



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 1273 OF 2014**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS....CLAIMANT**  
**VERSUS**  
**TUSKER MATTRESSES LIMITED.....RESPONDENT**

Mr. Nyumba for the Claimant

Mr. Chiuri Ngugi for Respondent

**JUDGMENT**

1. The issue in dispute in this matter as set out in the Memorandum of Claim filed on 1<sup>st</sup> August 2014 is;  

*“unwarranted introduction of Key Performance Indicators and New Qualification Benchmarks outside the parties Collective Bargaining Agreement.”*
2. The Parties have a Recognition Agreement signed on 19<sup>th</sup> October 2012 and a Collective Bargaining Agreement (CBA) signed on 14<sup>th</sup> November 2013 which took effect from 1<sup>st</sup> March 2013, for a period of two years.
3. Between 2<sup>nd</sup> and 3<sup>rd</sup> July 2014, the Respondent circulated a draft Key Performance Indicator and attached with new qualification benchmark in each category, requiring all employees to sign indicating their agreement to comply with the requirements. The document is attached to the Memorandum.
4. The Claimant engaged the Respondent and the Federation of Kenya Employers (FKE) with a view to have the document retracted pending collective negotiations on the matter.
5. However, on 21<sup>st</sup> July 2014, the Respondent sent a memo to all Branch Managers directing them to ensure that the Key Performance Indicators are signed within two weeks and / or before 3<sup>rd</sup> August 2014.
6. A meeting scheduled for discussion by FKE on 30<sup>th</sup> July 2013, was postponed without reasons.
7. A trade dispute was reported to the Ministry of Labour on 30<sup>th</sup> July 2014.

8. On 1<sup>st</sup> August 2014, this suit together with a Notice of Motion Application on a Certificate of Urgency was filed seeking to stop implementation of the key performance indicators and the new qualification Benchmarks outside the CBA initially pending the hearing and determination of the Application and eventually pending the hearing and determination of the main suit.

9. Interim orders were granted and have been extended severally awaiting the judgment of the Court.

The issues for determination are;

1. Whether the introduction of key performance indicators and qualification Benchmarks is a negotiable item under the Recognition Agreement and the CBA and therefore not an exclusive prerogative of the employer.
2. Whether the dispute was brought to Court prematurely before the conciliation process was finalized in terms of the CBA or as reported by the Claimant.
3. Remedies available to the Claimant if any.

#### 10. **Issue I**

**Clause 2a** of the Recognition Agreement sets out the scope of the Agreement and specifies negotiable matters to include;

*“rates of pay, overtime, hours of work, method of wage and salary payment, paid leave, duration of employment, medical benefits, principle of promotion, terms of employment for all unionsable employees.”*

11. The concluded CBA contains terms of employment applicable to all unionsable employees in 32 clauses.

#### 12. **Claimant’s submission**

It is the Claimant’s submission that the interdiction of performance indicators for signing by the employees, to commit to meet the set targets is a negotiable matter in terms of the Recognition Agreement and the CBA, and the Respondent was wrong to introduce the same without first discussing the matter with the union and the employees for them to understand the new requirements and role of the employees and the employer towards the success of the Key Performance Indicators.

13. That using the management to coerce, introduce and free employees to sign the Key Performance Indicators is wrong and not in keeping with good management practices.

14. Furthermore, new academic requirements for the jobs ranging from KCPE to KSCE for packers / baggers and shop assistants, Section Heads and Assistant Supervisors, spelt out in the Key Performance Indicators amounted to unilateral variation of the terms and conditions of employment contrary to the Recognition Agreement and the CBA.

15. That since many of the existing staff did not have the stated qualifications, the introduction was aimed at getting rid of the employees some of whom have served the Respondent for over twenty (20) years.

This would amount to reduction of staff through the backdoor.

16. That terms of employment, and matters that generally affect employees are negotiable in terms of the recognition Agreement.

17. The Court is urged to stop the introduction of the key performance indicators and the qualification Benchmarks before the same are fully discussed and agreed upon by the employer and the union on behalf of the employees.

18. That the Respondent be restrained from forcing employees to sign the said documents and vacate the set deadlines for signing the document.

19. That the Respondent to submit their proposals to the union for consideration / discussion and agreement.

## 20. Submissions by the Respondent

The Respondent filed a statement of Response to the claim and grounds of opposition to the Notice of Motion dated 15<sup>th</sup> September 2014 and 14<sup>th</sup> August 2014 respectively. The Respondent has also filed skeleton submissions on the matter.

The nub of the opposition is as follows;

- a. The Claim was prematurely brought to Court without invoking the dispute resolution mechanism provided under Clause 3 of the Recognition Agreement.

Instead, the Claimant reported a dispute to the Minister under **Section 62** of the Labour Relations Act 2007 on 30<sup>th</sup> July 2014.

Even then, the Claimant did not pursue the statutory mechanism to resolve the dispute but instead brought this suit after only two (2) days upon report of the dispute to the Minister.

The Court is urged to invoke its powers under **Section 15** of the Industrial Court Act, 2011 and decline to determine the Claim.

- b. 2ndly **Clause 2(e)** of the recognition Agreement reserves “*the sole right to conduct its business and manage its operations*” in the Respondent.

That introducing key performance indicators for the staff was necessary to improve productivity and the union and the employees had no role in the matter.

21. The Court was urged to strikeout the submissions made by the Claimant in the Memorandum of Claim as these do not constitute pleadings per **Rules 4** and **14** of the Industrial Court (procedure) Rule, 2010.

22. The Respondent urges the Court to follow the dicta of **Hon. Githinji J.A.** in his minority judgment in **Kenya Airways Ltd. V. Aviation and Allied Workers Union of Kenya and 3 others [2014] eKLR** to the effect that it was not the duty of the Court to investigate facts and circumstances and determine if the exercise of managerial prerogative was reasonable and done in good faith.

## 23. Determination

The Court notes that the Claimant / Applicant did not utilize internal dispute resolution mechanism nor did it exhaust the statutory conciliation mechanism before coming to Court.

24. However, the Court is satisfied that the issues in dispute demanded urgent attention by way of interim injunctive orders, hence the filing of the Memorandum of Claim simultaneously with an urgent notice of motion to seek such interim relief pending the resolution of dispute.

25. For this reason, the matter was properly brought to Court.

On whether the introduction of key performance indicators ought to have been preceded by discussions with employees and / or the union the Court has this to say.

26. The concise Oxford English Dictionary defines the word Key as

*“..... a thing that provides access to or understanding of something: a key to success; a set of answers to exercises or problems”*

*and performance as “the action or process of performing a task or function; and perform as “..... do something to a specified standard”*

*and indicator as*

*“a thing that indicates a state or level .....”*

27. The term Key Performance Indicator is a technical word used in Human Resource management processes. As discerned from the definition above, it is a mechanism that provides understanding towards doing something to a specified standard or level.

In the context of this case, the Recognition Agreement under Clause 2(a) flags out determination of *“terms of employment for all unionsable employees who are in the company”* as a *“negotiable matter.”*

28. It goes without saying that the provision of a new standard to be attained by the employees in their work constitutes a new term of employment because failure to attain the newly set standards will have negative consequences to the employee.

29. Equally, attainment of the set standards will have positive consequences to the employee.

The overall goal of this management tool is to improve the productivity of the Company. It is important therefore that the new measure is well understood by the employees, it is specific, measurable, attainable and time bound.

30. It is for this reason why it is imperative not only to discuss the Key Performance Indicators with the employees before their introduction, but it is also imperative that the employees be actively involved in the development of the key performance indicators.

31. These measures constitute a critical change of terms and conditions of service of the existing employees and are therefore negotiable items in terms of **Clause 2 (a)** of the Recognition Agreement concluded by the parties on 19<sup>th</sup> October 2012.

32. Whereas, it is the mandate of management to introduce the key performance indicators as a management tool at the work place, the employees must be actively involved in their development and implementation. It is futile and counter productive to impose the same on employees without having the employees understand the same and most importantly own them. This is not only beneficial to the employees but to the overall success of the new measures.

33. For these reasons, the Claim succeeds and the Court makes the following orders;

1. The Respondent is directed to involve the employees in the development and implementation of the Intended Key Performance Indicators either directly or through Collective Bargaining Agreement.
2. The Respondent is directed to vacate the deadline for the signing of the Key performance Indicators and new qualification benchmarks by 3<sup>rd</sup> August 2014.
3. The Respondent is directed to make their proposals on key performance indicators and allow Collective negotiations between the parties.
4. The Respondent is to pay the costs of the suit.

**Dated and Delivered at Nairobi this 13<sup>th</sup> day of March, 2015.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**