May 2019, the Prosecution amended the charge sheet and the Appellant was charged with 11 counts. They read as follows :-
 6. Count I: 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. Particulars are that on diverse dates between 24th March 2019 and 13th day of March 2019, at Nyali Sub county, within Mombasa County jointly with others not before Court trafficked by harboring twelve Nepalese Nationals for purpose of exploitation by means of deception.
 7. Count II: Promoting trafficking in persons contrary to section 5(a) of the [Counter Trafficking in Persons Act](#), No 8 of 2010. The particulars are that on diverse dates between 24th March 2019 and 13th March 2019 at Nyali Sub County within Mombasa County being the occupier and proprietor of Rangeela Bar & Restaurant Amkay Plaza Plot No IMN/822 permitted the same to be used by 12 Nepalese aliens for purposes of promoting trafficking in persons.
 8. Count III: Interfering with travel documents contrary to section 8 (a) of the [Counter Trafficking in Persons Act](#), No 8 of 2010. The particulars are that on diverse dates between 24th March 2019 and 13th March 2019 at Nyali Sub- county within Mombasa County, the Accused confiscated travel documents namely passports for 12 Nepalese nationals in furtherance of trafficking in persons.
 9. Count IV: Being in possession of proceeds of crime contrary to section 4(c) as read with section 16(1) (a) of the [Proceeds of Crime and Anti Money Laundering Act](#). The particulars are that on 13th March 2019 at Nyali Sub- County within Mombasa County, the accused was found in possession of Kshs 69,050; USD 1,382 and at the time of acquisition knew that it formed part of proceeds of crime namely trafficking in persons and tax evasion. He was fined Kshs 1,000,000 or in default to serve one year in prison.
 10. Count V: Deliberately defaults in the obligation to file income tax returns by due date contrary to section 97(e) of the [Tax Procedure Act](#), 2015 as read with section 104(3) of the [Tax Procedure Act](#) 2015. The particulars are that between 30th June 2017 and 30th June 2018 being a resident of Kenya and chargeable to tax under Pin A00267xxxx and passport No HM62xxxx & BA76xxxx and earning taxable income from Rangeela Bar & Restaurant and eligible to pay tax returns, knowingly defaulted on your obligation to file income tax returns for the year of income 2017-2018 which you ought to have filed with the commissioner as required by law.
 11. Count VI: Failure to submit income tax returns by due date contrary to section 94 of the [Tax Procedure Act](#), 2015 as read with section 104(1) of the [Tax Procedure Act](#). The particulars are that on 30th June 2017 and 30th June 2018 being a resident of Kenya and chargeable to tax under Pin A00267xxxxx and passport No HM62xxxx & BA76xxxx earning taxable income and eligible to file tax returns, failed to submit income tax for the year income 2016-2017 which by submission you ought to have done with the Commissioner as required by the Law.
 12. Count VII: Economic exploitation of a child contrary to section 10(1) as read with section 20 of the [Children Act](#) No 8 of 2001. The particulars are that on diverse dates between 24th March 2019 and 13th March 2019 at Nyali Sub- County within Mombasa County, the accused willfully/ negligently engaged a child GA aged 17 years in hazardous work namely dancing in a club which was harmful to her health or physical, mental, spiritual, moral or social development.



13. Count VIII: Economic exploitation of a child contrary to section 10(1) as read with section 20 of the [Children Act](#). The particulars are that on diverse dates between 24th March 2019 and 13th March 2019 at Nyali sub-county within Mombasa County the Accused willfully / negligently engaged a child BAM aged 16 years in hazardous work namely dancing in a club which was harmful to her health or physical, mental, spiritual, moral or social development.
14. Count IX: Engaging in business without a work permit contrary to section 53(1)(m) as read with section 53(2) of the [Kenya Citizenship and Immigration Act](#), 2011. The particulars are that on diverse dates between 1st January 2019 and 13th March 2019 at Nyali sub-county within Mombasa County, being not a citizen of Kenya the Accused engaged in business without exemption of the [Kenya Citizenship and Immigration Act](#) 2011. He was fined Kshs 100,000 or in default to serve 6 months in prison.
15. Count X: Unlawfully employs a foreign national contrary to section 45(1) (a) as read with section 60 of the [Kenya Citizenship and Immigration Act](#), 2011. The particulars are that on diverse dates between 24th March 2019 and 13th March 2019 at Nyali sub-county within Mombasa, the Accused was found to have employed Nepalese nationals as club dancers, persons whose status does not authorize them to engage in employment contrary to the provisions of the Kenyan Citizenship and Immigration Act.
16. However, after evidence of 16 prosecution witnesses had been tendered the charge sheet was once again amended on 21st August 2020 and Appellant was charged with 11 counts that read as follows:
17. Count I: 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. Particulars are that on diverse dates between 1st June 2018 and 13th day of April 2019, at Nyali Sub county, within Mombasa County jointly with others not before Court trafficked by harboring twelve Nepalese Nationals for purpose of exploitation by means of deception.
18. Count II: Promoting trafficking in persons contrary to section 5(a) of the [Counter Trafficking in Persons Act](#), No 8 of 2010. The particulars are that on diverse dates between 1st June 2018 and 13th day of April 2019 at Nyali Sub County within Mombasa County being the occupier and proprietor of Rangeela Bar & Restaurant Amkay Plaza Plot No IMN/822 permitted the same to be used by 12 Nepalese aliens for purposes of promoting trafficking in persons.
19. Count III: Interfering with travel documents contrary to section 8 (a) of the [Counter Trafficking in Persons Act](#), No 8 of 2010. The particulars are that on diverse dates between 1st June 2018 and 13th day of April 2019 at Nyali Sub- county within Mombasa County, the Accused confiscated travel documents namely passports for 12 Nepalese nationals in furtherance of trafficking in persons.
20. Count IV: Being in possession of proceeds of crime contrary to section 4(c) as read with section 16(1) (a) of the [Proceeds of Crime and Anti Money Laundering Act](#). The particulars are that on 13th day of April, 2019 at Nyali Sub- County within Mombasa County, the accused was found in possession of Kshs 69,050; USD 1,382 and at the time of acquisition knew that it formed part of proceeds of crime namely trafficking in persons and tax evasion. He was fined Kshs 1,000,000 or in default to serve one year in prison.
21. Count V: Deliberately defaults in the obligation to file income tax returns by due date contrary to section 97(e) of the [Tax Procedure Act](#), 2015 as read with section 104(3) of the [Tax Procedure Act](#) 2015. The particulars are that between 30th June 2017 and 30th June 2018 being a resident of Kenya and chargeable to tax under Pin A00267xxxx and passport No HM62xxxx & BA76xxxx and earning taxable income from Rangeela Bar & Restaurant and eligible to pay tax returns, knowingly defaulted



- on your obligation to file income tax returns for the year of income 2017-2018 which you ought to have filed with the commissioner as required by law.
22. Count VI: Failure to submit income tax returns by due date contrary to section 94 of the [Tax Procedure Act](#), 2015 as read with section 104(1) of the [Tax Procedure Act](#). The particulars are that on 30th June 2017 and 30th June 2018 being a resident of Kenya and chargeable to tax under Pin A00267xxxxx and passport No HM62xxxx & BA76xxxx earning taxable income and eligible to file tax returns, failed to submit income tax for the year income 2016-2017 which by submission you ought to have done with the Commissioner as required by the Law.
 23. Count VII: Economic exploitation of a child contrary to section 10(1) as read with section 20 of the [Children Act](#) No 8 of 2001. The particulars are that on diverse dates between 1st October 2018 and 13th April, 2019 at Nyali Sub- County within Mombasa County, the accused willfully/ negligently engaged a child G.A aged 17 years in hazardous work namely dancing in a club which was harmful to her health or physical, mental, spiritual, moral or social development.
 24. Count VIII: Economic exploitation of a child contrary to section 10(1) as read with section 20 of the [Children Act](#). The particulars are that on diverse dates between 12th November 2018 and 13th April, 2019 at Nyali sub-county within Mombasa County the Accused willfully / negligently engaged a child BAM aged 16 years in hazardous work namely dancing in a club which was harmful to her health or physical, mental, spiritual, moral or social development.
 25. Count IX; Engaging in business without a work permit contrary to section 53(1)(m) as read with section 53(2) of the [Kenya Citizenship and Immigration Act](#), 2011. The particulars are that on diverse dates between 1st June 2018 and 13th day of April at Nyali sub-county within Mombasa County, being not a citizen of Kenya the Accused engaged in business without exemption of the [Kenya Citizenship and immigration Act](#) 2011.
 26. Count X; unlawfully employs a foreign national contrary to section 45(1) (a) as read with section 60 of the [Kenya Citizenship and Immigration Act](#), 2011. The particulars are that on diverse dates between 1st June 2018 2019 and 13th April 2019 at Nyali sub-county within Mombasa, the Accused was found to have employed Nepalese nationals as club dancers, persons whose status does not authorize them to engage in employment contrary to the provisions of the [Kenyan Citizenship and Immigration Act](#).
 27. Count XI: Having suspected stolen property contrary to section 323 of the [Penal Code](#). The particulars are that on 13th March 2019 at Nyali Su- County within Mombasa County, the accused having being detained by Sgt Joseph Munyao a police officer as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code had in possession 18 Kenya Revenue Authority excise stamps serial Nos. 024xxxxxx05 to 024xxxxxx11.02xxxxxx13 to 024xxxxxx014,024xxxxxx19 to 024xxxxxx27 reasonably suspected to have been stolen or unlawfully obtained.
 28. Vide a judgement dated 26th November 2021, the Appellant was convicted and sentenced on six counts. They were:
 29. Count I: 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. He was sentenced to serve 30 years in prison.
 30. Count II: Promoting trafficking in persons contrary to section 5(a) of the [Counter Trafficking in Persons Act](#), No 8 of 2010.He was sentenced to serve 20 years in prison.
 31. Count III: Interfering with travel documents contrary to section 8 (a) of the [Counter Trafficking in Persons Act](#), No 8 of 2010. He was sentenced to serve 10 years in prison.



32. Count IV; Being in possession of proceeds of crime contrary to section 4(c) as read with section 16(1) (a) of the *Proceeds of Crime and Anti Money Laundering Act*. He was fined Kshs 1,000,000 or in default to serve one year in prison.
33. Count IX; Engaging in business without a work permit contrary to section 53(1)(m) as read with section 53(2) of the *Kenya Citizenship and Immigration Act*, 2011. He was fined Kshs 100,000 or in default to serve 6 months in prison.
34. Count X; unlawfully employs a foreign national contrary to section 45(1) (a) as read with section 60 of the *Kenya Citizenship and Immigration Act*, 2011. He was fined Kshs 100,000 or in default 6 months in prison.
35. Being dissatisfied with both conviction and sentence the Appellant herein filed a Petition of Appeal dated 9th December 2021. Grounds of appeal are reproduced herein verbatim; -
 - i. That the learned Trial Magistrate erred in law and fact in reaching a conviction on charges that were lacking in specificity and fatally defective, considering the manner in which they were drawn and lack of evidence to support them.
 - ii. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant contrary to the evidence on record which clearly demonstrated that PW1 – PW12 were people seeking greener pastures and came to Kenya voluntarily, a narrative which did not fit or support ingredients of the offence of trafficking in persons that the Appellant was charged with.
 - iii. That the Learned Trial Magistrate erred in law and fact by failing to appreciate that evidence led by the Prosecution did not support a finding that the Appellant was engaged in the promotion of trafficking in persons since the Appellant did not own or lease any premises, house or building for the purpose of promoting trafficking in persons, publish, export or import any material for purposes of promoting trafficking and did and did not manage, run or finance any job recruitment agency for the purposes of promoting trafficking.
 - iv. That the Learned Trial Magistrate erred in law and fact in associating the Appellant with the establishment called ‘Rangeela Bar’ while also finding that the charge was with regard to, ‘Rangeela Bar and Restaurant.’
 - v. That the Learned Trial Magistrate erred in Law and fact in further finding that the Appellant was the registered proprietor of ‘New Rangeela Bar’ and despite conflicting evidence relating to the proprietorship of the legal entity which operated the subject premises.
 - vi. That the Learned Trial Magistrate erred in law and fact in dismissing the Appellant’s defence that he did not own the business while there was no cogent evidence displacing the Appellant’s defence.
 - vii. That the Learned Trial Magistrate erred in Law and fact in engaging in speculation by connecting Appellant travels to PW1-PW12 travel itinerary, all of who travelled at different times and entered Kenya on their own while completely ignoring the evidence that some even came from Uganda with no connection to either the Appellant or his travel itinerary.
 - viii. The Learned Trial Magistrate erred in Law by misapplying the provisions of section 119 of *Evidence Act* to wrongfully shift the burden of proof relating to his travels being connected to the travels of PW1- PW12 despite the prosecution leading no evidence to connect the Appellant travels to the offences that the Appellant had been charged with.



- ix. That learned Trial Magistrate erred in law and fact in finding that the monies confiscated from the premises were proceeds of crime and were in the Appellant’s possession notwithstanding there was no evidence to connect the Appellant to the possession or receipt of monies in the tins / buckets.
 - x. That the Learned Trial Magistrate erred in Law and fact in finding that there was interference with PW1 –PW12’S travel documents by an act of keeping them.
 - xi. That the Learned Trial Magistrate erred in law and fact in finding that PW1 – PW 12’s passports were confiscated by the Appellant.
 - xii. That the learned Trial Magistrate erred in law and fact in finding that the prosecution had proved the charges contrary to the evidence on record which demonstrated that; -
 - a. PW1-PW12 came into the country lawfully.
 - b. PW1-PW12 sought to work willingly and lawfully and had been working in Kenya after special passes had been issued to them in 2018.
 - c. PW1- PW12 were granted valid special passes to work and when there was expiry an application was duly made for renewal, facts that were initially concealed from the Court by the Prosecution.
 - d. PW1-PW12 negotiated their employment terms and willingly travelled to Kenya and lawfully entered the country without any force or coercion.
 - e. Most of PW1- PW12 were ‘mjura” dancers and knew what the job entailed well before they travelled to Kenya to take up employment.
 - f. The Appellant had sought to have his Kenyan citizenship recognized and even has a ‘awaiting card” having applied for his Kenyan identity card.
 - xiii. That the learned Trial Magistrate erred in law by failing to order a criminal inquiry and prosecution under the Witness Protection Act of safe house manager Nathim Khan for threatening PW4 to give false testimony in court.
 - xiv. That the sentence imposed by the Trial Magistrate were manifestly excessive and arrived at on the wrong principle that the Court has no discretion.
36. The Appeal was opposed in its entirety by the Respondent.

Summary of Prosecution Case

- 37. The events leading to the case herein are that the office of Transnational Organized Crime under the leadership of Mr. Paul Gathari received intelligence reports of suspected human trafficking. This led them to Mkomani area in Nyalı at a building called Amir Plaza where they raided a club called Rangeela on 13th April 2019 and arrested the Appellant alongside twelve Nepalese ladies who were dancers in the said club.
- 38. The Prosecution called 21 witnesses.
- 39. PW1 was Namratar Thapa aged 34 years. She testified that she came to Kenya on 12/4/2019. Her friends informed her of a dancing job in Kenya and the Appellant paid her air fare. He sent her 25,000 rupees vide western union that she used to buy clothing and cosmetics. Appellant picked her up at the airport and got her visa at immigration and took her to a house in Bamburi at around 2 pm. At 8



- pm they went to the club Rangeela, in the company of 11 other ladies. They were to dance the 'mjura' Indian dancing style. However, they were arrested that night. The Appellant had promised to pay her Kshs 60,000 per month.
40. On cross examination, she testified that she was not forced to come to Kenya or forced to dance and had no complaint against the Appellant.
 41. PW2 was Asali Maya Bal, 20 years of age. She came to Kenya from Nepal to work. She had completed 6 months on the night of arrest. The Appellant paid for her expenses to come to Kenya and he met her at the airport and she was taken to Zawadi Apartments in Bamburi by a driver. She found 9 other girls also from Nepal in the said apartments. She stayed in the house till 8.30 pm then they left for the club at Rangeela. They reached the club at 9.30pm. The driver called Solo used to keep her passport. They each had tins designated for them for tip collection and she identified hers. The money would go to a man called Erick and he would keep records. She was there for six months. She used to communicate with her parents and they would get a day during the month when they would be off. On 12/4/2019 they were arrested.
 42. On cross examination she said she was earning Kshs 60,000 a month and had heard of the job through a friend of hers called Bishal. She stated that she was born on 26.8.1999 and was not a child. The customers at the club were also not allowed to touch them and had never been sexually exploited. She further stated that she was not barred from going anywhere and had no desire of meeting anyone in Mombasa.
 43. On re-examination she stated that she said that they had free days to visit places with the driver and the boss.
 44. PW3 was Gurong Adhikavi Sanju, she came to Kenya on 12th of October but could not remember the year. She came from Nepal. She had gotten a job at Rangela by the time she was in Nepal and her air ticket was paid by the Appellant and she was received at the airport by him. She worked for 6 months and stayed in Bamburi. However, she never went out alone and would communicate to her family from 3pm to 6pm through the company phone. She used to work at the club till 3-4 am in the morning. Customers used to give her money through her tin named Sanju and a man called Erick used to record the money. She was taken for age assessment which said she was 17 but she denied this and stated that she was 20 years of age.
 45. On cross examination, she said that she was born on 25/4/1998 and every month she would send Kshs 50,000- 55000. She had a husband and children and had no problem communicating with her family. When they wanted to walk around they would be taken round by Suleiman and was never sexually exploitation.
 46. PW4 was Kumari Phiyaka of passport No 09027719 and she said she was 25 years of age. She came to Kenya due to financial constraints in her country Nepal. Appellant sent her Kshs 60,000 and she bought a new dress with the money. She went through immigration by herself and her ticket was paid by the Appellant. She was received at the airport with the Driver Suleiman and taken to Zawadi Apartments. She had been to Kenya around 9- 10 months before the arrest. Customers gave them tips for dancing and this would be collected in their tins. On 26/2/2019 she collected Kshs 7500 and the next day she collected Kshs 40,400. She was paid Kshs 60,000 in February. Money in the tins would be taken by Erick. She further testified that there was no time to socialize and used the company phone to communicate from 3pm to 6pm. She was taken to renew her passport in Tanzania with driver Suleiman.



47. On cross examination, she said that she was born on 2/1/1995. She had two kids and was divorced and knew that she was coming to dance when she came to Kenya. Zawadi apartments were paid for by the company. She knew that she was coming to Kenya to work. She said that Nathir was threatening to charge them that she should say that Appellant took the passport from her. She would normally work between 9pm-3/4 am and would wake up at 2.30 pm and that's why she would only make calls only after 3pm. They were also never prevented from walking around.
48. PW5 was Rayika Bk. She came from Nepal to Kenya and knew she was coming to dance at club Rangeela and Appellant gave her Rupees 80,000 to travel to Kenya. He also gave her a one-month salary advance. She came through Mombasa and was not asked anything at immigration. She was given Visa that she paid for at around 50 dollars. She did not remember who between the Appellant and Suleiman picked her up. At the club they had tins for their tips and the money would be collected by the manager Erick. The money would be taken by Erick. She could not read properly but she could see in the records 4/1/2019 or Kshs 16,500 and at the end there was 31/1/2019 for 13,629 and Kshs 76,5639. They were free to walk around and used the company phone from 3pm to 6 pm. She danced for around 9 to 10 months. She gave her passport to the Appellant. The Appellant or driver would take them out once in a while and if she went out the house keeper Mary would accompany her. She was taken to Tanzania to renew her visa by Suleiman she did not pay for herself. After the arrest she was taken for age assessment.
49. In cross examination she testified that she was born on 9/12/1988 as indicated on her passport. She had met the Appellant in Nepal and had agreed to come to Kenya to dance. That the Appellant had treated her like a daughter. That she had a loan of Rupees 5M to pay. She was never a prisoner in Bamburi and was never held against her consent and that the Appellant was the best boss she had. She testified that she knew Nadhir Khan and he told them that if they said that they had given out passports they would be in problems and if they wanted salaries they should talk to the boss.
50. PW6 was Menuka Magari she was 24 years. She was told by her friend Riya about a job opportunity in Kenya and was given the Appellant's contact. She had been a cook at at Nepal and came to Kenya due to financial challenges. She was given contact of the Appellant and she contacted him after a month. During that time she was working in Uganda as a domestic worker. She came to Kenya with her boss from Uganda. She was staying with 11 other girls. On that day she arrived she stayed in Bamburi for 4-5 hours and went to club Rangeela where she was to dance. In the club there was a tin where customers would put money in a tin.
51. On cross examination, she said she was 24 years old and was born on 14/9/1996 and her passport was issued on 26/12/2017. On the day of arrest, the police came at 1.00 am.
52. PW7 was Tamany Sita from Nepal of passport number 0980XXXX. She came to Kenya for a better salary. Her friend Payi gave her the Appellants contact and he sent her 80,000 rupees as salary for the first month and came to kenya via a flight to Mombasa. She was received by the Appellant and Suleiman at the airport. She danced on that day at Rangeela and wore a long dress and jeans. Her target was Kshs 400,000 per month and her pay was NR 80,000. The customers used to give them tips and the money would be collected by Erick. She identified the books used to record the money collected, and pointed out that on 1/2/2019 she collected 10,900 and 14/2/ 2019 she collected 58,000 and 28/2/2019 she collected 17,836. The whole month was Kshs 594,794. The money was for the Appellant. She worked at Rangeela for 10 months. She went to India once and came back when working at Rangeela.
53. On cross examination she said she was 27 years. During the 10-month period she was never molested or forcefully enslaved. She further said the money paid in advance was not a bribe and she was not forced to raise Kshs 400,000 per month.



54. PW8 was Khadji Saru. She got the job in Kenya through a friend called Riya, she used to work in a shop in Nepal and came to Kenya because of financial problems. Appellant sent her an advance salary of NR 80,000 and she came to Kenya using her passport No 0777xxxx at Mombasa Airport and was not asked what she was coming to do at immigration and she paid about 50 dollars. She met Appellant at the airport and he took her to Zawadi Apartment in Bamburi. She had a target of Kshs 400,000 and she had a tin named Zoya where customers put money. She identified the tin. Money was collected by Erick and he would record in his books. On 1/2/2019 she collected 51,400; on 14/2/2019 she collected 61,000 and 21/2/2019 she collected 15,136. The total for the month was Kshs 882,344. She worked for around 9/10 months and renewed her passport in Tanzania with 8 other girls and Suleiman took them. Her passport was kept by the Appellant and were free to shop in the company of the maid.
55. On cross examination she said was not forcefully brought into the country. The Appellant would also give her bonuses and she was never forced to raise Kshs 400,000. She was given the phone between 3pm and 6pm and the maid in zawadi was not their body guard. They used the use the phone between 3 to 6pm.
56. PW9 was Rajdhani Kriti from Nepal. She came to Kenya due to financial constraints. Her friend Munai gave her the contact of the Appellant and he sent her NR 40,000 vide passport No 109xxxxx MF1 19. When she arrived in Kenya she was picked up by the Appellant and driver and took her to Zawadi apartments. She paid at the immigration office. She had a target of Kshs 300,000 On 14/2/2019 she collected 53, 1000; on 28/2/2019 she collected 13,736. She collected 575,812 in total in February 2019. She would be paid 60,000 per month. When her visa expired she travelled to Mumbai.
57. On cross examination she said she was not in Kenya against her will and Appellant was not using her to make money for himself. She was able to take care of her family while working for Appellant and was never forced to raise Kshs 300,000.
58. On reexamination she said that it was not compulsory for her to raise 300,000 a month and the club was okay with any amount of money she raised.
59. PW10 was Darji Ramaya. She came to Kenya vide passport No 0547xxxx and used to dance in Nepal. She contacted the Appellant herself from Nepal and told him she was looking for work. He sent her NR 60,000. She was met at the airport with Suleiman and was taken to Zawadi where she met 8 other girls. She had no issues at immigration. he started working the day after and would work till 3/4am. Her stage name was Roshini no 3 and her target per month was about Kshs 300,000 and it was given to the Appellant. On 1.1.2019 she collected 27,300 on 20.1.2019 she collected 18,182 and on 31.1.2019 she collected 13,929. The whole collection for January 2019 was Kshs 466,350. She worked at Rangela for 6 months. They had access to the company's telephone from 3 pm to 6 pm and she was not allowed to use her phone. She renewed her passport in Tanzania. Her passport got lost and she gave the Appellant to keep it for her. On 12/4/2019 she was with the police in Nyali and she was taken for age assessment and was told that she was about 25 years. They used to have only time off once a month and Appellant would take them out. On the day of arrest her tin had 7 dollars from customers and Kshs 1000 from the club as good luck.
60. On cross examination she said that she was 25 years old and born on 29th May 1993 and came in Kenya on August 2018. They would be paid bonuses after competitions; 50,000 for number one; Kshs 30, 000 for number two and Kshs 20, 000 for number 3.
61. PW11 was Pokhrel Kaunchan. And she came to Kenya due to financial constraints and her friend Riya connected her to the Appellant. The Appellant sent her to Kenya due to financial constraints and her friend Riya who connected her to the Appellant who sent her NR 30,000 which she paid for shopping



- and travel. She got her visa and came to Kenya and passed the immigration office. At the Airport she met the Appellant and driver who took her to a good house in Bamburi. She started dancing the next day, her stage name was Kany No9 she identified her tin marked as MF126 and a necklace given to her by her customer and the necklace in it. Erick would record how much she collected On 1st February 2019 she collected 13,250, 14th February 2019 she collected 39,8000 and 28th February she collected 13,936. The whole month she collected 450,137. She worked at the club Rangela for about 10 months and she used to work to 3/4am. She had a phone but her boyfriend damaged it and she used the company's phone between 3pm-6pm. Her passport was in the house all the time and the manager would keep them while at work.
62. On cross examination, she said Appellant did not bring her to Kenya illegally and neither did he use her for profit or take away her passport. She negotiated for her terms of employment. They had a maid at Zawadi apartments and were free to walk around. She used to be paid bonuses if she exceeded her targets and was never sexually molested by anyone. She did not understand why she was taken to the safe house and enjoyed working for the Appellant.
63. PW12 was Ale Sanjita, and used to work in Nepal as a dancer and came to Kenya for good opportunities. She travelled using her passport number 0975xxxx. Appellant sent her a one-month salary for NR 80,000 and she shopped with the money and gave some to her family. She went through immigration and paid USD 50 and Appellant received her and took her to Zawadi apartments. When she arrived it was an off day and they went to watch movies at cinemax with the girls. The following day they went at 9pm and came and danced till 4 am. It was lenga dance with full dance and at times they would wear western dresses. The Appellant had given her a target of Kshs 400,000. She would dance and get money from customers. Her stage name was Ashika. She identified her tin. Erick used to take the money in the tin and record it. On 1/1/2019 she collected Kshs 11,500; on 19/1/2019 she collected Kshs 18,250; on 31/1/2019 she collected 18,250 and on 31/1/2019 she collected 10900. Total collection for the month was Kshs 507,676. She worked for Rangeela for 11 months. She did not have a personal phone and would use a company phone. At zawadi apartments she used to walk to the shops with Mary. They had one day off per month and Appellant would take them to the movies, beach and dinner. She gave out her passport to the Appellant as it was safe with him She had went to Tanzania to renew her visa with the driver and girls. On 24/4/2019 they were arrested by police. There was money in her tin but she wasn't sure how much it was. She was taken to the police station where she recorded a statement and went for her dental checkup.
64. On cross examination she said she was 26 years of age. Her date of birthday was on her passport. She was satisfied with her salary and it was better than what she was earning in Nepal and would get a bonus if she was among the top three earners. Zawadi was a nice place for her and she was not denied or prevented from waking in the mall and there was a phone to use to make a call to her family.
65. PW13 was Helen otieno Omondi. She worked at Rangela Bar as a waitress for 7 months would serve alcohol to customers between 9pm to 3 am. The customers were mainly Indians and Arabs. The bar belonged to the Appellant who she pointed out in the dock. There were girls performing in traditional Indian dresses and would come in at 11pm and 3am. On 12/4/2019 there were arrested
66. On cross examination she said that she had worked there for 7 months and the girls had never been tortured and were happy with their work. The manager of the bar was a man called Erick.
67. PW14 was Emmanuel Simiyu an officer from the immigration Department in institution and enforcement Department. On 23/04/2019 the immigration department received an inquiry from DCI Transitional Organized Crime Unit requesting for the Appellants immigration status. He established Appellant was a holder of both a UK and Canadian passport. He established that the Appellant had



no work permit or special permit that allowed him to work in Kenya. The 12 victims also had no work permits to carry out authorized work in Kenya. He testified that he was able to trace travel history of the Nepalese girls through the PISCES system, and established that they had come between the years 2016 and July 2018. He also established that on 23/3/2019 the victims departed to Tanzania through lunga lunga having overstayed their visa. Their passports had so many anomalies and some had overstayed past 6 months and did not have works permits. They were repatriated back to their country on 17/7/2019. He further established that the Appellant had been coming to Kenya on so many occasions. He first came to Kenya on a visitor's visa in 2012 and had dual citizenship of the UK and Canada. As per immigration records he was just a visitor. On 29/5/2018 he arrived in Kenya through Ethiopian air and three days later PW7; PW12 arrived. On 23/6/2018 PW8 and PW11. On 5/07/2018 Appellant arrived in the country and on 09/07/2018 PW4 and PW5 arrived. On 21/7/2018 PW10 arrived on 17/07/2018 PW9 arrived. He produced the certificates for PW1 to PW12 travel history.

68. On cross examination he said he was requested by DCI to generate reports vide a letter dated 17/04/2019. To verify passports of the 12 girls and in another letter dated 14/04/2019 to determine whether Appellant had a work permit and his immigration status. The 12 girls were charged with an immigration offence of failing to get a work permit.
69. PW15 was Paul Kimotho a Dental officer at Coast General Hospital and had been in practice for 17 years and conducted age assessments. He did age assessments for 12 Nepalese girls and as per his assessment their ages ranged from 16 years to 35 years. He produced the age assessment report.
70. On cross examination he said that age assessment was an exact science and there was no word as 'approximate' in medical science.
71. On reexamination he Age assessment is inexact because there is no scientifically proof method of taking the exact age and there was always a range and a margin of error.
72. PW16 was Samwel Ngujiri and ex DC1 attached to the office of the Attorney General in Nairobi, security department. He was attached to transnational organized crime Unit at DCI headquarters. On 13/4. 2019 he was assigned to investigate the case herein. They followed intelligence that led them to Mkomani area in Nyalii building called Amri Plaza. On the second floor they identified Nepalese ladies in a club. He identified several bucket tins that contained a total of USD 1382 and Kshs 69,050 ; bead chains; Rayan Bar and Restaurant alcoholic retail license for members club dated 29/01/2019; invoice No INB 113512 dated 29/01/2019 for New Rangela Bar renewal; copy of invoice number 149715.149705,149724 for health service application for New Rangela Bar and Restaurant; police report on alcoholic drinks licensing application dated 28/01/2019; official Mombasa County Government payment receipt number 0036457; single business permit number ARN- AAA01YX8 for New Rangela Restaurant; invoice; invoice for single permit Number INV-69897 dated 1/1/2019; medical examination fee receipt for Alice Wanjiku, Kenga Karisa, Onyambu Kemunto; original passport Number 095xxxxx for Thayu Namrata and her vaccination card; 12 copies of passports for the Nepalese ladies; two copies of special file serial number 68xxxx, SN 118931 and 11xxxx for Thayu Renu and Thamzy Sita ;two phones, iPhone Apple white in color and Samsung duos silver in color. Someone called Shamida Singh showed up and indicated that he had been sent by the Appellant to collect passports. He handed over passports of number 2 to 11. They rescued the 12 girls and arrested the Appellant. Appellant identified himself as owner of the club.
73. In cross examination, he said that when they entered the room the girls retreated to the back room. He said he did not sign the inventory taken on at Rangela bar and restaurant. He said he signed the inventory but there was no name or date against the signature and he didn't have all the items in the



- inventory and did not sign Ex58 and counter signing had no date. Shanida who brought the passports recorded a statement but he could not spot it in the file. He received documents from Appellant who signed the inventory.
74. On reexamination, he said Ex 57 was dated on the first page and Ex 58 is also dated and was counter signed by PC Gikonyo and Shnaninda whose name appear at the top. Appellant signed Ex57 but he was referred to as Accused.
75. PW17 was Norman Oduor Adoyo an officer from KRA. He testified that stamps recovered from Appellant did not belong to him but belonged to WOW beverage and brand.
76. On cross examination he said that he did not know whether wines of world (WOW) had reported loss or misplacement of stamps.
77. PW18 was PC Emma Gikonyo 95xxx attached to Transnational Crime unit Mombasa. On 13/4/2019 they received information from Paul Gathura to proceed to Mkomani Amky Plaza to arrest victims of human trafficking. They entered Rangela bar and restaurant and found 12 ladies on the dance floor with people drinking and watching them. She was assigned to search premises. She found money in form of dollars and shillings at the counter. And later prepared inventory of stolen items.
78. On cross examination she said that Paul Gathura briefed them on the assignment of rescuing the girls and they did not have an informer and he did not tell them whether there was a complainant. She was not sure if all the ladies were adults and she spoke to the girls who complained of being denied freedom of movement and communication but did not indicate this in her statement. They recovered single business permits and licenses and can't recall whose name there were under.
79. PW19 was Domini Kinywa from KRA and worked in investigations and enforcement Department. He testified that Rangela bar had not registered with KRA for tax purpose and that the Appellant had personally registered as a tax payer under Pin A0xxxxxx81 and had not filed any annual returns as required by law.
80. On cross examination, he stated that there had been no report in regards compliance and letter from the DCI was dated 17.04.2021 and he had replied to the letter dated 21/02/2021. The date was an error that had not been corrected.
81. PW20 was PC Janet Waki (100xxxx) attached to headquarters in Transnational Organized Crime Unit. On 13/4/2019 they went to Rangela Bar and restaurant. She was in the company of Mr.P Gatuma Sgt Emma , PC Kiptui; PC Ngunjiri they found the 12 girls dancing. She was assigned the duty of searching the premises. She recovered monies in USD and Kenyan currency which belonged to the Appellant. Inventory was signed by Erick Ndolo who was an employee of the club. Inventory was dated 13/4/2019 MF1 68 and they recovered Kshs 11,800 USD all wrapped in a white bag Kshs 5, 100 was found on top of the counter. Kshs 7000 was in a black counter book; MF1 69 black counter book MF1 70 Kshs 31,300 and USD 742 was found in a white bag written LC Waikiki. The total amount Kshs 52200 and USD 744. The money was in old currency and they deposited it via an order dated 27/9/2019. They deposited Kshs 37000 belonging to the Appellant and Kshs 12,000 belonging 12 Nepalese girls. On 24/4/2019 they took the girls to age assessment. PW2 and PW3 were found to be underage at ages 16 and 17 respectively. The girls had buckets named after each of them and there was beads and one side of the bucket.
82. In cross examination she said she prepared the inventory for money and phones. The money was recovered from the counter where there was a manager. The owner was present and signed the inventory. The business permit and other documents were in the name of Rangela bar.



83. PW21 was Sgt Munyao Joseph (65xxx) attached at DCI (TOCU) Mombasa on 13/4/2019. They went to the club Rangela and found the 12 girls dancing in traditional Indian dresses and there were some Asian customers having drinks. He was assigned the work of dealing with the customers. He checked their passports and saw that they were okay. They attempted to communicate with the girls but there was language barrier. Appellant translated for them. They asked the girls where their passports were and they told him that the Appellant had taken their passports. They each had buckets with each of their name and in some there was money in USD and beads. The Appellant made plans for passports of the girls to be brought and an Asian woman brought them and they were interviewed the girls who told him that they had been put in touch with the Appellant vide an agent. He had paid them an advance salary. They had been received at the airport by him and stayed in Bamburi under the custody of a lady called Mary. Their phones had been taken away and could not communicate with their families back in Nepal. He further established that the ladies had no work permit and no special passes to engage in employment. On 3/5/2019 he wrote a letter to the Registrar of companies requesting details of Rangeela Bar and Restaurant in report dated 26/8/2019 Ref 310606 signed by Sarah Ndegwa it was indicated that the bar belonged to the Appellant. On 17/5/2019 he wrote a letter to county government of Mombasa for verification of single business number 0RNAAA 014X8 and he got a report 28/5/2019 Ref DTTI/Ma/o519/SBP/23. He wrote to the Nepale consulate that informed him that Appellant had used an agent to recruit the girls and had paid them a salary in advance.
84. In cross examination he said they inquired about the bar Rangela and confirmed that proprietor of the bar and they responded that from the county permit the person responsible was Gandham Singh.
85. In reexamination he said that the girls were not legally in the country and visa did not allow them to do what they do. From the county permit the person responsible for the business was Arm Sign.
86. Vide a ruling dated 0nd July 2021 it was established that a prima facie case had been established against the Appellants and he had a case to answer in six counts and was discharged on four counts.

Summary of Defence Case

87. Defence called three witnesses.
88. DW1 was the Appellant.
89. He testified he was living n and was married to Lyn Aderole. He was born in Tanzania and lived in Mombasa and held a British and Canadian passport. Had lived in Kenya for 25 years. In 2014 he applied for a Kenyan citizenship and had a waiting card issued on 16/6/2016 under serial number 238822305. He had lived in Kenya for 25 years. He testified that the owner of the club was Gandhi Ramshock Singh and he was awaiting his papers so that he could take over. He never brought the girls into the country and only received them at the airport to be their translator. He applied for special passes for the girls to work as artists and were issued on 27/9/2018 but they had expired by the time of the police raid. New applications had been made. He further testified that he never travelled outside the country to recruit the ladies.
90. In cross examination he said he was born in Tanzania on 14/12/1968, his birth certificate states 1986 which is a mistake and would be 53 in December and he did not have work permit and was not employ and it was Sudia Signh did who paid for the ladies air ticket. He said that he had known Gandhi had known Gandhi Ramsign for 13 years and he was the one paying the ladies and he had planned to take over the business from him.
91. In re-examination he said that New Rangela bar had not started business but had been registered 5/6 years old.



92. PW14 was recalled to testify on the special passes and confirmed that application for special passes were made on 10/9/2018 and were approved on 12/09/2018 and were issued by the department of immigration but were issued unprocedurally. There were all made on the same date but they lacked supporting documents i.e. letter for tourist regulatory Authority to allow subject to work as performing artists and the passes did not go through security checks.
93. DW2 was Erick Mdoe. He used to work at Rangela as a counter manager in 2018 and had worked there for 2-3 years when police came. He was employed by Mzee Gandhi and was the one paying him til the bar closed. He used to see Appellant and thought he was a friend of Gandhi.
94. On cross examination he said he was not working at the bar as of 2019. He used to collect tips for the girls and had seen a document showing that Gandhi was the owner.
95. DW3 Keya Karisa Randu. He used to work at Rangela between 2015 and 2019 when police raided bar in April 2019. The bar belonged to Gandhi. He was the one who employed him and paid him
96. On cross examination he said he had started working as a chef and was paid by Gandhi Kshs 15,000 and used to see Appellant at the bar.

Summary of Submissions

Appellant's submission

97. Vide their Advocate, the Appellant submitted on 4th April 2013. It was submitted that the judgement was not factual as primary prosecution witnesses was not similar in regards of how passports were handled, the only similarity is that all witnesses were looking for job opportunities and there are the ones who looked for the Appellant. PW1 stated that she contacted Appellant and came to Kenya on her own free will; PW2 stated that she did not know Appellant prior to coming to Kenya. PW3 and PW4 were never led in examination in chief as to who recruited them to Kenya for the job opportunity. PW5 indicated she got contact of the Appellant through a friend and PW6 got informed of the job opportunity through Riya and her friend and she came from Uganda and not Nepal. PW7 also got the job through a friend. PW8 got wind of the job through her friend Riya and PW9 got information about the friend Munia and W10 through Sajina and PW11; Ria and PW12 through her friend Paya. And there was no evidence provided to show that these women were agents of appellant or that he was carrying human trafficking as PW1 to w12 were job seekers.
98. It was further submitted that judgement averred that PW1 to PW12 were deceived vide upfront payments but this was false as they had the choice to saying no. And in fact all the ladies what sought work knew what it entailed.
99. It was further adduced that there was no evidence provided to show that the ladies were leaving in state of slavery and no evidence was provided to show that Appellant exercised any form of control over them moreover there were paid above minimum wage which was Kshs 10,107 per month and never complained about their working conditions. The ladies even managed to send money back to their families. And even negotiated their pay.
100. That the whole raid was based on economic sabotage and there was no search warrant making the evidence produced in Court inadmissible as provided under Article 50(4) of the *Constitution* of Kenya and *Philomena Mwilu Hon DCJ v ODPP*.
101. It was submitted that the Appellant did not promote trafficking in persons as he was not the proprietor of Rangela Bar as it was under Ganhiram Sundar Sign and Appellant was the proprietor of New



- Rangela Bar instead. DW1, DW2 and DW3 also gave evidence that Sundar Singh was the owner of the restaurant and bar and PW13 as well. No evidence was also given to the existence of Zawadi appartments save for hearsay evidence and the owner of Zawadi apartment was unknown.
102. It was submitted that the Appellant did not interfere with travel documents of the witness in question C/S 8 (a) of the *Counter Trafficking in Persons Act* of 2012 as MS Kirit travelled to Mumbai and gave back her passport; PW11 said Appellant did not take her passport and PW12 gave her passport to the Appellant, five days after her arrival. It was submitted that the Appellant merely kept their passports. Ms Thapa had her passport; Ms Bal had her passport kept by the driver, PW3 had nothing to say about her passport; PW4 said her passport was kept; PW5 said she gave her passport to the Appellant for safe keeping; PW6 had her passport, PW8 passport was with the Appellant; PW9 also gave hers to the Appellant; so did PW10 and PW12 and were not restricted from walking. No evidence was produced to show that the Appellant had forcefully taken their passports.
 103. The Appellant was not in constructive possession of the passports and there were brought on by Shaminder Sign Chanda ID No 1125XXX of mobile number 0722412XXX.
 104. It was further submitted that the Appellant was not in possession of proceeds of crime as read under section 16(1) of the *proceeds of Crime Act* 2009 as the money given to the ladies was free of charge from the customers. The money given to the ladies for dancing was given free of charge and was done voluntarily hence why no customer was arrested.
 105. It was submitted that the Appellant did not engage in business without a work permit as he was merely a patron and investor and he the girls had special passes that enabled them to work.
 106. It was further submitted that Blue Heart NGO who kept the girls in the safe house ought to have been investigated as one of their employee Nathir Khan and was threatening to charge the girls if they did not lie about the Appellant.
 107. It was submitted that Count I, II, III was excessive and the Appellant could have been fined as he was a first time offender and there were no aggravating circumstances. In count IV, IX the Appellant could have should have been given more lenient fines. As for Count X, it was defective in nature and even if the Appellant was to be convicted he deserved a more lenient sentence. It is submitted that the law in trafficking should be revised as it is too draconian and barbaric.

Summary of Respondent's Submissions.

108. It was submitted that from evidence of PW1 and PW12 it was clear that the Appellant was in possession of their passports and they could not move freely and their communication timelines were limited. The offence of trafficking was proved to the required standard. Reliance was placed on *Muhammed Asif v R* [2017] eKLR Machakos Hc Criminal Appeal No 82 of 2017 And Hc Appeal No 39 of 2020 *Geoffrey Mutemi Manzi v Republic* (2021)
109. It was submitted that the prosecution proved its case beyond reasonable doubt and a pre-sentence report was given that considered the impact on the victims before sentencing and sentences given were legal



Analysis And Determination

110. This is a first appellate court and my duty as such is well set out in the case of *Okeno v Republic* [1972] E.A 32 as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Rulwala v Republic* [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

111. Having considered the records in the trial court, grounds of appeal and submission by both Appellant and Respondent, the issues that arise for determination are: -

- i. Whether ingredients of the offence of trafficking in persons was proved by the Prosecution?
- ii. Whether the offence of promotion of trafficking in persons was proved by the prosecution?
- iii. Whether the prosecution proved that the Appellant was the owner / proprietor of Rangeela Club as at 13th of April 2019?
- iv. Whether Appellant interfered with the travel documents of PW1 to PW12.
- v. Whether the monies recovered at Rangeela club on the 13th April 2019 were proved to be proceeds of crime and money laundering.
- vi. Whether the sentence meted out was manifestly excessive

112. Before delving into the analysis and determination of the issues, this Court has noted that there was an apparent error on the Judgement of trial magistrate as he referred to the charges contained in the Amended charge sheet dated 23rd May 2019 instead of the charge sheet Amended and lodged in court on 21st August 2020. That error affected the dates in Counts I, II, III, VII, VIII, X, instead of referring to diverse dates between 1st June 2018 to 13th April 2019 as amended on 21st August 2020, it indicates diverse dates between 24th March 2019 and 13th March 2019.

113. Count IX in the charge sheet dated 23rd May 2019, indicated that the offence was committed on diverse dates between 1st January 2019 and 13th of March 2019 whereas in the Charge sheet dated 21st August 2020 the offence in count IX indicated that it was committed in diverse dates between 1st June 2018 and 13th April 2019.

114. The error that has been pointed out above was however not noticed by the Appellants nor the Respondent and the question that arises is whether the error occasioned an injustice on the Appellant. The view of this Court is that the trial magistrate ought to have confined the judgment to the correct charge sheet as amended on 21st of August 2020 and nor revert to the one that had been expunged.

115. The Appellant was charged in Count I with: 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.



116. Section 3(1)(d) of the Counter trafficking in persons Act No 8 of 2010 provides thus A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbors or receives another person for the purpose of exploitation by means of—; d) deception; Section (5) of the same Act provides thus: A person who traffics another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.
117. In *Muhammad Asif v Republic* [2017] , Justice P. Nyamweya held thus
- “.....The offence of trafficking in persons captures the entire trafficking continuum, and engagement in just one of these trafficking “stages” is sufficient. Therefore different persons or groups of people may be responsible for different aspects of the trafficking crime. The offence is thus formulated in such a way as to capture the different actors along the trafficking continuum, including those who do not directly exploit the victim’s labour or services, so long as they knew their action was for the purpose of exploiting or facilitating the exploitation of a person.”
118. In *Benard Onyandi v Republic* [2018] eKLR the Court held that;
- “for the Prosecution to establish an offence under the Counter trafficking or the prosecution to establish an offence under the act it must show that the accused (1) recruits or (2) transports, or (3) harbors, or receives another person’s for the purpose of exploitation and has used threats or force or abduction, or fraud, or deception, or abused vulnerability or obtained consent by payment to the victim or person having control of the victim. The offence of trafficking consists of a process with the ultimate purpose of exploitation of the person trafficked. Every participants in every stage of the process is guilty of the offence, and an accused need not participate in all stages to be guilty. If the prosecution established to the satisfaction of the court that the accused was part of the chain and committed only one act in the chain which was aimed at facilitating the commission of the offence, he would be guilty of the offence of trafficking In Persons.”
119. Section 2 of the *Counter Trafficking in Persons Act* No 8 of 2010 provides that “Exploitation” includes but is not limited to—(Emphasis mine).
- (a) Keeping a person in a state of slavery;
 - (b) Subjecting a person to practices similar to slavery;
 - (c) Involuntary servitude;
 - (d) Forcible or fraudulent use of any human being for removal of organs or body parts;
 - (e) Forcible or fraudulent use of any human being to take part in armed conflict;
 - (f) Forced labour;
 - (g) Child labour;
 - (h) Sexual exploitation
 - (i) Child marriage;
 - (j) Forced marriage.



120. Article (1) of the *Slavery Convention* 1926, that Kenya has ratified under Article 2(6) defines slavery as, ‘status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.’”
121. Article 2 of the *Forced Labour Convention* 1930 that Kenya has ratified under Article 2 (6) of the *Constitution* defines "forced or compulsory labour to mean, ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.’
122. From the evidence on record, a similar pattern can be established of how the 12 Nepalese girls made their way into Kenya. PW1, PW5, PW6, PW7, PW8, PW9, PW10, PW11 and PW12 were all informed by a friend of a dancing job in Kenya. PW2, PW3 and PW4 knew of the dancing job from the Appellant directly. The Appellant facilitated their travel and sent them a month’s salary in advance and some used this to buy cosmetics and dresses. At immigration the Appellant facilitated some of them through the immigration desk while others paid the USD 50 required at the desk by themselves. It was only PW6 that came to Kenya from Uganda and was brought by her former boss. They were all aware of the kind of work they were to engage in and were on average paid around Kshs 60,000 save for PW7 who negotiated a slightly higher rate of about NR80,000. This was significantly above the Kenyan national minimum wage of Kshs 15,120/= . They stayed in two houses in Zawadi apartment and described their living conditions as good. Their work involved dancing at Rangeela Club from about 9.00 pm to 3/4 am in the morning which was around 6 to 7 hours a day. In their evidence they testified that there was no sexual exploitation of any kind. Their communication was however limited to the company phone between 3pm and 6pm and when they needed to go outside the compound, Mary the house keeper would accompany them and they had one off day in a month. Some of the twelve key witnesses testified that they saw no need to walk around or socialize in Mombasa. PW13 a waitress in the club also gave evidence that the work of the ladies was to dance and they were quite happy with their work.
123. From evidence provided the Appellant did recruit the 12 Nepalese ladies who connected with him directly or through a friend and facilitated their transportation to Kenya by paying their air fare. However, elements of exploitation as provided under section 2 of the *Counter Trafficking in Persons Act* No 8 OF 2010 were not proved to the required standard as the 12 Nepalese girls were neither forced into labor; sexually exploited, forced into marriage; subjected to slavery or kept in a state of slavery or involuntary servitude or exploited in others ways as listed in the provision.
124. I also find that the Nepalese ladies were not deceived. According to ‘<https://www.law.cornell.edu/wex/deception>” deception is defined as “knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact”
125. From the evidence on record there is no indication that the 12 Nepalese ladies were deceived into coming to Kenya. They all knew the kind of work they would be engaging in and upon arrival that is the exact nature of work they engaged in. The element of exploitation alluded to by the trial Court at paragraph 102 of the judgment to the effect that the Appellant used means of deception by sending one month’s salary in advance to facilitate travels and taking advantage of financial vulnerability for purposes of exploitation is not in evidence and the Appellant was not charged with the offence under section 3(1)(e). The Prosecution failed to prove the element of deception to the required standard.
126. Appellant was also convicted on count II with the offence of promoting trafficking in persons contrary to section 5(a) of the *Counter- Trafficking Act* No 8 of 2010.



127. Section 5 (a) of the Act reads thus;

A person who—

- (a) knowingly leases, or being the occupier thereof, permits to be used any house, building, or other premises for the purpose of promoting trafficking in persons; commits an offence and is liable to imprisonment for a term of not less than twenty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life.

128. PW1 to PW12 were consistent in their evidence that the Appellant was their boss in Club Rangeela and paid them an average of Kshs 60,000 per month. PW13 also alluded to the fact that the Appellant was the one who paid her salary at all times. PW21 also gave evidence in Court that the Registrar of companies confirmed that Club Rangeela belonged to the Appellant in report dated 26/8/2019 Ref 310606 signed by Sarah Ndegwa. It was clear from the evidence that the proprietor of club Rangeela was the Appellant and not Mr. Singh as he alluded in his defense. However, the element of human trafficking was not proved in count I which was the mother of successive counts and subsequently the count of promotion of human trafficking cannot stand. Subsequently I find that the prosecution did not prove the charge to the required standard.

Count III

129. The Appellant was charged with; interfering with travel documents contrary to section 8 (a) of the *Counter Trafficking in Persons Act* No of 2010.

130. Under section 8 of the Act provides thus;-A person who— (a) confiscates, conceals, alters, destroys or in any other manner deals with any identification or travel documents, of another person in furtherance of trafficking in persons or in order to prevent that other person from leaving the country or seeking redress from the Government or appropriate agencies commits an offence and is liable to imprisonment for a term not less than ten years and to a fine not less than ten million shillings or to both.

131. As per evidence on record PW4, PW5, PW9, PW10, PW12 gave their passports to the Appellant directly for safe keeping. PW1 had arrived on the material date and had her passport with her. PW2 testified that the driver used to keep her passport for safe keeping, When the arrest happened all passports of the girls were recovered from an Asian lady who the Appellant called. PW7 and PW9 however gave evidence that they travelled to India and Mumbai respectively when their visa expired and they returned to Kenya thereafter. Being as the first count collapsed, this count cannot hold because the elements of confiscation, concealment, destruction and alteration were not proved. Further to this the element of trafficking of persons was not proved under Count 1.

132. The Appellant was charged under count IV with: Being in possession of proceeds of crime contrary to section 4(c) as read with section 16(1) (a) of the *Proceeds of Crime and Anti Money Laundering Act*.

133. Proceeds of crime means ; means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed,'



134. The Court in *Abdulrahman Mahmoud Sheikh & 6 others v Republic* provided thus;
- "The letter, spirit purpose and gravamen of the *Proceeds of Crime and Anti-Money Laundering Act* is to ensure that one doesn't benefit from criminal conduct and that should any proceeds of criminal conduct be traced, then it ought to be forfeited, after due process, to the state, on behalf of the public which is deemed to have suffered some injury by the criminal conduct."
135. On 13th April 2019 when the police raided Appellant's club they recovered Kenya Shillings 69,050 as well as 1382 USD. The particulars of the offence are that the time of acquiring this money knew that it formed part of the proceeds of crime namely trafficking of persons and tax evasion. The offence related to tax evasion was in count V and VI, and trial magistrate acquitted the Appellant for no case to answer. The prosecution therefore had the onus of proving that money recovered at the club in the material night formed part of the proceeds of trafficking in persons. The evidence adduced by prosecution witnesses is that this money was recovered from tins which were tips given to the dancing girls at the bar. The tins were labelled with the different names of the girls and at the end of the dancing records were kept as to how much each dancer had received in terms of tips from the customers. There is an explanation that the money produced as exhibit were tips for the dancing girls. Being that this Court has found that the offence of trafficking in persons and promoting trafficking persons was not proved the offence of being in possession of proceeds of crime as a result of trafficking in persons cannot be sustained.
136. The Appellant in Count IX was charged with: Engaging in business without a work permit contrary to section 53(1)(m) as read with section 53(2) of the *Kenyan Citizenship and Immigration Act*, 2011 and was fined Kshs 100,000 or in default to serve 6 months in prison.
137. Section 53(1)(m) of the said section provides thus:
- A person not being a citizen of Kenya, engages in any employment, occupation, trade, business or profession, whether or not for profit or reward, without being authorized to do so by a work permit, or exempted from this provision by regulations made under this Act commits an offence.
138. Section 53 (2) of the said section reads;
- Any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both;
139. By Appellants own confession, he was not a Kenyan but was in the process of acquiring Kenyan Citizenship. Evidence produced by PW14 was that Appellant was a citizen of UK and Canada. PW21 recovered several documents (Exhibit 44, 47, 49 & 50) in the name, phone number and address of the Appellant indicating that he was the proprietor of the New Rangeela Bar and Restaurant. A letter dated 26th August 2019 – exhibit 82b was from the Registrar of companies revealed that Rangeela Bar and Restaurant was registered on 28th September 2015 and Appellant was listed as the proprietor. PW1 to PW12 and PW13 all testified that it is the Appellant who at all times paid their salaries. The Appellant's defence was that he was planning to take over the bar from Mr. Singh but there was overwhelming evidence showing that he was the proprietor of Rangeela bar though he alleged that he planned to take it over as 'New Rangeela bar.' Being that the Appellant was not a Kenyan Citizen he required authority to operate any business ventures in the country. Since he operated Rangeela Bar



and Restaurant without a permit, the trial court rightly found that he was guilty of the offence under section 53 (1)(m) and section 53(2) of the immigration Act.

140. The Appellant was also found guilty and convicted for the offence in Count X ; Unlawfully employs a foreign national contrary to section 45(1) (a) as read with section 60 of the Kenyan Citizenship and Immigration Act, 2011. Section 45(1)(a) provides thus; No person shall employ— (a) a foreign national who entered Kenya illegally; Section 60 provides thus; A person who is convicted of an offence, under this Act, for which no penalty is specifically provided shall be liable to a fine not exceeding one million shillings or imprisonment for a term not exceeding five years, or both. He was sentenced to pay a fine Kshs 100,000 and in default to serve six months in prison.
141. From evidence on record the 12 victims entered Kenya at different timelines. Save for PW6 who came from Uganda, the rest had come from Nepal and entered Kenya on tourist’s visas, which were legal. However, it was the evidence of PW4, PW5, PW10, PW12 that they travelled to lungalunga to have their passports renewed. Whether the passports were properly renewed or not, the Nepalese nationals had no authority to work in Kenya. Their engagement by the Appellant as dancers was therefore illegal more so because the Appellant himself was not a Kenyan and had no permit to engage in any form of business in Kenya.
142. Consequently, I find the Prosecution proved its case beyond reasonable doubt and agree with the findings of the lower court. I also find that sentence meted out was well within the legal limit.
- a. For avoidance of doubt the orders that ensue from this appeal are as follows:
- a. The Appeal against conviction and sentence in Counts I, II,III,IV is allowed. The convictions are quashed and sentences set aside.
- b. he Appeal against conviction and sentence in Count IX and X is dismissed and Appellant is ordered to pay the fines or complete the default sentences.
- c. The Appellant has 14 days to appeal the decision of this Court.
- d. The Appellant be released forthwith for Count I.II.III
- e. The Appellant be reimbursed Kshs 1,000,000 paid for count IV.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF OCTOBER 2022

HON LADY JUSTICE A.ONG’INJO

JUDGE

In the presence of; -

Mr Ogwel, Court Assistant.

The Appellant in present in person.

Mr Chacha Mwita, Advocate for the Appellant.

Ms Kambaga, Respondent Counsel.

HON LADY JUSTICE A.ONG’INJO

JUDGE

Mr Chacha, Advocate: I pray that certified copies of the judgment be supplied. We would like to present it to Shanzu Courts where Appellant passport was detained pursuant to the offences for which he was convicted.



Order: Certified copies of judgement to be supplied to Appellant counsel upon payment of copying charges.

Certified copies of judgment to be supplied to the Respondent Counsel by the Registry.

HON LADY JUSTICE A.ONG'INJO

JUDGE

