



**Republic v Jetha (Criminal Case 595 of 2019)  
[2021] KEMC 13 (KLR) (26 November 2021) (Judgment)**

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**REPUBLIC OF KENYA  
IN THE SHANZU LAW COURTS  
CRIMINAL CASE 595 OF 2019  
DO ODHIAMBO, RM  
NOVEMBER 26, 2021**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ASIF AMIRALI ALIBHAI JETHA ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. Every morning in Africa, a gazelle wakes up knowing very well it must outrun the fastest lion or it will be killed. At the same time a lion wakes up knowing very well it must run faster than the slowest gazelle, or it will starve. It doesn't matter whether you are a lion or a gazelle; when the sun comes up, you better be running because the purpose of human life is survival and self-preservation; so a (wo)man must do what a (wo)man has to do. What matters at the end of the day is the (amount of) food on the table and while pursuing survival and self-preservation, we all strive to eat and not to be eaten. All human beings have 24 hours in a day. It is how each and every one of us make use of the 24 hours that make the difference which is manifested by individual success at the end of the day. It is for this reason (survival and self-preservation) that some 12 Nepalese girls woke up on different days between 2018 and 2019 and made it to Kenya in a bid to make a living for themselves.
2. It is quite surprising that Kenya which is classified as an emerging lower income economy with a GDP per capita of USD 1,817 and unemployment rate of 4.9% in 2019 is found to be attractive to some people thousands of miles away. Conversely, Kenya also has a good number of its citizens seeking employment in the Middle East and finding themselves in situations which they didn't anticipate before taking flights. Seeking employment out of one's country comes with mixed feelings ranging from culture shock to unexpected interactions with the law enforcement authorities.
3. The accused person herein one Asif Amirali Alibhai Jetha, a dual citizen of Canada and United Kingdom was charged with the following counts:



1. 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. The particulars are that on diverse dates between 24<sup>th</sup> March 2019 and 13<sup>th</sup> March 2019 at Nyali sub-county within Mombasa County, jointly with others not before court trafficked by harboring 12 Nepalese nationals for purposes of exploitation by means of deception.
2. 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 24<sup>th</sup> March and 13<sup>th</sup> 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.
3. 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 24<sup>th</sup> March 2019 and 13<sup>th</sup> 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.
4. 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 13<sup>th</sup> March 2019 at Nyali sub-county within Mombasa County, the accused was found in possession of KSh. 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.
5. Count V: Deliberately defaults in the obligation to file income tax returns by the due date contrary to Section 97(e) of the Tax Procedure Act, 2015 as read with Section 104(3) of the [Tax Procedures Act](#), 2015. The particulars are that between 30<sup>th</sup> June 2017 and 30<sup>th</sup> June 2018, being a resident of Kenya and chargeable to tax under PIN XXXXXXXXXXXX and Passport No. XXXXXXXXXXXX & BA762051 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.
6. 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 30<sup>th</sup> June 2017 and 30<sup>th</sup> June 2018, being a resident of Kenya and chargeable to tax under PIN XXXXXXXXXXXX and Passport No. XXXXXXXXXXXX & BA762051 earning taxable income and eligible to file tax returns, failed to submit income tax for the year of income 2016-2017, which by submission you ought to have done with the Commissioner as required by law.
7. Count VII: 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 24<sup>th</sup> March 2019 and 13<sup>th</sup> March 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.
8. 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 24<sup>th</sup> March 2019 and 13<sup>th</sup> March 2019 at Nyali sub-county within Mombasa County, the accused willfully/negligently



engaged a child B.A.M 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.

9. Count IX: Engaging in business without a work permit contrary to Section 53(1) as read with Section 53(2) of the [Kenya Citizenship and Immigration Act](#), 2011. The particulars are that on diverse dates between 1<sup>st</sup> January 2019 and 13<sup>th</sup> 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.
  10. 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. On diverse dates between 24<sup>th</sup> March 2019 and 13<sup>th</sup> March 2019 at Nyali sub-county within Mombasa County, 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 [Kenya Citizenship and Immigration Act](#).
  11. Count XI: Having suspected stolen property contrary to Section 323 of the Penal Code. The particulars are that on 13<sup>th</sup> March 2019 at Nyali Sub-county within Mombasa County, the accused having been 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. 02460679005 to 024601679011, 02466779013 to 024601679014, 024601679019 to 024601679027 reasonably suspected to have been stolen or unlawfully obtained.
4. The accused denied all the charges and the prosecution called 21 witnesses to prove its case against the accused. The accused was represented by Mr. Magolo and Mr. Egunza.
  5. On the day the accused was charged in court, 12 girls all of Nepalese origin (herein referred to as ‘the 12 Nepalese girls’) were presented to court via Miscellaneous Application No. 100 of 2019 dated 13<sup>th</sup> April 2019 and supported by affidavit of Sgt. Joseph Munyao (PW21). In that application, the prosecution sought to have the victims accommodated in a safe house pending their testimonies in court. Trace Kenya in collaboration with Blue Heart International offered to provide accommodation to the 12 Nepalese girls. In accordance with the provisions of Section 11 of the Counter Trafficking in Persons Act, No. 8 of 2010, the names and passport numbers of the 12 Nepalese girls have been redacted to protect their confidentiality and identity.

### **Prosecution’s Case**

6. PW1 to PW12 (the 12 Nepalese girls) spoke Urdu and their testimonies were translated into English by Javed Dada Mohammed of ID. No. XXXXXXXXX.
7. PW1 Namrata Thapa of Passport No. XXXXXXXXX (Exhibit 1) testified that she travelled from Nepal to Kenya through India. She was taken for age assessment which showed that she was 34 years old. She traveled on Air Asia to Malaysia then connected using Ethiopian Airlines to Ethiopia on 12<sup>th</sup> October 2018 and landed in Mombasa from Addis Ababa (boarding pass—Exhibit 2). She stated that she organized with her friends in Nepal to come and work as a dancer in Kenya and that her air ticket was paid for by the boss whom she didn’t know at that time. The boss whom she later came to know as Asif sent her NPR 20,000 via western union to buy clothes. She was told she was supposed to work at Rangeela Bar & Restaurant in Mombasa which belonged to the boss (the accused). After she landed the boss went to pick her from the airport and went to the immigration desk and got the visa for her. The boss then took her to a house in Bamburi around 2pm. At the house she found some girls who



- also worked at Rangeela Bar & Restaurant. She rested until 7:00pm when they started preparing to go to work. They went to the club at 8pm. The boss then told her that her work would be dancing the Indian dance. As it was her first day she didn't know much. They were arrested the same night at 1am and she had her passport. It was her expectation that she would go home after the work and the accused had agreed that her salary was to be Sh. 60,000 per month.
8. On cross-examination by Mr. Magolo for the accused, PW1 stated that dancing wasn't her passion though she wasn't forced to come and work as a dancer in Kenya. She stated that she was a beautician and that's why she bought mascara and lipstick when the accused sent her money. She stated that she wasn't contacted by the accused directly and that she came to Kenya out of her own free will to earn a living and she was happy to dance. She stated that it was not her first time coming to Kenya as she had worked for someone called Tony earlier on and had gone back home. She stated that she had no complaint against the accused and that it wasn't true the accused brought her to Kenya against her will and that she didn't have a problem with being helped by the accused at the immigration. She wasn't force to dance and was only at the restaurant for a night.
  9. On re-examination by Mr. Ade for the prosecution, PW1 reiterated that it was the accused who sent her money and told her not to carry any luggage. He then picked her from the airport and took her to a house in Bamburi where she met other 12 girls staying in two houses. She stated that they left the house at 9pm for the restaurant and danced until they were arrested. She was promised a salary of Sh.60,000 by the accused.
  10. PW2 Asali Maya Bal aged 20 years old holder of Passport No. XXXXXXXXXX (Exhibit 3) testified that she had been working for six months by the time she was arrested. She stated that she knew while still in Nepal that she was coming to work as a mujra dancer in Mombasa which is performed while wearing a lenga dress. It was her testimony that the accused planned for everything and sent her the air ticket. He met him when he came to pick her from the airport and took her to Zawadi Apartments in Bamburi where she met nine other girls from Nepal where they stayed in two flats. She stayed in the house until 8.30pm when she started preparing to go to work. On the first day she didn't know the place of work and the girls explained to her what time she was supposed to get ready. They used to be taken to Rangeela Bar & Restaurant in two cars and would dance until 3am or 4am. There was a tin with her name labelled 'Maya' (tin marked Maya-2 – Exhibit 4). The tin was for customers' collection into which they would put money if they liked her dance. The money would then be taken by a manager called Erick who would count and record the money (three black counter books – Exhibit 5a, b & c). She identified her name from the books and stated that she danced for six months. After dancing they would be taken back to the house and would have one day off every month. She used to communicate with her parents back in Nepal. On 12<sup>th</sup> April 2019 when they were arrested there was money on the tin but she couldn't remember the amount.
  11. On cross-examination by Mr. Magolo, PW2 stated that she had no idea why was arrested and taken to Nyali police station. She recorded a statement and indicated that she was a professional dancer and had come to dance and was being paid for it. She stated that she was being paid Sh. 60,000 and would send Sh. 50,000 to her parents back in Nepal. Her accommodation was paid for by the employer. She gave her passport to the driver Sulu for safe keeping. It was her testimony that she got the job while she was in Nepal through someone called Bishal who connected her with the accused. She further stated that she was born on 26<sup>th</sup> August 1999 and that her passport was issued to her on 4<sup>th</sup> October 2018. She was therefore 20 years old. While dancing the customers were not allowed to go close to them but they would drop money into her tin. She stayed at Zawadi Apartments which was better than the place where they were being hosted. She stated that the accused would arrange for them tours and she had



- nobody to meet in Mombasa. She stated that she was not barred from going anywhere and denied ever being sexually assaulted by anyone.
12. On re-examination by Mr. Ade, PW2 stated that she came to Mombasa to dance at Rangeela Bar and that the tin was for collecting money from customers. They had free days to visit places with the driver or the accused.
  13. PW3 Gurung Adhikari Sanju testified that she came to Kenya from Nepal on 12<sup>th</sup> October of a year she couldn't remember. She had come to work as a dancer just as she used to in Nepal. She had gotten a job offer at Rangeela by the time she was coming to Kenya. Her air ticket was paid for by the accused whom she referred to as Asif boss (copy of boarding pass dated 8<sup>th</sup> October 2018 – Exhibit 6). The accused picked her from the airport and took her to Zawadi Apartments. She stated that she didn't remember ever giving her passport (copy of passport No. XXXXXXXXX – Exhibit 7) to the immigration department. She couldn't remember how she was given the visa and for how long it was for. At the apartments she was staying with some girls from Nepal. The girls then told her what her work would involve. The accused then told her that she would work for six months. They were not walking around though the accused would take them out once a month. She stated that she used to communicate with her family between 3pm and 6pm using the company phone. She used to work from 9pm up to 3am or 4am and her stage name was 'Sanju' and she had a tin with her name which was for putting money (tin labeled 'Sanju'—Exhibit 8). The money from the tin would be taken by the manager called Eric who would then record it somewhere which she couldn't remember. She stated that she didn't know how to read. She further stated that she had been dancing at Rangeela Bar for six months by the time she was being arrested. At the time she was arrested there was money inside the tin but she didn't know how much it was. After being arrested she was taken for age assessment then to a safe house though the doctor didn't tell her anything.
  14. On cross-examination by Mr. Magolo, PW3 stated that she was 20 years old but couldn't remember when she applied for her passport. She received it on 24<sup>th</sup> July 2018 after presenting her birth certificate. She was a dancer back in Nepal. The dance was Indian mujra and that's what she came to do at Rangeela Bar and wasn't compelled to dance. The customers would give them money to put in the tin and Eric would record the collections. From her monthly salary she used to send between Sh. 50,000 to Sh. 55,000 to her family in Nepal. She had a husband back at home. She stated the place where they stayed was better than the safe house where they were being kept. She stated that she didn't know anyone in Mombasa and had no plans of visiting anyone. She added that she had no problem communicating with her family back at home. Whenever they wanted to walk around the driver (Suleiman) or the accused would take them out. She denied being involved in any sexual exploitation while at Rangeela Bar as she was a decent dancer with her husband who was aware she was coming to Kenya to work as a dancer. She stated that they had been to Lunga Lunga border and they came back.
  15. On re-examination, PW3 stated that it is true they went to Lunga Lunga border with Suleiman, the driver. She reiterated that the tin was for collecting money from client and Eric used to take the money.
  16. PW4 Kumari Phiyak aged 25 years testified that she was a dancer back in Nepal for two years where she has a family. She stated that she came to Kenya due to family problems. She was divorced and had a family of three brothers to take care of. She travelled to Kenya on her Passport No. XXXXXXXXX (Exhibit 9) after the accused sent her air ticket. He sent her equivalent of Sh. 60,000 and she bought dresses using the money. She was received by Suleiman (the driver) at the airport and taken to Zawadi Apartments. At the airport she passed through the immigration desk and got her visa. At the time she was arrested she had been in Kenya for around nine or ten months. At the apartments she wasn't alone as she met other girls from Nepal. Before she came she had spoken to the accused and knew she was coming to dance at Rangeela Bar & Restaurant. She knew what the work involved and started working



the next day after she arrived. She had a tin with her name (Exhibit 10) which was for collecting money from customers. The money would then be taken by Eric the manager who would record them in a book. She testified that she would dance from 9pm to 3am or 4am and would check the records of money collected after the end of the night. For example, on 26<sup>th</sup> February 2019 she collected Sh.7,000 and Sh.40,400 the following day. Before she came she was told that her salary would be Sh. 60,000 per month. At the apartments where they stayed there were neighbors but she didn't know them and she didn't have communication with the people outside. She had given her passport to the boss for safe custody as she didn't have a safe place to keep it. While at the apartments she used to talk to her family back in Nepal between 3pm and 6pm using the company's phone which was being kept by Mary, the caretaker. Once a month they would be taken for a walk. She stated that she renewed her visa in Tanzania when she went with Suleiman, the driver. At the border the immigration officers came to their vehicle, looked at them and stamped the passports. She didn't pay any money herself to the immigration. At the time she was arrested she had a tin which had money inside. After being arrested she was taken to the hospital for age assessment.

17. On cross-examination by Mr. Magolo for the accused, PW4 stated that she was born on 2<sup>nd</sup> January 1995 making her 25 years old. She was married and got divorced four years ago and has twin kids aged 7 years. Back in Nepal, she was a dancer. She had been dancing in Kenya for eleven months. She complained that at the safe house where they were staying the driver had been peeping through the window and that they were not being fed well. When coming to Kenya she knew she was coming to work and be paid her salary. She had been faithfully paid her salary. She stated that the club was in business and would collect money from customers and everyone would be paid a salary after the end of the month. When they were arrested they were taken to the police station without being told what they had done. At the safe house the manager one Nathim threatened them that they would be charged and told them to say that the accused took their passports. She travelled to Tanzania and had her visa stamped. They went with the driver Suleiman and he got them stamped after paying for them. She testified that they would work until 3am or 4am and go home to sleep until 2.30pm. She would talk to her parents back in Nepal after 3pm. It was her testimony that she had no interest in knowing anyone in Mombasa as she didn't speak English or Kiswahili. She had permission to walk around and she would always go out with the driver as they were never prevented from walking around. She was paid for the work which she was doing according to the agreement.
18. On re-examination by Mr. Ade for the prosecution, she reiterated that she was divorced and had children in Nepal. She stated that they had no issues where they were staying and it was Nathim who told her to come and say lies in court or else she would be charged. She stated that they went to Tanzania with the driver called Suleiman. He then took their passports to the immigration officer and looked at them but they didn't understand what he said.
19. PW5 Ranjita Bk of passport No. XXXXXXXXX (Exhibit 11) testified that she left her family of two brothers and two sisters to come and work as a dancer in Kenya. Before coming to Kenya she had been a dancer in Srilanka. She had then been given the dancing contract by the accused and she knew what she was coming to do in Kenya. She met the accused in Nepal and he gave her NPR 80,000 to travel to Kenya. She had financial problems before she left Nepal which she hoped to solve while in Kenya. It was her testimony that she landed in Mombasa from Addis Ababa and went through the immigration without any troubles after paying USD 50 for the visa. She couldn't remember who picked her from the airport between the driver Suleiman or the accused. She was then taken to Bamburi where she met other eight Nepalese girls. She knew what the work involved as it was not her first time. They did Indian dance and other songs they didn't understand. They would dress the way they wanted. The boss (the accused) insisted on decent dressing like lenga or jeans. They were not in touch with the customers but they would put money on their respective tins. At times they would send the waiters to bring them



money. She had a tin marked Rani (Exhibit 12) and the money would be taken by Eric who would record it. It was her testimony that she had worked for 9 or 10 months upto the time they were arrested. They would finish dancing at 3am or 4am and they would be taken home in Bamburi. At the house they were free to walk around but they were not talking to the neighbors. The accused or the driver would take them out once a while. Between 3pm and 6pm, they would use the company phone kept by Mary (the caretaker) to communicate with their family. Upon arrival she gave her passport to the accused to keep it for them and it was in the house where they were staying. Mary kept them and the driver would carry them as they went to work. She remembered renewing her visa when she went to Tanzania for in-and-out where someone came and looked at them inside the vehicle. They were in Tanzania for two days and knew about in-and-out visa renewal in Dubai. She was arrested while at work and taken to the hospital where her age was assessed.

20. On cross-examination by Mr. Egunza (holding brief for Mr. Magolo) for the accused, PW5 stated that she left Nepal for the first time several years ago and that she was born on 9<sup>th</sup> December 1988. She had initially come to Kenya to dance which was her passion and source of livelihood. She first met the accused in Nepal and he offered her job opportunity and she agreed to travel to Kenya voluntarily. She took the job to get herself out of financial problems as she had a loan of NPR 5,000,000. She stated that the accused never took advantage of her and that he treated her as his daughter. She travelled to Kenya through Mumbai and Ethiopia and went through immigration desks in all the countries. She denied ever being charged with any immigration offence. When she arrived she knew the accused or his driver Suleiman would be waiting for her at the airport. She denied being a prisoner in Bamburi where they were staying and wasn't held without her consent. She stated that if the club wasn't closed then she would go back to her work as she preferred Kenya to other countries and described the accused as the best boss ever and that she had no complaint against him. She denied ever being sexually molested while working for the accused. She stated that they would get tips from the customers and would put them on their respective tins. She stated that she was never forced to carry the tin and solicit for money from the customers. She blamed the police for spoiling her job which was her source of income. After the arrest, she wasn't able to send money to her parents as she normally did. She stated that Nathim Khan told them that if they said they gave out their passports then they would be in problems and promised to talk to the accused for them to get their salaries.
21. On re-examination, PW5 reiterated that she came to Kenya due to financial problems she had in Nepal being a loan of NPR 5,000,000. Upon arrival in Mombasa, she passed through the immigration desk and met the person who came to pick him.
22. PW6 Menuka Magar aged 24 years old testified that she was a dancer but also wanted to be a cook. She had a family back in Nepal and came to Kenya due to financial problems back at home. She travelled on her passport No. XXXXXXXXX (Exhibit 13). She had been informed of a dancing job opportunity in Kenya by her friend called Riya who gave her the contact of the accused. She then contacted the accused when she was in Uganda where she had been for a month working as a domestic worker. The accused then went to pick her from Uganda and they travelled by road. Upon reaching Mombasa, she stated that the accused took her to the house where other girls were staying. She found eleven girls in the house who informed her that her work would begin at 9pm. On that day she went to work and did murja dance while wearing lenga dress. She stated that her stage name was 'Angel' and she had a tin with her name labelled on it (Exhibit 14) which was used for collecting money from customers. She stated that she didn't know how much was on the tin on the day they were arrested as she had just started. She added that the manager was around though he didn't know his name as she was seeing him for the first time. It was her further testimony that she couldn't remember the exact place where they were taken in Bamburi but she was there for four or five hours. They were then taken to Rangeela Bar by the driver whose name she couldn't remember. At that time she had her personal phone from Nepal



but it wasn't working. It was her testimony that the other girls were not talking to outsiders when she was there. While at the police station she stated that they were taken to the hospital for dental check-up and age confirmation. While at the border she stated that she was not asked what she had come to do and that it was the boss who paid for the visa. She stated that she didn't spend a night at Bamburi where the other girls were as she had just come from Uganda with the boss.

23. On cross-examination by Mr. Magolo, PW6 noted that she was 24 years old having been born on 14<sup>th</sup> September 1996 and that her passport was issued to her on 26<sup>th</sup> December 2017. She stated that she was in Kenya in February 2018 where she had been a dancer for six months at a club called Sargam though she couldn't remember the exact place where it was. She added that it was her second time coming to Kenya. After leaving Sargam she went to Uganda where she worked for around six months as a house help. Before leaving Nepal, she stated that she had been a dancer for one to two years and she came to Kenya because the pay was better. She stated that she was at Bamburi for few hours and that she went to Rangeela at 9pm and was arrested at 1am. She stated that she didn't know how the business was being ran and that for the time she was there she only got the collection which was dropped in her tin. She added that she had a long lenga dress and there was no contact with the customers who were there.
24. On re-examination by Mr. Ade for the State, PW7 stated that she was given money by the clients to put on the tin. When she arrived, she was taken to a house in Bamburi and later taken to Rangeela Bar at 9pm where the police found her while dancing. For the three hours she was at Rangeela Bar, she stated that she didn't come into contact with the customers but received money from them.
25. PW7 Tamang Sita testified that she has a family with six siblings and that she is married with one child. She stated that she came to Kenya to work as a dancer for better salary and got the job through her friend Payi who gave her the contacts of the accused. They spoke on phone and the accused sent her NPR 80,000. She travelled to Kenya using her Passport No. XXXXXXXX (Exhibit 15) which she applied for using her ID while in Nepal. She landed at Mombasa and was received by the accused and his driver Suleiman and then taken to Zawadi Apartments in Bamburi. She then found some girls from Nepal in the house and they explained to her where she would be working. The following day they were taken to work at 9.30pm by the driver and she performed Indian dance while dressed in a lenga. She stated that they were not meeting customers. She stated that her stage name was 'Hanuskar' and she had a target of Sh. 400,000 per month and her salary was NPR 80,000 per month. She stated that as they danced the customers would give them money which they would put in their tins. Her tin was marked 'Anuska 12' (Exhibit 16). She stated that the money on the tin would be taken by Eric who was the manager of Rangeela Bar and was working for the accused. The money would then be recorded somewhere. For example, she stated that on 1<sup>st</sup> February 2019 she collected Sh. 10,900; on 14<sup>th</sup> February 2019 she collected Sh. 58,000; and on 28<sup>th</sup> February 2019 she collected Sh. 17,836. For the month of February 2019, she collected a total of Sh. 594,794 which went to the accused. She stated that there was money in the tin when the police came though she didn't know how much. It was her testimony that every day after work they would be taken back to Bamburi by the driver. By the time she was arrested she stated that she had worked there for ten months and that she went to India at some point and came back. She stated that she couldn't remember visiting any Immigration Department offices in Mombasa and that she didn't know where her passport was stamped. When the police came, they were taken to the hospital for age assessment though she wasn't told how old she was.
26. On cross-examination by Mr. Igunza for the accused, PW7 stated that she knew the accused as her boss and that she worked for him for ten months. She added that for that she was never molested or enslaved to work forcefully. She stated that she was not forced to raise money. She stated that she came to Kenya through Mumbai and that she had never been charged for any immigration offence. She stated that she got the contacts of the accused from Payal and she spoke to him and negotiated the terms of



- employment before coming to Kenya. She stated that the accused paid her NPR 80,000 as a one-month salary advance. She denied that the money was an inducement or bribe for her to come to Kenya. She stated that she knew she was to be met by the accused or his driver at the airport. Given that she didn't know how to read and write, she didn't know whether what was stamped on her passport was work permit or visitors pass. She denied being enslaved and that the customers at the club never touched her. She stated that it was Eric the manager who would set the targets and that she wasn't forced to raise Sh. 400,000 per month. At the time of the arrest she stated that she didn't count the money that was in the tin and what was recorded. She stated that it was Eric who would count the money and she was never around when the money was being counted.
27. On cross-examination by Mr. Ade, PW8 stated that she had no agreement with the accused by the time she was receiving money from him. She knew he was waiting for her at the airport. She reiterated that she had a monthly target of Sh. 400,000 and that the bucket was for collecting money which would be taken by Eric and recorded.
28. PW8 Khadgi Saru testified that she used to work in a family shop in Nepal. She stated that she was married though had no child and that she came to Kenya due to family financial problems. It was her testimony that she got the dancing job in Kenya through her friend Riya though she had never danced in Nepal. Because it was good money she decided to come. The accused then sent her NR 80,000 being one month's salary. She then used her Passport No. XXXXXXXXX (Exhibit 17) to travel. She stated that at Mombasa airport she was not asked anything by the Immigration and she paid USD 50. She then met the accused at the airport and he took her to Zawadi Apartments in Bamburi where she found some girls. On the first day she went to work but didn't dance. On the second day she started dancing to Indian and Nepalese songs while wearing lenga dress. She stated that her stage name was 'Zoya' and she was given a target of Sh. 400,000 per month and that the money was being taken by him. She stated that she would get money from the customers which she would put on her tin labeled 'Zoya 5' (Exhibit 18) and the money would be taken to Eric, the manager, to record in a book. She stated that on 1<sup>st</sup> February 2019, she collected Sh. 51,400; on 14<sup>th</sup> February 2019 she collected Sh. 61,000; and on 28<sup>th</sup> February 2019 she collected Sh. 15,136. For the month of February 2019, she collected Sh. 882,344. The money would then be taken by the manager who would give it to the accused, the boss. She stated that her salary was NPR 80,000 per month and that she had worked for around nine or ten months.
29. PW8 continued to state that she had renewed her passport in Tanzania when she went by bus and stayed there for two days in a hotel. She stated that she went with the driver and eight other girls. At the border she stated that an officer came to their bus but didn't speak to them and that it was the driver who took their passports. At Zawadi Apartments she stated that they had one day off and were free to go to the shops with the maid and once a month they would be taken out by the accused, the boss. She didn't have a phone and would use the company's phone between 3pm and 6pm. She added that she didn't have her passport as it was taken by the accused. When the police came she stated that there was money on her tin.
30. On cross-examination by Mr. Igunza (holding brief for Mr. Magolo) for the accused, PW8 denied ever being brought to the country forcefully and denied that the accused was profiting from her. She stated that she was not forced to stay at Zawadi Apartments against her will and that her passport was not snatched from her. She added that she was not forced to dance at Rangeela Bar against her will and that she knew what she was coming to do in Kenya and she was being paid for it. She added that she was happy with her salary and that the accused was giving her bonuses. For her it was a good experience working for the accused. While coming to Kenya she stated that she followed official route and was never charged for any immigration offence. She reiterated that the accused gave her a target of Sh. 400,000 but didn't force her to raise it per month and that it was her free will to raise it. She stated



- that while in Tanzania she didn't face any immigration problems and that she had gone for pleasure. She stated that the maid at Zawadi Apartments wasn't a body guard to ensure they didn't escape and that it was them who would request her to accompany them to the shop and that they would be given the phone between 3pm and 6pm.
31. On re-examination, PW8 reiterated that she had a target of Sh. 400,000 per month and that she used to raise it. She also reiterated that the maid would give them the phone between 3pm and 6pm and she would accompany them to the shop.
  32. PW9 Rajdhani Kriti a former dancer in Nepal stated that she had come to Kenya due to money problems back at home and her friend Muna told her that there was work in Kenya. She testified that she had been in Kenya before and that her friend had also been in Kenya. She then came knowing where she was to work and that she was coming to work for the accused. She then got his contacts through friend and travelled on her Passport No. XXXXXXXXX (Exhibit 19). The accused then sent her NPR 40,000 to travel to Kenya. When she reached Kenya, she went through the Immigration desk and paid for the visa. She was then picked by the accused and his driver at the airport and taken to Zawadi Apartments in Bamburi where she found other girls from Nepal. She knew from the accused that she had come to dance at a club called Rangeela. Her stage name was Kritica 11 and she had a target of Sh. 300,000 per month set by the accused who would take the money. She stated that she used to get the money through dancing and the money would be put on her tin labelled 'Kriti' (Exhibit 20) by the customers. The money would then be taken by Eric, the manager, who would record it in a certain book. For example, on 1<sup>st</sup> January 2019 she collected Sh. 14,800; on 14<sup>th</sup> February 2019 she collected Sh. 53,100; and on 28<sup>th</sup> February 2019 she collected Sh. 13,736. In total for the month of February 2019, she collected Sh. 575,812. She stated that she worked at Rangeela Bar & Restaurant for ten months and would be paid Sh. 60,000 per month. After work the driver would take them back home at 3am. She stated that they would use the company phones between 3pm and 6pm given to them by the maid, Mary. It was her testimony that they were never visiting anywhere though they had one day off once a month and the boss (the accused) would take them out. She stated that there was a time her visa expired and she travelled to Mumbai and that she never travelled to Tanzania. She stated that at the time the police came she was around and there was money in her tin though she didn't know how much it was. She stated that she had given her passport to her boss, the accused. After they were arrested, she stated that they were taken to the hospital for age assessment though she had told the police she was 25 years old.
  33. On cross-examination by Mr. Magolo for the accused, PW9 stated that she wasn't being held in Kenya against her will and that she wasn't forced to work at Rangeela. She denied that the accused was using her to make money. She denied being at Zawadi Apartments against her will and that she was not held hostage. She added that she loved working for the accused as he offered a better opportunity than what was available in Nepal. She added that she was the one who requested her friend Muna for the contacts of the accused as it was her wish to come and work for him. She stated that while working for the accused she was able to take care of her family back in Nepal. Before she arrived, she was aware that the accused and the driver would pick her from the airport and that she wasn't kidnapped at the airport. It was her testimony that as much as she was given a target of Sh. 300,000 by the accused, she was not forced to raise the amount per month as the accused was comfortable by whatever amount she made for him and she was also comfortable with her salary.
  34. On re-examination, PW9 reiterated that she had a target of Sh. 300,000 per month which wasn't a must and that she came from Nepal due to money problems. She stated that it was the accused and the driver who picked her from the airport.



35. PW10 Dargi Rammaya testified that she had worked as a dancer in Nepal and that she came to Kenya due to financial problems. She travelled using her Passport No. XXXXXXXXX (Exhibit 21) and she knew she was coming to work as a dancer at Rangeela. She stated that she knew the accused through her friend Sajina who was also a dancer in Mombasa but had gone back to Nepal. Back in Nepal she stated that she used to work as a dancer at night and at the salon during the day. It was her testimony that she contacted the accused herself while she was still in Nepal and told him that she wanted a job. The accused then sent her NPR 60,000 which she spent on her family before travelling to Kenya. Upon landing at the airport, she was picked by the driver of the accused. At the Immigration desk, she was issued with a visa without any questions. The driver then took her to Zawadi Apartments where she found some eight girls from Nepal. The following day she went to work and danced until 3am and her stage name was 'Roshni 3'. It was her testimony that she was given a target of Sh. 300,000 by the accused and she would receive money from the customers which they would put inside her tin. She would also receive necklaces worth Sh.500 from the customers like the three (Exhibit 22) she had when they were arrested. The money on the tin would be taken by Eric the manager who would give it to the boss after it had been recorded. From the records, she collected Sh. 27,300 on 1<sup>st</sup> January 2019; Sh. 18,182 on 20<sup>th</sup> January 2019; and Sh. 13,929 on 31<sup>st</sup> January 2019. Her total collection for January 2019 was Sh. 466,350. She stated that she worked at Rangeela for six months and the collection would be recorded every day. While staying at Zawadi Apartments, she stated that she was not in communication with people outside and that she would communicate with her family back in Nepal using the company's phone between 3pm and 6pm. She had a phone though she wasn't allowed to use it and she gave it to her friend to keep it for her. Upon arrival from Nepal, she stated that her passport got lost and when she found it she gave it to the accused to keep it for her. She added that when her visa expired she travelled with the girls and the driver to Tanzania for two days and renewed it on their way back at the border. She stated that she didn't meet the immigration officials and it was possible the driver paid for the visa renewal. When they were arrested on 12<sup>th</sup> April 2019, they were taken to the police station where she recorded her statement and were taken to the hospital for age assessment. While at Rangeela Bar she stated that they used to work every day though had an off day once a month and they would be taken out by the accused. When they were arrested her tin had a Sh. 1,000 note (Exhibit 23) which she got from the company for good luck and USD 7 (Exhibit 24) which she got from a customer.
36. On cross-examination by Mr. Magolo, PW10 stated that she was born on 29<sup>th</sup> May 1993 and that she came to Kenya in August 2018 for six months but had extended and stayed in Kenya for ten months. She stated that she had been a professional dancer in Nepal for two years and that at Rangeela the pay was better than in Nepal. She added that her accommodation and transport to work was catered for and she would get bonus after surpassing the target. She revealed that the bonus was for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> best employee and would be Sh. 50,000, Sh. 30,000 and Sh. 20,000 respectively. She stated that there would also be money necklace which would be sold by the bar and counted as a collection. It was her testimony that when they were arrested they were not told of any offence and that there was no issue between her and her employer, the accused. She praised Zawadi Apartments as good place compared to where the safe house where they were taken after being arrested.
37. On re-examination, she reiterated that the money necklace formed part of collection and would be recorded in the book.
38. PW11 Pokhrel Kanchan testified that she had worked as a dancer in Nepal for around six months and that she came to Kenya due to financial problems and she had a loan to clear and Kenya had better opportunities. She travelled to Kenya on 22<sup>nd</sup> October 2017 on her Passport No. XXXXXXXXX (Exhibit 25). It was her testimony that she heard about the accused from her friend Riya who used to work for him as a dancer. She then gave her the contacts of the accused and she called him when she



was still in Nepal. The accused then told her there was a job for her and he sent her NPR 30,000 for shopping and travel. When she landed in Mombasa she passed by the Immigration and didn't tell them what she had come to do. She then paid USD 50 for the visa. At the airport she met the accused and the driver and was then taken to Zawadi Apartments in Bamburi where she found other girls from Nepal. By the time she was coming she had been told by the accused that she would be dancing at a club. She then started dancing the following day and she would be at work from 10pm to 4am. It was her testimony that she had a target of Sh. 300,000 per month which was set by the boss, the accused. She would dance and get money from the customers which she would put in a tin with her stage name as 'Keny 9' (Exhibit 26). She also got a necklace (Exhibit 27) from customers. It was her further testimony that the money collected would be taken by the manager who would record it in a book. For example, on 1<sup>st</sup> February 2019 she collected Sh. 13,250; on 14<sup>th</sup> February 2019 she collected Sh. 39,800; on 28<sup>th</sup> February 2019 she collected Sh. 13,936. Her total collection for February 2019 was Sh. 450,137 and that she had worked at Rangeela for ten months and her salary was Sh. 60,000. She stated that she didn't have a personal phone and that she would use company phone between 3pm and 6pm. Her passport was kept by the house manager. She stated that she didn't have friends in the neighborhood though she could walk within the compound. It was her testimony that she had travelled to Tanzania with the other girls where she renewed her visa. While at the border someone came to look at them and left and that it was the driver who paid for the visa.

39. On cross-examination by Mr. Igunza, PW11 stated that the accused didn't bring her to the country illegally and that she wasn't trafficked. She denied being kept at Rangeela for profit and that her passport wasn't taken away from her. She also denied being kept at Zawadi Apartments against her will. She stated that she knew about Rangeela when she spoke to the accused and she negotiated her employment terms and she was to be paid salary, accommodation, food and transport to/from work. She noted that she went through immigration without any problems and hadn't been charged for immigration offence. While at the apartments she stated that she wasn't locked in a room and was allowed to walk around. It was her testimony that the collection on the tins were for business and that she was being paid well and she was comfortable in Kenya than Nepal. She would also get bonuses upon reaching her target. For the time she worked at Rangeela she stated that she was never molested and was happy when her passport was kept for her as she gave it out willingly.
40. On re-examination, she reiterated that the collection was for the boss and she would get bonuses after exceeding the target.
41. PW12 Ale Sanjita testified that she used to work in Nepal as a dancer for three months before she came to Kenya for better opportunities which she was informed of by her friend Paya who used to stay in Kenya. She then travelled to Kenya using her Passport No. XXXXXXXXX (Exhibit 28). She stated that she communicated with the boss when she was still in Nepal and he sent her NPR 80,000 as one monthly advance salary which she used for shopping. When she reached Kenya she passed through the immigration desk and paid USD 50 for visa. She then met the accused and the driver (Sulu) who were waiting for her at the airport and they took her to Zawadi Apartments where she found some girls from Nepal. She arrived on an off day and she went to watch a movie with the girls at Nyalı Cinemax. The following day she went to work and danced from 9pm to 4am. It was her testimony that she was given a target of Sh. 400,000 per month by the accused. She would dance and get money from customers which she would put in her tin with her stage name as 'Ashika 1' (Exhibit 29). They would also receive money necklace (Exhibit 30) which she had on her tin. It was her testimony that the money would be taken by the manager who would record it down and then give it to the boss, the accused. For example, on 1<sup>st</sup> February 2019 she collected Sh. 11,500; on 19<sup>th</sup> February 2019 she collected Sh. 18,250; on 31<sup>st</sup> January 2019 she collected Sh. 10,900. Her total collection for the month of January 2019 was Sh. 507,676 and that she worked at Rangeela for eleven months. She stated that she didn't have a personal



- phone and would use company phone from 3pm to 6pm which was kept by Mary. At the apartments, she stated that they were free though Mary would take them to the shops. Once in a month they had an off day and would be taken out to the beach, movies or dinner by the accused. Five days after she arrived she gave out her passport to the accused to keep. She narrated how they went to Tanzania with the driver and stayed there for two days. They passed through the immigration and the driver (Sulu) took their passports to the immigration officer. On the day they were arrested, she stated that her tin had money though she didn't know how much. She was also taken to the hospital for age assessment.
42. On cross-examination, PW12 stated that she couldn't remember when she came to Kenya after she spoke to the accused and requested him to come and dance. She denied being tricked into coming to the country. She knew she was coming to dance and being paid a salary which she was comfortable with and better than her salary in Nepal. She was also aware that she was coming to do collection and that she had a target. It was however not a must to reach the target and the 1<sup>st</sup> three people would be given a bonus of Sh. 50,000, Sh. 30,000 and Sh. 20,000 respectively. It was her further testimony that she had been in Nairobi in 2016 as a dancer. She stated that Zawadi Apartments was a good place and that they were not being detained and were allowed to walk around and make calls using company phone. She admitted that she didn't have a personal phone. She stated that she was never prevented from going anywhere she wanted and that she was not made to work against her will. When they were arrested they weren't told of the reason for their arrest and that it was Nathim Khan from Blue Heart who told them that they had been arrested for prostitution. She added that the money collected would be recorded by the manager and handed over to the boss.
43. On re-examination, PW12 reiterated that she had a target of Sh. 400,000 which was set by the accused and that there was always a bonus for overpassing the target. The money would be put on the tin and would be taken to the counter where the manager was.
44. PW13 Hellen Atieno testified that on the night of 12<sup>th</sup> April 2019 she was working as a waitress at Rangeela Bar & Restaurant serving customers at night between 9pm and 4am. It was her testimony that the bar belonged to the accused and that she had worked for him seven months and she was being paid Sh.400 per day. She testified that there were girls performing traditional Indian dances while wearing long Indian dresses. She stated that there were tins for each girl where customers would put in money if they liked the dancing. It was her testimony that the customers were mostly Indians and Arabs and that the girls used to stay in Bamburi at the house of the accused. The girls would be brought by the driver at 11pm and leave at 3am.
45. On cross-examination by Mr. Igunza, PW13 stated that she was being paid a salary for the seven months she worked for the accused and that she had a staff badge. She stated that she knew the girls as Indians but didn't know where they came from and she never saw them being tortured. She noted that they had their freedom and were happy to work and were willing to be taken by the driver to/from work. She admitted that she also used to get tips from the customers and she wasn't under tough working conditions. She stated that the girls told her that they were staying in Bamburi though she didn't know the exact place where they were staying. She denied being threatened by the accused. She stated that the bar was being managed by someone called Eric and that the accused had not kidnapped the girls.
46. On re-examination, PW13 reiterated that the manager of the bar was Eric and the girls were staying in the house of the accused in Bamburi and she knew them as fellow workmates though she wasn't dancing like them.
47. PW14 Emmanuel Simiyu was a former police officer based at Immigration Department (investigation and enforcement) and a trained document examiner and forensic analyst. He stated that he is in charge of Personal Identification Secure Comparison Evaluation System (PISCES) which generates



data base on travelers in and out of the country. It was his testimony that he is one of the officers duly authorized to access the confidential information, generate and share the data with other agencies or countries upon request. He testified that on 23<sup>rd</sup> April 2019 the Immigration Department received an enquiry from DCI Transnational Organized Crime Unit requesting for immigration status of Asif Amirali Alibhai Jetha who is a holder of UK Passport No. XXXXXXXXX and Canadian Passport No. XXXXXXXXX. He was required to verify whether he had a work permit or special pass to allow him to work in Kenya. He then conducted a search and found out that Asif Amirali Alibhai Jetha didn't have a work permit or any special pass to allow him to work in Kenya. By a letter dated 17<sup>th</sup> April 2019, he was also required to generate travel histories of the accused and the 12 Nepalese girls. He generated their travel histories from PISCES which is a border management system. For example, Sanjita Ale (PW12) first came to the country in 2016 and left and came back on 18<sup>th</sup> June 2018 through Moi International Airport using Ethiopian Airlines as shown in her travel history (Exhibit 62l). She came with Tamang Sita (PW7) on the same flight (Exhibit 62g). For Bk Ranjita (PW5) she came on 2<sup>nd</sup> November 2013 and left then came back on 9<sup>th</sup> July 2019 through Moi International Airport on Ethiopian Airlines (Exhibit 62e) and travelled with Phiyak Kumar (PW4) on the same flight (Exhibit 62d). For Saru Khadgi (PW8), she first came into the country in 26<sup>th</sup> September 2014, left and came back on 23<sup>rd</sup> June 2018 through Moi International Airport on Ethiopian Airlines (Exhibit 62h) and travelled with Pokhrel Kanchan (PW11) as shown in her travel history (Exhibit 62k). For Bal Asayi Maya (PW2), he stated that he couldn't get her entry details into the country. For Gurung Adhikari Sanju (PW3), he stated that she arrived in the country on 12<sup>th</sup> October 2018 (Exhibit 62c). For Menuka Magar (PW6), she arrived on 3<sup>rd</sup> February 2018 (Exhibit 62f) while Namrata Thapa (PW1) arrived on 5<sup>th</sup> March 2018 (Exhibit 62a) and Dargi Rammaya (PW10) arrived on 21<sup>st</sup> July 2018 (Exhibit 62j) on Ethiopian Airlines. It was his testimony that all the girls travelled to Kenya within a span of very short time using the same entry point and same flight. He stated that on 23<sup>rd</sup> March 2019, the girls departed to Tanzania through Lunga Lunga one-stop border post having overstayed their visitors' extension visas which required them not to be in the country for more than six months. He explained that when one overstays for six months, then he/she should exit Kenya to a country outside East Africa to renew their visa. This wasn't done in this case. He stated that they verified their entry stamps and entry visas on their passports and detected anomalies. Some of them who had overstayed were able to get their extensions from the immigration officers. He stated that the girls were not visitors with the kind of extensions that was on their passports. As for the work permits which is normally done online, he stated that there were no applications for special pass or permit which is normally endorsed on the passport. The girls were repatriated back to Nepal on 17<sup>th</sup> July 2019 using Qatar Airways through JKIA.

48. As for the travel history of the accused (Exhibit 64), PW14 stated that he had been coming to the country on several occasions since 2012 when he first came on a visitor's pass and not a work permit. He stated that the accused was a dual citizen of Canada and U.K. He went on further and stated that on 29<sup>th</sup> May 2018, the accused arrived in the country through Moi International Airport using Ethiopian Airlines. Three weeks later on 18<sup>th</sup> June 2018, PW7 and PW12 arrived in the country while PW8 and PW11 arrived on 23<sup>rd</sup> June 2018. Again on 5<sup>th</sup> July 2018, the accused arrived in the country and on 9<sup>th</sup> July 2018, PW4 and PW5 also arrived in the country while PW9 arrived on 17<sup>th</sup> July 2018 and PW10 arrived on 21<sup>st</sup> July 2018. All the travel histories were obtained from PISCES which is a border management system developed by Department of Homeland Security in the U.S. He prepared a certificate for generating the travel history of the 12 girls (Exhibit 61) and the accused person (Exhibit 63) and printed it on 15<sup>th</sup> October 2020.
49. On cross-examination by Mr. Magolo, PW14 stated that he was requested by the DCI to generate the reports vide a letter dated 17<sup>th</sup> April 2019 to assist in the investigation of human trafficking case. He



stated that there was another letter that sought to ascertain whether the accused had a work permit and he responded vide a letter dated 23<sup>rd</sup> April 2019. He signed the certificates for the travel history (Exhibit 61 & Exhibit 63) on 15<sup>th</sup> October 2019. He reiterated that the 12 girls departed through Lunga Lunga where the passports were stamped as they had stayed for more than six months and had to go outside East Africa for the visa to be renewed. He was under the impression that the 12 girls were arrested in Lunga Lunga and charged for immigration offences like failing to get work permits.

50. On re-examination, PW14 admitted that he hadn't seen charge sheet for the girls so he wasn't sure whether they had been charged. He reiterated that their passports indicated that they exited through Tanzania.
51. PW15 Dr. Paul Kimotho a dental officer from Coast General Hospital testified that his job entails management of dental patients and medico-legal cases where he conducts age assessments and issue reports. He did age assessments for the 12 Nepalese girls. He found out at that Bal Asayi Maya (PW2) was approximately 16 years old (Exhibit 31a) as at 25<sup>th</sup> April 2019; Gurung Adhikari Sanju (PW3) was approximately 17 years old (Exhibit 31b) as at 25<sup>th</sup> April 2019; Bk Ranjita (PW5) was approximately 30 years old (Exhibit 31c) as at 25<sup>th</sup> April 2019; Thapa Namrata (PW1) was approximately 35 years old (Exhibit 31d) as at 25<sup>th</sup> April 2019; Rajdhami Kriti (PW9) was approximately 25 years old (Exhibit 31e) as at 25<sup>th</sup> April 2019; Pokhrel Kanchan (PW11) was approximately 25 years old (Exhibit 31f) as at 25<sup>th</sup> April 2019; Khadgi Saru (PW8) was approximately 26 years old (Exhibit 31g) as at 25<sup>th</sup> April 2019; Phiyak Kumari (PW4) was approximately 23 years old (Exhibit 31h) as at 25<sup>th</sup> April 2019; Dagri Rammaya (PW10) was approximately 25 years old (Exhibit 31i) as at 25<sup>th</sup> April 2019; Ale Sanjita (PW12) was approximately 26 years old (Exhibit 31j) as at 25<sup>th</sup> April 2019; Tamang Sita (PW7) was approximately 25 years old (Exhibit 31k) as at 25<sup>th</sup> April 2019; and Menuka Magar (PW6) was approximately 22 years old (Exhibit 31l) as at 25<sup>th</sup> April 2019.
52. On cross-examination by Mr. Igunza, PW15 stated that he is a doctor of dental surgery from University of Nairobi and that he wasn't the in-charge at Coast General Hospital and that the reference numbers in the age assessment reports are issued by the hospital. He stated that the ages as indicated were approximate and that age assessment is an inexact science.
53. On re-examination, he reiterated that he works at Coast General Hospital's dental department where the assessments were done. He admitted that he wasn't the one in-charge of the department though he was authorized to conduct the age assessments.
54. PW16 Samuel Ngunjiri ex-DCI officer at Transnational Organized Crime Unit testified that on 13<sup>th</sup> April 2019 they were led by Mr. Paul Gathara to Amkay Plaza in Nyali Mkomani. They went to a bar on the 2<sup>nd</sup> floor where they found some Nepalese girls dancing in the club. He was assigned to make an inventory of the items recovered. He recovered 12 buckets each labeled with the names of the girls who were dancing which had money for the girls. He stated that he wasn't aware of the relationship between the bucket and the chains. He testified that the proceeds would be collected by the owner of the club which was exclusively for members. His inventory consisted of the following: bucket for Kriti Rajdhani No. 11 had USD 62, Sh. 1,000 (Exhibit 32a) and one beads chain (Exhibit 32b); bucket for Saru Khadgi No. 5 labelled 'Zoya' had Sh. 1,000 note, USD 105 (Exhibit 33a) and one beads chain (Exhibit 33b); bucket for Phiyak Kumari with stage name 'Akanchia 7' had USD 27 and Sh. 1,450 (Exhibit 34a) and bead chain (Exhibit 34b); bucket No. 13 for Menuka Magar with stage name 'Angel' had USD 66 and Sh. 1,000 note (Exhibit 35a) and bead chain (Exhibit 35b); bucket No. 9 for Kanchan Pokhrel with stage name 'Keny' had USD 56 and Sh. 1,000 note (Exhibit 36a) and bead chain (Exhibit 36b); bucket No. 10 for Bk Ranjita with the stage name 'Rani' had USD 28 and Sh. 1,000 (Exhibit 37a) and bead chain (Exhibit 37b); bucket No. 8 for Sanju Gurung with the stage name 'Saju' had USD 87



and Sh. 1,000 (Exhibit 38a) and one bead chain (Exhibit 38b); bucket No. 3 for Dargi Rammaya with stage name 'Roshni' had USD 7 and Sh. 1,000 note (Exhibit 39a) and three bead chains (Exhibit 39b); bucket No. 7 for Thapa Namrata with stage name 'Riya' had USD 61 and Sh. 1,000 note (Exhibit 40a) and one bead chain (Exhibit 40b); bucket No. 12 for Sita Tamang with stage name 'Anuska' had USD 57 and Sh. 1,000 note (Exhibit 41a) and one bead chain (Exhibit 41b); bucket No. 2 for Asali Maya with stage name 'Maya' had USD 56 and Sh. 1,000 (Exhibit 42a) and one bead chain (Exhibit 42b); bucket No. 1 Ale Sanjita with the stage name 'Ashika' had USD 26 and Sh. 1,000 (Exhibit 43a) and one bead chain (Exhibit 43b); Rangeela Bar & Restaurant alcoholic retail license for members' club dated 29<sup>th</sup> January 2019 (Exhibit 44); invoice No. INB-113512 dated 29<sup>th</sup> January 2019 for New Rangeela Bar & Restaurant renewal (Exhibit 45); copy of invoice No, 149715, 149705, 149724 for health service application for New Rangeela Bar & Restaurant (Exhibit 46); police report on alcoholic drinks licensing application dated 28<sup>th</sup> January 2019 (Exhibit 47); official Mombasa County government payment receipt No. 0036457 for food hygiene license (Exhibit 48); single business permit No. ARN-AAA01YX8 for New Rangeela Bar & Restaurant (Exhibit 49); invoice for single business permit No INV-69897 dated 1<sup>st</sup> January 2019 (Exhibit 50); medical examination fee receipt for Alice Wanjiku, Kenga Karisa and Onyambu Kemunto Serial No. 150335 (Exhibit 51); original passport for Thapa Namrata and her vaccination card (Exhibit 1); copies of passports for the 12 Nepalese girls (Exhibit 52); two copies of special pass file 680048 Serial No. 118931 and 118827 for Thapa Renu and Tamang Sita respectively (Exhibit 53a) and (Exhibit 53b); laminated piece of paper containing foreign mobile phone numbers and names (Exhibit 54); 10 one-quire counter books containing daily collection writings (Exhibit 55); 18 KRA stickers Serial Nos. 024601, 679027, 679026, 679025, 679024, 679023, 679011, 679022, 679021, 679020, 679019, 679014, 679013, 679010, 679009, 679008, 679007, 679006 and 679008 (Exhibit 56); two phones: iPhone Apple white in color and Samsung Duos silver in color which were sent to cybercrime for analysis and were not produced as exhibits.

55. It was PW16's testimony that after preparing the inventory at 0100 hrs (Exhibit 57) they rescued the 12 Nepalese girls and arrested the owner of the bar and took him to Nyali police station. He stated that while at the police station at 4.42am someone called Shamider Shinger showed up and indicated that he had been sent by the accused to collect the original passports of the girls at the bar which they never saw during their search. The man handed over to him the 11 original passports belonging to PW2 to PW12. He prepared another inventory with the 11 passports at 0442 hrs (Exhibit 58) which was signed by him, the accused, Shimder Singer ID No. 11225193 and PC Emma Gikonyo (PW18). It was his testimony that the accused identified himself as the owner of the club and most of the customers were of Indian descent though some were of African descent.
56. On cross-examination by Mr. Magolo, PW16 stated that the girls retreated to the backroom when they got in. He admitted that he didn't take serial numbers of the money he found and didn't indicate the denominations. He stated that the girls didn't sign the inventory of the contents of the buckets. He admitted that he didn't have all the items in the inventory. He stated that he didn't arrest the person who brought them the passports to the police station and that the person recorded his statement. He reiterated that he obtained all the documents from the accused who signed the inventory.
57. PW17 Norman Oduor Adongo from Kenya Revenue Authority testified that the 18 excise stamps (Exhibit 56) recovered from the accused didn't belong to him. He stated that he tested the stamps using a machine called SM45 and found out that the stamps were issued to Wines of the World Beverages Ltd on 22<sup>nd</sup> June 2014 for a product called Famous Grouse. They responded to the DCI's letter dated 13<sup>th</sup> May 2020 (Exhibit 59) vide theirs dated 14<sup>th</sup> May 2020 (Exhibit 60).
58. On cross-examination by Mr. Magolo, PW17 stated that the letter didn't reveal where the stamps had been recovered from. He admitted that the stamps were genuine and were issued to Wines of the Word



- which deal in wines and spirits and are not to be issued to anyone who is not registered. The importer of the product is supposed to affix the stamps on the product while still at the factory. He stated that he knew Wines of the World though he didn't know whether they had reported loss or misplacement of the stamps.
59. PW18 PC Emma Gikonyo from DCI (Transnational Organized Crime Unit, Mombasa) testified that on 13<sup>th</sup> April 2019 she received information that they were to proceed to Amkay Plaza to rescue victims of human trafficking. When they reached the premises, they were prevented from entering and the guards called the accused who was the owner of Rangeela Bar & Restaurant situated on the 2<sup>nd</sup> floor. As they entered, they saw ladies dancing and some people were drinking and watching them. They introduced themselves and she was assigned the duty of searching the premises together with PC Kiptes in the company of the counter manager. They recovered money in form of USD and KSh and counter books which had records of daily collection with different amounts indicated on them. She stated that they recovered 644 notes of USD 1 (Exhibit 65a); one note of USD 100 (Exhibit 65b); 37 notes of Sh. 1,000 (Exhibit 65c) which were deposited in court as old currency; two notes of Sh. 500 (Exhibit 65d); 105 notes of Sh. 100 (Exhibit 65e); 25 notes of Sh. 200 (Exhibit 65f); 55 notes of Sh. 50 (Exhibit 65g). There also original passport for PW1 and other assorted documents including business permits (Exhibit 44 to 51). She then prepared an inventory of the items. The 12 Nepalese girls were then taken to Nyali police station.
60. On cross-examination by Mr. Magolo, PW18 stated that they had been instructed by Paul Gathara to go and rescue the suspected victims of human trafficking and they were briefed about the place which she didn't know before then. She stated that they were not accompanied by anyone from any government institution like Kenya Revenue Authority or Immigration Department. It was her testimony that she wasn't sure whether all the girls were adults. She added that the girls had complained about being denied freedom of communication or movement. She stated that they recovered a single business permit and licenses though she couldn't remember in whose names they were in.
61. On re-examination, she stated that the girls were not at the bar willingly.
62. PW19 PC Dominic Kengara from Kenya Revenue Authority (Investigation and Enforcement Department) stated that on 17<sup>th</sup> April 2019 they received a letter seeking to know whether the accused had been submitting his returns either personally or through business name. They responded vide a letter dated 9<sup>th</sup> May 2019 (Exhibit 66) after checking through the system that: the entity Rangeela Bar & Restaurant had not registered for tax purposes and there were no returns; the accused person existed in the system and was registered as tax payer with PIN XXXXXXXXXXXX and as at May 2019 he had not filed annual returns as required by law and there were no records of his returns. They therefore initiated further enquiries.
63. On cross-examination by Mr. Magolo, PW19 stated that they commenced enquiries to ensure compliance though there was still no report on compliance. He admitted that the DCI do not collect taxes on behalf of KRA though they assist in compliance and they don't maintain records of those who have paid taxes.
64. On re-examination by Ms. Keya, PW19 stated that they did a further audit on the accused by checking businesses operated by him and his bank accounts though they hadn't done anything because of the ongoing case. He stated that he received the letter from Revenue Protection Unit and checked the system about the details of the accused.
65. PW20 PC Janet Waki (100188) from DCI (Transnational Organized Crime Unit) said she was in the company of Paul Gathara, Sgt. Munyao, PC Emma Gikonyo, PC Kiptes and PC Ngunjiri when they



were informed about girls who had been trafficked. They proceeded to the bar where the girls were and the owner opened and they found 12 Nepalese girls dancing. The accused then identified himself as the owner of the club. She was assigned the duty of searching the premises together with PC Emma and PC Kiptes. They recovered money in USD and KSh (Exhibit 65a – 65g). She then made an inventory of the items recovered (Exhibit 68) dated 13<sup>th</sup> April 2019 which was signed by the accused and Eric Ndolo who was the manager of the bar. She stated that they recovered black counter book for recording daily collection (Exhibit 69); black counter book (Exhibit 70). They also recovered Sh. 31,300 and USD 742 inside a white bag labeled ‘LC Waikiki’ (Exhibit 71) and the total was Sh. 56,200 and USD 744. The money collected (Sh. 37,000 for the accused and Sh. 12,000 for the girls) was deposited in court as old currency as per the court order dated 27<sup>th</sup> September 2019 (Exhibit 72) and cash deposit slip dated 28<sup>th</sup> September 2019 for Sh. 12,000 (Exhibit 73) and cash deposit slip dated 28<sup>th</sup> September 2019 for Sh. 37,000 (Exhibit 74) were issued. They also recovered original passport for PW1 which was returned to her. There were also 12 buckets for the girls with beads inside. The accused was then arrested and the 12 girls were taken to Nyali police station. It was her testimony that the girls were taken for age assessment and two of them were found to be underage: PW2 was 16 years while PW3 was 17 years old.

66. On cross-examination by Mr. Magolo, PW20 reiterated that she was part of the team that went to the bar and she was tasked with the responsibility of doing the search. She then prepared an inventory for the money that was recovered from the counter where the manager was. It was her evidence that the manager was in charge of the counter and the accused was present too and he signed the inventory. She stated that the girls co-operated with them and willingly recorded their statements. She admitted that she’s the one who recorded the statements of PW2 and PW3 who told her they were 20 years as per their passports. She added that the business permit and other documents were in the name of Rangeela Bar & Restaurant. She admitted that she didn’t have training in revenue collection and has never supervised payment of taxes.
67. PW21 Sgt. Joseph Munyao (65883) from DCI (Transnational Organized Crime Unit) was the investigation officer. He stated that on the night of 13<sup>th</sup> April 2019 he received information from Mr. Paul Gathara that there was intelligence information of suspected girls who were suspected to be victims of human trafficking. They proceeded to Amkay Plaza where they got bouncers at the gate and got resistance until the boss was called. The accused then came and opened the gate and they went to 2<sup>nd</sup> floor where the bar was based. There was loud music and they saw Asian girls dancing on the floor with their traditional regalia. There were also Asian customers having drinks. They then assigned each other roles and he was tasked with the responsibility of dealing with the customers. He looked at their passports and allowed them to leave. It was his testimony that they were not able to communicate with the 12 girls due to language barrier and the accused translated for them the questions they had for them. They then requested for the girls’ documents but they didn’t have them at the moment as their passports were kept by the accused. At the dancing floor each of the 12 girls had a bucket with money and beads inside. The accused told them that he wasn’t a Kenyan.
68. It was his testimony that the girls were taken to Nyali police station and the accused was asked to make arrangement for their passports to be brought. An Asian man brought the girls’ passports and they looked genuine together with the tourist visas. He stated that they interrogated the girls with the assistance of Nepalese consulate and they described how they were recruited through an agent in Nepal who was in touch with the accused. They stated that they had been communicating with the accused who had promised them better conditions of service and had done advance payment for them. He stated that they were informed by the girls that it was the accused who financed their air tickets to travel to Kenya. Upon arrival it was the accused who would pick them from the airport and take them to the apartments in Bamburi where they were staying. The girls informed him that they were in custody of a



lady called Mary and that their phones were taken and they couldn't communicate with their families in Nepal.

69. On 17<sup>th</sup> April 2019, PW21 stated that he wrote a letter Ref CID/SEC/TOCU/4/4/Vol. 1/4 (Exhibit 77a) to the Nepalese Consulate requesting them to confirm whether the girls were their citizens and they confirmed so on the same day vide letter Ref. NCK/044/2019 (Exhibit 77b). On the same day, he wrote a letter Ref. CIC/SEC/TOCU/4/4/Vol. 1/1 (Exhibit 79a) and received a reply on 23<sup>rd</sup> April 2019 Ref. IMM/POL/COM/Vol. 8/60 (Exhibit 79b) indicating that the girls had no work permits to work in Kenya and had no special passes to engage in any employment. On 14<sup>th</sup> April 2019, he wrote a letter (Exhibit 78a) to the Department of Immigration in reference to work permit for holder of UK Passport No. 51091627 (Exhibit 75) and Canadian Passport No. XXXXXXXXX (Exhibit 76) and got a response on 23<sup>rd</sup> April 2019 vide letter Ref. IMM/POL/COM/Vol. 8/59 (Exhibit 78b) stating that the holder of the passports had no work permit or special pass to allow him to engage in employment.
70. On 17<sup>th</sup> April 2019, he wrote another letter to Commissioner, Investigation & Enforcement of KRA and received a report Ref. KRA/5/1006/IED/058 dated 9<sup>th</sup> May 2019 stating that the accused person had not been filing returns as required and there were no records of him submitting returns. On 18<sup>th</sup> April 2019, he filed Miscellaneous Application No. 22 of 2019 (Exhibit 80) and secured a safe house to keep the girls. Trace Kenya offered to host the girls on 18<sup>th</sup> April 2019 (Exhibit 81). On 25<sup>th</sup> April 2019, he obtained a court order to conduct age assessment for the girls and received a report indicating that two of them (PW2 and PW3) were underage.
71. On 3<sup>rd</sup> May 2019, PW21 wrote a letter (Exhibit 82a) to the Registrar of Companies requesting for details of Rangeela Bar & Restaurant and received a response on 26<sup>th</sup> August 2019 (Exhibit 82b) showing that Rangeela Bar & Restaurant belonged to Asif Amirali Jetha, the accused. On 17<sup>th</sup> May 2019, he wrote a letter (Exhibit 83a) to the County Government of Mombasa for verification of single business permits No. ORN AAA014X8 and got a response dated 28<sup>th</sup> May 2019 Ref. DTI/MSA/05-19/SBP/23 (Exhibit 83b(i), (ii), (iii) & (iv)). On 13<sup>th</sup> February 2020, he wrote a letter to Department of Commissioner of Domestic Taxes Enforcement Officer requesting for verification of 18 excise stamps which were recovered from the accused. He obtained a response that the said stamps were genuine but were issued to Wines of the Word on 2<sup>nd</sup> June 2014. After getting all the reports, he found out that the accused had committed several offences and he charged him accordingly.
72. On cross-examination by Mr. Magolo, PW21 stated that the team was led by Mr. Paul Gathara and they had intelligence information that there were immigrants who had been smuggled and were being held at Rangeela Bar & Restaurant. He stated that he didn't find any who had entered the country illegally and that they were not in chains but were dancing. He stated that the passports of the girls were brought to the police station after they had been rescued. It was his testimony that as much as the girls had entered the country through recognized points of entry, it didn't rule out the fact that they had been smuggled. He added that as tourists they were supposed to be in the country for three months. He stated that two of the girls were found to be under 18 years old after age assessment though they had valid passports. He stated that while interrogating the girls at the club, the accused assisted in translation though he didn't know the translator that was availed to the doctor.
73. He further stated that Exhibit 26a dated 17<sup>th</sup> May 2019 sought to enquire about details, the proprietor, the validity or any information about New Rangeela Bar & Restaurant and they got a response that the applicant and proprietor was Gandhiram Sundar Singh whose contacts they didn't have. He stated that the name, phone number and email address of the accused appeared on the business permit. He further stated that he wrote a letter to the Registrar of Companies but got a response from the Registrar of Business Names. He had sought the details of Rangeela Bar but got a response referring to Rangeela



Bar and not New Rangeela Bar & Restaurant. He also got an invoice issued by County Government of Mombasa addressed to New Rangeela Bar & Restaurant attached to business permit (Exhibit 49) issued to New Rangeela Bar & Restaurant. It was his testimony that he got the documents from the premises they went to where the proprietor was Mr. Singh. It was his further testimony that they recovered excise stamps and when they wrote to Kenya Revenue Authority, they got a confirmation that the same had been issued to a company owned by a Mr. Kariuki in Thika. Regrettably, he stated that they didn't get a statement from the company in Thika. As the owners of the stamps were known, he stated that there was nothing that prevented him from confirming whether they were stolen. He stated that KRA confirmed supplying the stamps to a company in Thika but were recovered in Mombasa. He admitted that the DCI has not mandate to collect taxes under *Tax Procedures Act*, 2015. He also admitted that application for work permit or extension of pass or pass is not copied to the police.

74. On re-examination by Ms. Keya, PW21 stated that the girls were not legally in the country and that their visas didn't allow them to do what they were doing. He stated that the girls' visas had expired and the accused had taken them to the border for them to be stamped. He reiterated that the physical appearance of the girls showed that they were young and age assessment showed that two of them were under age. He admitted that they had gone to Rangeela Bar & Restaurant though the documents showed New Rangeela Bar & Restaurant situated on the 2<sup>nd</sup> floor of Amkay Plaza. He reiterated that the documents recovered from the premises referred to New Rangeela Bar & Restaurant i.e Exhibit 50, Exhibit 49, Exhibit 48 & Exhibit 47 and that it was the accused who was in charge. However, from the county government permits, the person responsible is indicated as Gandhiram Sundar Singh and the contacts details in Exhibit 83b are those of the accused. He stated that he verified from Safaricom that the phone number belonged to the accused. As regards the excise stamps, he stated that he charged the accused for having stamps which were supposed to be in Thika and that he is not barred from investigating matters under *Kenya Revenue Authority Act*. He reiterated that the accused admitted being the owner of the club. It was his assertion that Rangeela Bar and New Rangeela Bar are one and the same thing.

### **Prima Facie Case**

75. By a ruling dated 2<sup>nd</sup> July 2021, the court found out that the prosecution had failed to establish a prima facie case against the accused person in respect to Count V, Count VI, Count VII, Count VIII and Count XI and he was acquitted under Section 210 of the Criminal Procedure Code. However, in respect to Count I, Count II, Count III, Count IV, Count IX and Count X the court found out that the prosecution had established a prima facie case against the accused and he was put on his defence under Section 211 of the Criminal Procedure Code. He gave sworn testimony and called two witnesses.

### **Defence Case**

76. In his testimony, the accused that he is married with two children and his wife is a teacher at Brookhouse School, Nairobi. He stated that he was born in Tanzania though his mother was born in Mombasa and he acquired a birth certificate of a Kenyan born out of the country Serial No. XXXXXX (Defence Exhibit 4) and that he holds British and Canadian passports. He added that he applied for Kenyan citizenship in 2014 and on 16<sup>th</sup> June 2016 he was issued with waiting card for Kenyan ID SN XXXXXXXXXXXX. In his application for Kenya citizenship, he submitted his mother's birth certificate, her passport, grandparents' birth certificate, his uncle's ID and affidavit as the guardian who raised him up (Defence Exhibit 1a – e). It was his testimony that he has stayed in Kenya for 25 years and that his wife who is a teacher has stayed in the country for around 23 years and she had a work permit to teach at Brookhouse School in Nairobi.



77. As regards Rangeela Bar & Restaurant, the accused stated that the same is owned by Gandhiram Sundra Singh who is his friend and used to be a tenant at his wife's apartment. It was his testimony that in 2019, Gandhiram wanted to sell the bar to him and he was in the process of registering a company called 'New Rangeela Bar & Restaurant' to take over the business. He stated that he had not yet taken over the business by the time the police came as he had not yet received his Kenyan ID. It was his further testimony that he would accompany the driver to the airport to help in interpretation as the girls couldn't speak English. The girls, he said, knew he was going to be their boss. He obtained special passes (Defence Exhibit 2i – x) from the driver issued by the Immigration Department on 27<sup>th</sup> September 2018 and valid for three months for them to work as artists. At the time the police came, the special passes had expired and new applications had been made online and he got copies of the same (Defence Exhibit 3i – ix). He added that two of the girls had arrived on the day the police came and arrested him and the applications had not been processed by then. He denied bringing the girls in the country and insisted that he was only working as a translator as he had not taken over the business. He also denied interfering with the passports of the girls as he was never in possession of them and didn't accompany them to the border point for any entry to be made on their passports. He stated that it was the owner of the club who rented the premises for them. He denied travelling out of the country to make arrangement for any girl to be brought to the country and only assisted them at the immigration desk to fill in the forms when they arrived. He admitted that they were to be his employees after setting up his business.
78. On cross-examination by Ms. Ogega, the accused stated that he was born in Tanzania on 14<sup>th</sup> December 1968 though he didn't know when his parents moved to Kenya and that he has stayed in Kenya for 25 years. He admitted that his birth certificate had a mistake which showed that he was born in 1986. He also admitted that he didn't have proof that he had been in Kenya as a child. It was his assertion that he had applied for Kenyan citizenship in 2016 but his file got lost and before then he would visit Kenya as British or Canadian. On his application for Kenyan ID, he was informed that he had insufficient documents and he submitted the required documents for his grandparents. While in Canada he said he worked for a publishing company though he had not been back there for seven years. He stated that he doesn't have a work permit as he's currently unemployed. He denied paying air tickets for the girls and stated that it was Gandhiram Sundar Singh who paid for them. For the girls' special passes, he stated that he got them from one of Gandhiram Sundar Singh's staff and they were to last for three months after which they were to be renewed. He denied helping the girls to apply for or pay for the passes and only assisted them in translations as they couldn't speak English. He stated that 'New Rangeela Bar & Restaurant' was registered in his name five years ago and he had planned to take over the business. He denied having certificate for Rangeela Bar & Restaurant. It was his further assertion that Gandhiram Singh was his friend and wife's tenant whom he had known for 13 years and had planned to buy the bar from him. He stated that the said Gandhiram wasn't a witness in his case as he didn't know where he was. He admitted having contacts with the girls and was present on the day they were arrested and they used to refer to him as 'boss' though he wasn't the one paying their salaries. He reiterated that it was Gandhiram Sundar Singh who used to pay them though he didn't have proof.
79. On re-examination by Mr. Magolo, the accused noted that he only helped the girls at the airport during entry as they could not speak English. He stated that the special passes expired after three months and he was given the application for renewals 11 days before their expiry. He stated that New Rangeela Bar & Restaurant hadn't started business but had been registered 5 or 6 years earlier. He also noted that his application for Kenyan ID wasn't successful because of missing documents like his mother's birth certificate. He stated that he would travel to Canada and work and that his wife has worked in the country for 25 years and has applied for residency. He stated that when the police came to the premises, he was called because the owner wasn't around.



80. In answering to summons issued under Section 150 of the Criminal Procedure Code, PW14 was summoned (Defence Exhibit 7) to confirm the authenticity of special passes (Defence Exhibit 5a – i) that the accused sought to rely on. He stated that he checked the Electronic National Foreign Service (EFNS) that is used for applying for special passes, dependants’ passes, pupils’ passes, work permits and research passes. He then entered the details of some of the Nepalese girls and found out that the applications were all made on 10<sup>th</sup> September 2018 and were approved on 12<sup>th</sup> September 2018. He admitted that the special passes were issued by the Immigration Department though unprocedurally as they lacked supporting documents like letter from Tourism Regulatory Authority allowing the subjects to work as performing artists at New Rangeela Bar & Restaurant. He stated that the passes didn’t go through security checks and were issued for three months which expired on 1<sup>st</sup> January 2019. He stated that the girls had entered the country on visitors’ passes and had stayed beyond the stipulated time and the special passes had expired.
81. DW2 Eric Ngoro testified that he used to work at Rangeela Bar & Restaurant as a counter manager. He stated that he had worked in the bar for two to three years after he was employed by Mzee Gandhi who was paying him until the bar was closed. He therefore knew him as the owner of the bar and he knew the accused as a friend of Mzee Gandhi. He admitted that he was around when the police came and that there were girls dancing.
82. On cross-examination by Ms. Ogega, DW2 stated that he worked at the bar from 2015 for two to three years and that April 2018 was his last day. He testified that he wasn’t at the bar in 2019. As a counter manager he used to collect tips for the girls and the owner of the bar was Mzee Gandhi. He stated that he didn’t know when the bar was opened though he had seen documents showing him as the owner. He added that he would see the accused at the bar talking to Mzee Gandhi and didn’t know whether he was also an owner.
83. On re-examination by Mr. Magolo, DW2 clarified that he stopped working at the bar when the police came and arrested the girls after which the bar was closed.
84. DW3 Kenga Karisa Randu testified that he worked at Rangeela Bar & Restaurant from 2015 until 2019 when the police raided the bar and arrested some girls. It was his testimony that the bar belonged to Gandhibhai and it was him who employed him and used to pay his salaries. He added that while at the bar he came to the accused as a friend of Gandhibhai who had planned to take over the business.
85. On cross-examination by Ms. Ogega, DW3 stated that he worked in the bar as a chef and he was employed by Gandhibhai though there was no written contract of employment. He stated that his salary was Sh. 15,000 per month and he would be paid in cash without signing anything or any pay slip. He stated that he used to see the accused at the bar.
86. On re-examination by Mr. Magolo, DW3 reiterated that he had no written contract with Gandhibhai and that he would receive his salary in cash.

### **Defence Submissions**

87. Mr. Magolo made oral submissions and attacked the charges count by count:
1. In respect to Count I regarding trafficking in persons, Mr. Magolo submitted that the act of harboring was not proved. He stated that from their passports, the girls came to the country legally and were issued with special passes for purposes of working at Rangeela Bar & Restaurant. He added that there was no attempt to connect the accused with the premises in Bamburi where the girls were staying. It was counsel’s contention that a title of ownership, a lease agreement or a caretaker in charge of the premises would have sufficed to prove that



the accused owned the premises. In the absence of evidence to prove lawful authority over the premises, counsel stated that the act of harboring the girls couldn't stand.

2. In respect to Count II regarding promoting human trafficking, Mr. Magolo submitted that the prosecution despite having plot number didn't conduct search to find the owner of Amkay Plaza. He stated that reliance on the fact that the accused was found on the premises and admitting being the owner of the premises wasn't enough to make him the owner. He submitted that the accused produced documents showing that the property belonged to someone else and gave reasons for his presence and continued patronage of the premises.
  3. In respect to Count III regarding interfering with travel documents, Mr. Magolo submitted that a reading of Section 8 of Counter Trafficking in Persons Act gives the impression that 'interference' means altering a document for purposes of deceiving and is an attempt to make the document read what it was not intended. He denied that the documents were confiscated but were only kept in safe custody. He submitted that the passports when required were available and were brought at the police station when they were called for.
  4. In respect to Count IV regarding being in possession of proceeds of crime, Mr. Magolo submitted that [Proceeds of Crime and Anti-Money Laundering Act](#), 2009 creates Assets Recovery Agency which has the mandate of recovering proceeds of crime and were not involved in the process. He stated that the accused was not found with the money in his body but inside the bar which belonged to someone else. He stated that the money was from sale of alcohol and the tips on the tins were not proved to be proceeds of crime.
  5. In respect to Count IX regarding engaging in business without work permit, Mr. Magolo submitted that there was no evidence showing that the business belonged to the accused. He reiterated that the business belonged to someone else. He stated that the accused though not holding a Kenyan passport, he had a waiting card and his parents are of Kenyan lineage. Counsel relied on the case of Republic vs. Africa Spirits Ltd & another; Director of Public Prosecutions & another (Proposed Interested Parties) [2019] eKLR and submitted that under the Kenyan Citizenship and Immigration Act, it is the Immigration Department which has the mandate to investigate, arrest and charge under the Act and that in this case, the DCI was overreaching its mandate by not involving the Immigration Department.
  6. In respect to Count X regarding unlawfully employing foreigners without work permits, Mr. Magolo submitted that there was no proof to show that the accused was the employer but admitted that the accused had intention of taking over the business. He stated that the accused was only an interpreter for the girls. He added that the girls had special passes which allowed them to take up employment which were renewed after their expiry.
88. He finally urged the court to find that the prosecution had not established its case(s) against the accused beyond reasonable doubt and acquit the accused.

### **Prosecution Submissions**

89. Ms. Gachau not being acquainted with the matter didn't make any submissions and relied on the evidence on record as adduced by the prosecution witnesses.

### **Analysis**

90. The testimonies of the prosecution witnesses were almost similar. The story line is that the accused person contacted them while they were still in Nepal and sent them money for air tickets and one-



month salary in advance. Upon landing in Kenya, the accused met each one of them at different times at the airport in the company of his driver Suleiman and took them to Zawadi Apartments in Bamburi where they stayed. The daily routine was that they would be driven to Rangeela Bar & Restaurant every day at 9:00pm where they would entertain guests up to 4:00am or 5:00am.

91. In Kenya the law relating to human trafficking is found in *Counter-Trafficking in Persons Act*, No. 8 of 2010. Section 3(1) of the Act provides that “A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of
- (a) threat or use of force or other forms of coercion;
  - (b) abduction;
  - (c) fraud;
  - (d) deception;
  - (e) abuse of power or of position of vulnerability;
  - (f) giving payments or benefits to obtain the consent of the victim of trafficking in persons; or
  - (g) giving or receiving payments or benefits to obtain the consent of a person having control over another person. Section 3(3) further provides that “The recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set out in subsection (1) of this Act.”
- Flowing from the definition, the elements which must be proved are: the Act (what is done) recruitment, transportation, transfer, harboring or receipt of persons; the Means (how it is done); the Purpose (why it is done).
92. The definition of human trafficking is lifted from the internationally recognized definition under the United Nations Convention against Transnational Organized Crime (Palermo Protocol) adopted by General Assembly Resolution 55/25 of 15<sup>th</sup> November 2000 as the main international instrument in the fight against transnational organized crime. It was opened for signature by member states in Palermo, Italy, on 12<sup>th</sup> to 15<sup>th</sup> December 2000 and entered into force on 29<sup>th</sup> September 2003. The Convention is further supplemented by three Protocols which target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. It is a requirement that countries must become parties to the Convention itself before they can become parties to any of the Protocols.
93. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children was adopted by the U.N. General Assembly Resolution No. 55/25 and it entered into force on 25<sup>th</sup> December 2003. It is the first global legally binding instrument with an agreed definition on trafficking in persons. The intention behind this definition is to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international co-operation in investigating and prosecuting trafficking in person cases. The purposes of this Protocol are: to prevent and combat trafficking in persons, paying particular attention to women and children; to protect and assist the victims of such trafficking, with full respect for their human rights; and to promote co-operation among States Parties in order to meet those objectives. Kenya became a signatory to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women



and Children on 5<sup>th</sup> January 2005. And by virtue of Article 2(6) of *the Constitution*, the Palermo Protocol thus forms part of Kenyan law.

94. The Convention represents a major step forward in the fight against transnational organized crime and signifies the recognition by Member States of the seriousness of the problems posed by it, as well as the need to foster and enhance close international co-operation in order to tackle those problems. States that ratify this instrument commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences (participation in an organized criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement co-operation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.
95. A UNODC 2018 Report indicated that 59% of victims of human trafficking from South Asia (Bangladesh, Maldives, Nepal and Pakistan) were females and that Nepal reports more child victims than adults. The same Report also noted that there is scarce information on the forms of exploitation for trafficking cases detected in South Asia and that trafficking for sexual exploitation and trafficking for forced labour are nearly equally detected in the sub-region. The Report provided no information regarding the sex profiles of the people prosecuted or convicted of trafficking in South Asia and the only information available related to some 450 people who were arrested for trafficking in persons in Nepal in 2016 and in Sri Lanka in 2017 and about 80% were males though there was no information regarding their citizenships. As an origin area for trafficking to the rest of the world, victims from South Asia have been detected in more than 40 countries around the world. The main destinations appear to be the countries of the Gulf Co-operation Council in the Middle East. Most South Asian countries introduced the specific offence of trafficking in persons in line with the UN Trafficking in Persons Protocol definition after December 2003 when the Protocol entered into force. For many of these countries, the anti-trafficking legislative framework is fairly recent. (UNODC, Global Report on Trafficking in Persons 2018).
96. For Kenya, the *Counter-Trafficking in Persons Act*, No. 4 of 2010 was assented to on 13<sup>th</sup> September 2010 and came into force on 1<sup>st</sup> October 2012. It was enacted to implement Kenya's obligations under the United Nations Convention Against Transnational Organized Crime particularly its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; to provide for the offences relating to trafficking in persons and for connected purposes.

### Issues For Determination

97. In Count I, the accused was charged for 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 which provides that "A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of—(d) deception." The issue for determination is whether the accused trafficked the 12 Nepalese girls for exploitation by means of deception. Section 2(1) of the Act defines "exploitation" as but is not limited to—
  - (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; sexual exploitation;
  - (i) child marriage;
  - (j) forced marriage. In trafficking one would expect the victims to be desperate people hoping to escape. Here the victims seemed happy and comfortable with the arrangements they had with the accused. What they were all desperate for was employment while still in Nepal which the accused offered them. For example, PW5 stated that she had financial problems in Nepal which she thought would be sorted by coming to work in Kenya as a dancer. As regards consent, the 12 girls travelled to Kenya by choice. The Act defines “consent” in relation to a person to mean “that the person agrees by choice, and has the freedom and capacity to make that choice.” It is to be noted that the consent of a victim is irrelevant where any of the means have been used; and the recruitment, transportation, transfer, harbouring or receipt of a child for exploitation shall be considered “trafficking in persons” even if this does not involve any of the means.
98. In *Muhammad Asif vs. Republic* [2017] eKLR, Justice P. Nyamweya observed that “...for a person to be charged under section 3(1)(d) and Section 3(5) of the Counter Trafficking in Persons Act No. 8 of 2010, the evidence should indicate that the accused person has
- (a) recruited, transported, transferred, received, held, concealed, or harboured the victim, or exercised control, direction or influence over the movements of the victim; and
  - (b) by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and
  - (c) done this for the purpose of exploiting the victim or facilitating their exploitation.
99. Barbara Ann Stolz in policy essay ‘Identifying Human Trafficking Victims’ in *Criminology & Public Policy* (2010) Vol. 9 Issue 2 (p. 267) discussed the difficulty in identifying the victims of human trafficking. She posits that their identification is difficult because of a number of reasons i.e. denial of the situation (victims not perceiving themselves to be victims); fear of law enforcement (based on past experiences or what they had been told by traffickers); fear of retaliation by the traffickers against the victim or their families; shame; love of the trafficker cultural norms; language barriers; difficulty in expressing emotions of psychological trauma; or lack of knowledge as to whom to identify oneself as a victim. She therefore suggested that in order to identify victims of human trafficking certain myths about victimization must be overcome like: a victim is not a victim because she was paid; had the freedom of move; lived in a regular house; was married to the trafficker; was a citizen; or knew the type of employment she would be engaged in.
100. It was the prosecution’s case through PW1 to PW12 that it was the accused who sent them money for air tickets to travel from Nepal to Kenya. Upon arriving at Moi International Airport in Mombasa, the accused would pick them and take them to Zawadi Apartments in Bamburi where they stayed. The 12 girls were in employment and had targets which they had no pressure to hit but it would be in the interest of each one of them to hit the target as there were bonuses attached to it. The accused however denied sending them money to facilitate their travels.
101. In *Benard Onyandi vs. Republic* [2018] eKLR, Riechi J., held that “For the prosecution to establish an offence of trafficking in persons, it must show that the accused (1) recruits or (2) transports, or (3) harbours, or receives another person 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 participant 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.” Consequently, as stated above the facts of the case and the evidence tendered by the prosecution must show that the accused

- (a) recruited, transported, transferred, received, held, concealed, or harboured the victim, or exercised control, direction or influence over the movements of the victim; and
- (b) by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and
- (c) done this for the purpose of exploiting the victim or facilitating their exploitation.

102. The circumstances and evidence tendered show that the accused committed the Act (of human trafficking) by facilitating the travels of the 12 Nepalese girls, recruiting, transferring them from the airport and harboring them in their place of residence. He used the Means of deception by sending them one-month salary in advance to facilitate their travels and taking advantage of their financial vulnerability for the Purposes of exploitation where the girls were kept in state of slavery and subjected to practices similar to slavery by being used to get money from customers at the bar. The exploitation of the girls was also manifested in the way their movements and communication were controlled. It was their evidence that they only had one day off in a month and were only allowed to use the house keeper’s (Mary) phone between 3:00pm and 6:00pm to communicate with their families back in Nepal. The 12 Nepalese girls were therefore at the mercy of the accused in terms of their movement and communication.
103. PW14 in his analysis of the travel history of the accused observed that his entry into and exit out of the country at certain intervals coincided with the arrivals of some of the 12 Nepalese girls. For example, on 29<sup>th</sup> May 2018 the accused entered the country through Moi International Airport, Mombasa. Three weeks later on 18<sup>th</sup> June 2018, PW7 and PW12 arrived into the country on the same flight. On 23<sup>rd</sup> June 2018, PW8 arrived and the accused left the country three days later on 26<sup>th</sup> June 2018. The accused then came back on 5<sup>th</sup> July 2018 and PW4 and PW5 arrived four days later on 9<sup>th</sup> July 2018 on the same flight while PW9 and PW10 arrived on 17<sup>th</sup> July 2018 and 21<sup>st</sup> July 2018 respectively. A perusal of the passports of the accused indicate that on the dates stated the accused arrived in Nepal on 27<sup>th</sup> June 2018 and left on 3<sup>rd</sup> July 2018 for India and departed India on 5<sup>th</sup> July 2018 for Mombasa, Kenya. He made this trip on his Canadian Passport No. XXXXXXXXX. It is further indicated on the passports that the accused has visited India and Nepal a number of times and the last time he was in Nepal was on 2<sup>nd</sup> December 2018.
104. While the accused was not obliged to explain his travel destinations and reasons for such travels, the circumstances of the case reveal that his travels out of the country was connected with the arrivals of the girls into the country. The accused did not rebut the connection between his travel and the coincidental arrivals of the girls.
105. In *Rafaeri Munya alias Rafaeri Kibuka vs. Reginam* (1953) 20 EACA 226, it was held that “The force of suspicious circumstances is augmented where the person accused attempts no explanation



of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.” Section 119 of the *Evidence Act* (Cap. 80) further requires the court to make presumptions based on the evidence before it. It provides that “The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

106. In his defence, the accused did not make any reference as regards his travels in and out of the country around the same time some of the girls arrived in the country. Consequently, I find that the accused was actively involved in recruiting the girls and organizing for their transportation into the country.

107. In Count II, the accused was charged for promoting trafficking in persons contrary to Section 5(a) of the Counter Trafficking in Persons Act, No. 8 of 2010 which provides that “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.” It was the testimony of the 12 Nepalese girls that they were staying at Zawadi Apartments where the accused took them after picking them from the airport. They would go to Rangeela Bar everyday at 9pm from the said apartment. While at Zawadi Apartments, the girls were under the care of Mary, the housekeeper. It was also the testimonies of the 12 girls and PW13 that they used to dance at Rangeela Bar and they knew the accused as the boss and owner of the business. PW13, a waitress at the bar testified that she worked for the accused for seven months and knew the bar belonged to him. In his defence, the accused stated that it was Gandhiram Sundar Singh who owned Rangeela Bar & Restaurant and had rented the apartments for the girls. It was the accused person’s contention that he had plans to take over the business and the girls knew he was going to be their boss and they referred to her as such. Mr. Magolo submitted that there was no proof in form of tenancy agreement or caretaker to confirm that the accused was the one who had rented the apartments for the girls or owned Rangeela Bar & Restaurant. As stated above, the girls knew Zawadi Apartments after they were taken there by their boss after being picked from the airport. It was their first port of call after entering the country. The second place they knew was Rangeela Bar & Restaurant which was their work place. The accused admitted that he had registered New Rangeela Bar & Restaurant with the intention of taking over the business of Rangeela Bar & Restaurant after getting his Kenyan citizenship papers. In the meantime, he stated that his role was just as an interpreter for the girls. The documents presented in form of business permits, county government licenses and witness testimonies are all evidence available and circumstances that point to the fact that the accused leased the premises at Amkay Plaza where Rangeela Bar & Restaurant was situated and he also rented Zawadi Apartments for the girls’ accommodation and owned Rangeela Bar & Restaurant. The evidence against the accused as regards his occupation and proprietorship of the premises is more than circumstantial.

108. Jowitt’s Dictionary of English Law, 4<sup>th</sup> Edition, states that

“...with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, a fingerprint recovered from the window forced open by the burglar matches the accused’s fingerprints; or where there is a DNA match between the accused’s control sample and genetic material recovered from the scene of the crime...” In *Kipkering arap Koskei & Another vs. Republic* (1949) 16 EACA 135, a locus classicus case



on reliance of circumstantial evidence in our jurisdiction, the court stated that for guilt to be inferred from circumstantial evidence the “...the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt...”

109. In this case, the prosecution did not call witnesses like a caretaker or landlord to prove that the accused was the one in charge of apartments where the girls stayed or the bar where he was arrested. The available evidence is that the girls once picked from the airport would be taken to Zawadi Apartments by the accused. In the evening, they would be driven to Rangeela Bar & Restaurant where they plied their trade. The circumstances under which everything happened painted a picture of a person providing accommodation to his workers and taking care of their transport to work daily.
110. From the foregoing, it is therefore clear that the accused was the occupier and proprietor of Rangeela Bar & Restaurant from where the girls worked and he did so with the aim of benefiting from it later (that is, if he wasn't benefiting already). In *Mohammed Asif vs. Republic (2017) eKLR*, it was held that “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.”
111. In Count III, the accused was charged for interfering with travel documents contrary to Section 8(a) of the Counter Trafficking in Persons Act, No. 8 of 2010 which provides that “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 of not less than ten years or to a fine of not less than ten million shillings or to both and upon subsequent conviction, to imprisonment for a term of not less than ten years without the option of a fine.” It was the prosecution case through the 12 Nepalese girls that as soon as they arrived in the country they would give their passports to the accused for safe custody. The passports were availed to the police station by a friend of the accused soon after his arrest but couldn't be found at the premises when the police conducted a search. There was no justification for the passports being handed over to the accused. It could be that the purpose of keeping the passports was to restrict their free movement out of the country. Indeed when their visas expired, some of the Nepalese girls travelled to Tanzania as a group with Suleiman, the driver. It was the prosecution case that the accused facilitated the interference of the passports of the victims when they went to Tanzania to renew their passes after they had overstayed in the country. The accused denied being involved in such activity. He stated that his role was to act as an interpreter for the girls when they arrived at the airport as they didn't speak English.
112. Section 7 of the Act provides that “A person who facilitates, aids or abets the exit or entry of persons from or to the country at international and local airports, territorial boundaries and seaports for the purpose of promoting trafficking in persons 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 a term of not less than thirty years without the option of a fine.” In this respect, the act of taking the passports of the girls (on the pretext of safe custody) and facilitating their journey to Tanzania to renew their visas amounts to “confiscation” and as such I find that there was interference with their travel documents. Further, PW14 testified that the special passes were issued irregularly as certain supporting documents were missing. At the border, the girls



testified that the driver (Suleiman) took their passports and talked to someone before and after they crossed. They didn't talk to anyone by themselves. For example, PW5 and PW8 stated that while inside a bus at the border someone whom they didn't know came and looked at them and didn't say anything and they didn't have money to pay for the renewal of the visa. However, their visas were renewed. It is evident that the purpose of renewing the visas through 'in-and-out' procedure at the border was for furtherance of human trafficking facilitated by the accused through his driver.

113. In Count IV, the accused was charged for 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*, No. 9 of 2009 (POCAML) which provides that “

A person who—

- (c) has possession of property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by him or by another person, commits an offence.” Section 2 of POCAML defines "proceeds of crime" as ‘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.’ From the premises KSh. 69,050 and USD 1,382 were recovered in different tins and which were tips given to the girls by customers at the bar. The money was thus an economic advantage derived from the promotion of human trafficking by the accused. Mr. Magolo submitted that the money was not found in the body of the accused and was found inside the bar which didn't belong to the accused. Possession is defined in Black's Law Dictionary as “The detention and control, or manual or ideal custody, of anything which may be the subject of property, for ones use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. It includes 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 of any other person; 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.” Having found that the accused owned the premises, I hereby also find that the accused was therefore in possession of the money recovered from the bar.

114. It was also Mr. Magolo's submission that the DCI overreached their mandate by purporting to arrest and charge the accused for being in possession of proceeds of crime. It was his contention that POCAML is a self-sufficient legislation with authorized officers allowed to carry out the mandate of Assets Recovery Agency. Section 2 of the Act defines “authorized officer’ as

- (a) a police officer;
- (b) an officer of the department of the Kenya Revenue Authority for the time being responsible for matters relating to customs;
- c) A gency Director; or



- (d) any person or class of persons designated by the Minister as an authorized officer to perform any function under this Act.
115. Korir J., in *Grace Dola & another vs. Director, Directorate of Criminal Investigations & 2 others* [2021] eKLR observed that “...the Directorate of Criminal Investigations is constitutionally mandated to investigate any crimes and offenses suspected to have been committed by any person. Likewise, the Director of Public Prosecutions is empowered to prosecute any person suspected of committing an offence known to the law.” Similarly, E. Ogola, J. in *Daniel Ogwoka Manduku vs. Director of Public Prosecutions & 2 others* [2019] eKLR while discussing whether the investigative powers of the Inspector-General of Police and the Director of Criminal Investigations can be interfered with held that “The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.” The arrest in this case was carried out by police officers from a unit of the DCI and as such I find that they had the mandate under POCAMLA to arrest the accused and charge him for being in possession of proceeds of crime.
116. In Count IX, the accused was charged for 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 which provides that “A person who 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.” By his own admission, the accused stated that he is not a Kenyan and doesn’t have a work permit. The evidence adduced by the prosecution was that the accused was running Rangeela Bar & Restaurant. PW21 stated that they recovered several documents which showed that the accused owned the premises. For example, PW21 produced a single business permit (Exhibit 49) issued on 22<sup>nd</sup> January 2019 for ‘New Rangeela Bar & Restaurant’ with the contact details (phone number and email address) of the accused. There was also an invoice (Exhibit 50) showing proof of payment of Sh. 50,250 for ‘New Rangeela Bar & Restaurant’ with the name and email address of Gandhiram Sundar Singh.
117. There was also food hygiene license (Exhibit 48) issued on 1<sup>st</sup> February 2019 in the name of ‘New Rangeela Bar & Restaurant.’ Further, there was a police report on alcoholic drinks license applicants (Exhibit 47) issued to ‘New Rangeela Bar & Restaurant’ on 28<sup>th</sup> January 2019 with the contact details (phone number and email address) of the accused who was listed as the person responsible. Additionally, there was application for grant/renewal of alcoholic retail license (Exhibit 44) issued on 29<sup>th</sup> January 2019 to ‘New Rangeela Bar & Restaurant’ with the phone number of the accused who is listed as a manager. The form is system generated and the applicant didn’t sign it. The application was paid for by an invoice dated 29<sup>th</sup> January 2019 and has the contact details (phone number and email address) of Suleiman Said Mohamed. In the course of the investigations, PW21 did obtain a letter dated 26<sup>th</sup> August 2019 (Exhibit 82b) from the Registrar of Companies which revealed that ‘Rangeela Bar & Restaurant’ was registered on 28<sup>th</sup> September 2015 and the accused was listed as the proprietor. However, the letters dated 19<sup>th</sup> July 2019 (Exhibit 83(b)(i)) from the County Secretary & Head of Public Service (Mombasa County) and 28<sup>th</sup> May 2019 (Exhibit 83(b)(ii)) from the Chief Officer, Department of Trade, Tourism & Investment (Mombasa County) stated that the applicant of the single business permit was Gandhiram Sundar Singh and who was also the proprietor of ‘New Rangeela Bar & Restaurant.’
118. The *Business Registration Service Act* No. 15 of 2015 establishes the Business Registration Service whose functions are to carry out all registrations required under the Act; maintain registers, data and records on registrations carried out by the Service; inter alia. It therefore follows that the BRS keeps



records of all companies and for any information regarding any company, then BRS is the authoritative source. The County Government has no role in determining ownership or proprietorship of a business. Theirs is to receive payment for application for licenses and licenses from anyone who might not even be an owner. From the invoices (Exhibit 45 and Exhibit 50), the names appearing (Gandhiram Sundar Singh and Suleiman Said Mohamed respectively) are names of the persons making payments and not the owner of the business. The single business permit (Exhibit 49); the police report on alcoholic drinks licensing applicants (Exhibit 47); and the application grant/renewal of alcoholic retail license (Exhibit 44) all bear the name of the accused. The accused denied being the owner of Rangeela Bar & Restaurant but admitted that he had incorporated 'New Rangeela Bar & Restaurant' in 2015 with the aim of taking over the business from Gandhiram Sundar Singh. It is noteworthy that all the applications for licenses were issued to 'New Rangeela Bar & Restaurant' which the accused admits he registered in 2015 in preparation for taking over the operations of 'Rangeela Bar & Restaurant.' It therefore means that even before the accused took over the business he was in charge of operations as shown by the documents produced in evidence. The available evidence therefore points to the fact that the accused was the proprietor of the business and did so knowing very well that he didn't have a work permit.

119. From the testimonies of the 12 Nepalese girls, all the money collected by them belonged to the accused who they fondly referred to as 'the boss'. He is the one who set the targets for them and paid bonuses for the top three every month. PW13 also identified accused as her employer and owner of the bar. However, in his defence the accused denied owning the business and stated that it belonged to his friend though he had planned to take it over. DW2 and DW3 also stated that the business belonged to one Gandhibhai who employed them. The available evidence however points to the accused as the brain behind the operations of 'New Rangeela Bar & Restaurant' and the defence tendered didn't dislodge the prosecution case in this respect.
120. In Count X, the accused was charged for unlawfully employing a foreign national contrary to Section 45(1)(a) as read with Section 60 of the *Kenya Citizenship and Immigration Act*, 2011 which provides that "No person shall employ – (a) a foreign national who entered Kenya illegally." Section 2(1) defines 'a foreign national' as 'any person who is not a citizen of Kenya.' It is not in dispute that PW1 to PW12 were Nepalese. They entered Kenya on different dates and their visas allowed them to stay in the country for maximum six months. Upon expiry of that period, they travelled to Tanzania and purported to have their visas renewed in a way which PW14 stated was irregular as some supporting documents were not availed. Prior to the renewal of their visas, the girls had taken up employment. It was the testimony of all the 12 Nepalese girls that they were each working for the accused at Rangeela Bar & Restaurant as dancers. They didn't have written contracts of employment but they were receiving salaries of Sh. 60,000 each per month. Moreover, prior to travelling to Kenya each received one-month salary in advance. The question to ask is whether the 12 Nepalese girls entered the country illegally or not. From the evidence tendered, I find nothing to hold that the initial entry of the girls in the country was illegal save for the means and the purpose for which it was done. Their entry was however supposed to last three months after which they follow the right process to have their continued stay remain legal. On 23<sup>rd</sup> March 2019, some of the girls crossed the border over to Tanzania through Lunga Lunga hoping to come back with renewed visas. They did so and obtained visa extensions irregularly without following the due process. It therefore follows that their subsequent entry and continued stay was illegal and as such they couldn't take up any form of employment.
121. It is also noteworthy that the applications for special passes (Defence Exhibit 5) capture the phone number of the accused as that of the employer. The same phone number (0722412422) is indicated in the application for grant/renewal of alcoholic retail license (Exhibit 44); police report on alcoholic drinks license applicants (Exhibit 47); and a single business permit (Exhibit 49) issued to New Rangeela



Bar & Restaurant. The glaring consistency and accuracy with which the details of the accused are captured in the personal documents of the girls cannot be wished away. The only conclusion to be drawn is that he had engaged the 12 girls in employment.

### Conclusion

122. This case provided learning opportunities and challenges for everyone who was involved. The 12 Nepalese girls went through an experience that they may not wish to be part of again in their lives. The search for green pastures due to regional economic imbalance has made many a people to jump across fences and take flights across oceans just to have a taste of life outside their motherland and comfort zones. We hope and believe the girls will share their experience with others so as not to get into their former shoes. The prosecutors who handled this case at various stages must have learnt and felt challenged by the new information they had to be armed with on short notice in order to present their case against experienced and prepared defence counsel. The investigation officer must have picked a lesson or two when it comes to enforcing tax laws especially under the *Tax Procedures Act*, 2015. The law prohibits assuming the role of authorized officers when you don't have the express consent of the Commissioner. Mr. Magolo (and Mr. Igunza at the initial stages) did a marvelous job in countering the prosecution case. His hard work and spirited fight led to the collapse of some serious counts under Section 210 of the Criminal Procedure Code. For Trace Kenya and Blue Heart, we are grateful for their participation and interest in the matter. Needless to say, I learnt a lot and I had to put in a lot of hours in reading and researching on everything that this case required of me. It is not every day that one gets to hear and determine such a case.

### Determination

123. The upshot of the above is that the facts have remained stubborn; they have aligned themselves with the law and consequently I find that the prosecution has established its case beyond reasonable against the accused person and find him guilty of the following counts:

1. 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;
2. Count II: Promoting trafficking in persons contrary to Section 5(a) of the Counter Trafficking in Persons Act, No. 8 of 2010;
3. Count III: Interfering with travel documents contrary to Section 8(a) of the Counter Trafficking in Persons Act, No. 8 of 2010;
4. 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*;
5. 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;
6. 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.

124. Accordingly, I hereby convict the accused of the above mentioned offences under Section 215 of the Criminal Procedure Code.

**DELIVERED AT SHANZU THIS 26<sup>TH</sup> DAY OF NOVEMBER 2021**

.....  
**HON. DAVID ODHIAMBO**



**RESIDENT MAGISTRATE**

Shanzu Law Courts

In the presence of:

Mr. Magolo for the accused

Ms. Ogega – Prosecutor

Mr. Ondari – Court Assistant

