



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 1654 OF 2015**

**KENYA UNION OF COMMERCIAL**

**FOOD AND ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**TUSKER MATTRESSES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The parties herein agreed to dispose of this claim through written submissions without oral hearing. According to the claimants, the respondents' reason to engage outsourced labour in its core functions was not permissible. The claimant further contended that by dismissing or declaring unionisable employees redundant and further by refusing to engage regular permanent employees to replace those dismissed or declared redundant, the respondent had used outsourcing as a means to discriminate employees with direct employment contracts.
2. According to the claimant, the respondent escalates such discrimination by offering less pay to outsourced labour doing equal work. The claimant further contended that the respondent's ultimate intention was to do away with Trade Union representation, which went against the right to freedom of association.
3. The respondent on its part contended that it was not in breach of any terms or condition set out in the recognition agreement or CBA. The respondent further contended that there was no single clause in the CBA which defined or restricted its core functions or dictated that core functions could not be outsourced.
4. According to the respondent, it was within its legal mandate as a private business entity to engage in strategies, employ to engage in strategies, employ such persons and enter into agreements or partnerships of any sort that would ensure the growth and sustainability of the business. The respondent contended further that it was incorrect for the claimant to insinuate that the outsourced workers were not members of the union or were barred from joining the union. The respondent further denied there had been any rampant dismissal of employees to create room for outsourced employees. The respondent also denied that any employee had been declared redundant or unfairly dismissed.
5. Mr Nyumba in his final submissions contended among others that the functions outsourced by the respondent were core functions of any modern supermarket carrying out retail management and product marketing without these core functions a modern supermarket like the respondent could not function. Mr Nyumba further submitted that the actual gross wages earned by regular and established staff were higher than what outsourced labour received. This according to the claimant was a scheme to replace regular

and permanent employees who negotiate their terms and replace them with cheap outsourced labour who are not entitled to any benefits arising from the parties CBA.

6. In support of his submissions Mr Nyumba sought reliance on the case of **Mr Wringley Company (EA) Ltd Vs the Attorney General & Others Pet No. 22 of 2012** which he submitted set out the parameters for outsourcing. These parameters, he contended were meant to protect employers carrying out core functions from outsourcing as a means to escape from meeting its accrued contractual obligations.

7. Ms Kirimi on her part submitted that the respondent like any other business entity and without any legal or business restriction can outsource some of its non-core work force. According to Counsel, the parties had a RA and CBA which were the documents either party could use to find a claim against the other. The claimant did not state which of the clauses of the RA and CBA the respondent disregarded or breached.

8. On the issue of outsourcing and discrimination, counsel sought reliance on the case of **KUCFAW –Vs- Tusker Mattresses Ltd [2015] eKLR** where similar claims by the respondent were dismissed. On this point counsel submitted that the claim should be dismissed on account of *res judicata*.

9. According to Counsel, the outsourced labour is not core to the respondent's business. Ms Karimi submitted that with a workforce of 3000 employees, the alleged outsourced labour is less than 20% of the employee. Counsel further relied on the case of **Kenya Ferry Services Ltd Vs Dock Workers Union [2015] eKLR** where the court stated among others that outsourcing was a management prerogative.

10. The respondent raised an important and preliminary question of *res judicata*. No court should entertain any matter which was substantially in issue in a former suit decided between the same parties. The principle of *res judicata* is intended to cushion courts and deter parties from reopening concluded litigation. The claimants' and respondents' herein were parties in cause number 434 of 2015. In that suit the respondent sought through an interlocutory application an order to restrain the respondent from outsourcing core functions within its business which were performed by unionisable employees.

11. The grounds and affidavit asserted that the respondent had commenced outsourcing contracts from Artemis African Limited, a commercial employment agency, with the intention of doing away with employees with whom they had a direct contract of employment. This happens to be the same complaint in the matter before me. Whereas the court has not been told the fate of the substantive suit, the fact that the same question of outsourcing was in issue in the earlier case makes it inappropriate for the court to make a pronouncement on the issue by virtue of *res judicata* or at worst sub judice of the earlier matter is still pending before the court.

12. On the issue of outsourcing, the Court of Appeal in the case of **Kenya Airways Ltd Vs Aviation & Allied Workers Union & Others Lady Justice Murgor** observed that outsourced service is one such widely accepted business concept which enable a company to focus on core business, reduce overheads, increase cost and efficiency savings and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs.

13. This court associates with the same sentiments and notes that the claimant before the court has opposed the outsourcing without demonstrating that the process could lead to job losses. The outsourced workers do still have a right to join the claimant union for those eligible. Nothing has been placed before the court to reasonably demonstrate that outsourced employees have been prevented from joining the claimant union. No allegation has been made that such employees would not benefit from negotiated CBA between the union and the respondent.

14. The claimant simply opposed the outsourcing for its own sake without demonstrating how it would prevent or hinder its right to represent such outsourced labour and negotiate on their behalf as per the existing recognition agreement between the claimant and the respondent.

15. The court therefore finds the claim without merit and the same is hereby disallowed with costs to the respondent.

Dated at Nairobi this 1<sup>st</sup> day of December 2017

**Abuodha J. N.**

**Judge**

Delivered this 1<sup>st</sup> day of December 2017

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.