



**Harley's Limited v Kenya Bureau of Standards (Tribunal Appeal
5 of 2018) [2019] KEST 115 (KLR) (27 September 2019) (Judgment)**

Neutral citation: [2019] KEST 115 (KLR)

**REPUBLIC OF KENYA
IN THE STANDARDS TRIBUNAL
TRIBUNAL APPEAL 5 OF 2018
GM MBURU, CHAIR, MS MAKHANDIA, H SIGEI, P MUNGAI & L ABDIWAHID, MEMBERS
SEPTEMBER 27, 2019**

BETWEEN

HARLEY'S LIMITED APPELLANT

AND

KENYA BUREAU OF STANDARDS RESPONDENT

JUDGMENT

1. The Appellant is a limited liability company with registered offices in Nairobi. They are in the business of wholesale distribution and importation of pharmaceutical products in Kenya, which include among others adult disposable diapers by the name DraiMaxx, the subject of this appeal.
2. The Respondent is a body corporate established under Section 3 of the *Standards Act*, Cap 496 laws of Kenya whose functions among others include promoting standardization in industry.
3. The appeal was filed on 19th October, 2018 together with a notice of motion application by the appellant challenging the decision of the Respondents test results that its consignment had failed to meet the standard specifications vide communication through the letter of 6th June, 2018. On 22nd June, 2019 the Honourable Tribunal pronounced itself on the notice of motion where it dismissed the application for want of a case warranting the interim orders prayed for in the application.
4. Upon the ruling, the appellant sought for and was granted leave to file supplementary grounds of appeal. The supplementary grounds of appeal were filed on 19th June, 2019. The matter was heard by written submissions where both parties were allowed to orally highlight on the same before the Tribunal on 30th August, 2019.



Summary

5. We are mindful to reproduce the summary of the facts of the appeal before us for appropriate background information. The Appellant Company is a duly licensed importer of among others the subject products herein, being adult diapers, under the “DRAIMAXX” brand.
6. On the other hand, the Respondent is a government agency established under Section 3 of the Standards Act, CAP 496 Laws of Kenya (hereafter “the Act”). Section 4(1)(e) being a relevant section of the Act, mandates the Respondent to ‘prepare, frame, modify or amend specifications and codes of practice.
7. The Respondent is mandated to appoint qualified inspection agents to undertake its functions on its behalf from within and without the country as envisaged by Section 4(1) (j) of the Act. Among those appointed and contracted agents by the respondent is SGS India PVT LTD to undertake on its behalf inspection for purposes of Pre-Export Verification of Conformity (PVoC) of Standards of goods imported from India. The agents are authorized in law to issue a certificate of conformity (CoC) after certifying that the products meet the various Kenyan standards. The certification does not however discharge an exporter from their contractual obligation in relation to the quality and quantity of the goods as well as the discharge of the rights and obligation under the contract of sale between the parties. The respondent can also as a matter of fact reject such a consignment covered by the certification by the appointed agents if found to be non-conforming verification at the port of entry.
8. In the present appeal it is not disputed that the Appellant’s Draimaxx Adult Diapers had been inspected by the Respondent’s duly appointed agent for conformity with the Kenya standards. It is also not disputed that the agent issued the Appellant with the Pre-Export Verification of Conformity (PVoC) vide a certificate of conformity No. S-2018/05/479416 issued on 04/05/2018.
9. It is the Respondent’s decision by way of letter dated 6th June, 2018 declaring the Appellant’s products to have failed to conform and meet the standard KS 2662:2016 Disposable Adult Diapers Specifications on markings that this appeal seeks to challenge.
10. Having heard the parties in their submissions before us and gone through the documents filed, we find the following issues confronting us for determination in this appeal namely;
 - i. Whether the Respondent acted fairly and reasonably in its decision to declare the products substandard;
 - ii. Whether the standard KS 2662:2016 Disposable Adult Diapers Specifications set-out any form, manner or otherwise prescribed style that must be adopted in satisfaction of the specifications thereunder,
 - iii. Whether, if the answer to (ii) above is in affirmative, the Appellant flouted those prescribed specifications in its products;
 - iv. What does the respondent’s Policy and Guidelines provide on conformity standards required under KS 2662:2016 and whether those policies and guidelines were followed to the standard required;
 - v. Whether the prayers sought in the appeal are available to be granted to the appellant.
11. This decision shall answer the issues identified above wholesomely and not singly.
12. It was submitted before us that and not disputed that the Respondent’s decision of 6th June, 2018 was communicated to the Appellant on the 27th of August, 2018. In a bid to explain the delay, Mr. Biwott



Counsel for the Respondent stated that the Appellant was aware of the intervening circumstances which led to the delay. That the Directors of the Appellant as well as one of the Respondent's inspection officer were arraigned in court and charged over the subject products. Mr. Lusi for the Appellant did not rebut this explanation in his reply. This Tribunal is aware that indeed there were criminal charges against the Appellant Company and 8 others in Criminal Case No. 1783/2018. This case is pending before court for hearing and determination. We are satisfied that there was justification for the delay in responding to the letter by the Respondent in the circumstances. We find no fault on the part of the Respondent and failure to accord with the Respondent's timelines in its policy document is reasonably explainable in the circumstances obtaining herein. There was thus no violation of the Appellant's rights as enshrined in *the Constitution* and the law.

13. It was submitted by Mr. Lusi before us that the subject Standard does not prescribe a defined, fixed or recommended form, manner, nature or format to be adopted by parties in complying with the specifications thereto but that it does expressly set-out the particular elements and/or specifications that must be marked. He also submitted that other adult diapers in the market have adopted their varied styles and/or design in providing for the marking. It was submitted that it is therefore legally impossible and implausible to fault the Appellant on a supposed failure to comply with a non-existent prescribed style or format.
14. Mr. Lusi further submitted that the Respondent's CPR 173 policy require that a tested sample must be preserved and availed for inspection by an Appellant or the Tribunal to enable it judiciously determine the subject matter before it. He further submitted that the failure to submit such samples, according to him warrants an inference that it is because the samples that were tested are not the Appellant's products. We hasten to state that, we disagree with respect but agree with Mr. Biwott that the samples submitted as per the sample submission form as well as imports sampling form contained a unique identifier under customs entry number 6895200 which remained constant in all the relevant forms availed to us. We thus find that the samples collected are the same samples tested. However, failure to avail the samples by the Respondent as required by CPR 173 Inspection Process INS/OP particularly requirement 6.5.3 on returnable samples and regulation 6.12.2 on post-delivery activities is aimed at facilitating firsthand confirmation of the samples by the Tribunal or such other organ undertaking verification. We have perused through these requirements and we have no option but to agree with the requirements that for purposes of this finding the samples presented before it by the Appellant are indeed the products in issue herein and are the ones imported, tested and are marketed by the appellant. In any event, there was no objection by the Respondent's Counsel as to the reliance by the Appellant as well as this Tribunal on the samples availed to us.
15. We have analyzed the samples presented before us. We sought for and obtained clarifications on the markings as well as comparison with other brands which were presented alongside the Appellant's brand, the subject of this appeal. In our ruling of 22nd March 2019, we enlisted the basis of our decision at page 9 thereof that the analysis made regards the documentations presented including test reports, laboratory test reports and the submission forms. We did not have the benefit of the samples of the actual product in issue, and we noted this deficiency in that ruling.
16. Having said that, we found that in the samples availed in evidence before us and in the absence of specifically prescribed, defined, fixed or recommended form, manner, nature or format to be adopted in complying with the specifications thereto or that certain specifications must be marked, the diapers imported by the Appellant met the specification KS 2662:2016 under both primary and secondary packages. The markings were clearly imprinted in blue, red and black ink in the three samples availed. The markings could only have been placed after importation. It was also evident from the samples that there were marked sets of the number of diapers per pack per size. This was an affirmation of



the submission that the standard KS 2662:2016 Disposable Adult Diapers Specifications, does not recommend, prescribe and/or set-out any form, manner or otherwise prescribed style that must be adopted by importers, manufacturers or distributors in satisfaction of the specifications thereunder but only require that number of diapers per pack must be set-out. Since it does not set out at what stage these markings must be made, we have no reason to fault markings which were in-printed after the product has been cleared at the point of entry rather than at the country of origin.

17. As regards the Certificate of Conformity (CoC), the respondent has the right to reject a consignment covered by any such CoC if found to be nonconforming at the port of entry. Section 14 of the [Standards Act](#) Chapter 496 Laws of Kenya on Powers of inspectors that they can...

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(g) seize and detain, for the purpose of testing, any goods in respect of which he has reasonable cause to believe that an offence has been committed;

(h) seize and detain any goods or documents which he has reasonable cause to believe may be required as evidence in any proceedings for any offence under this Act.

18. The import is that CoC is not a final document and the Respondent has the power to seize the goods either at the entry point or market and subject them to further retesting which results can overrule the CoC. In this case, though there was no retesting, the finding on the compliance with markings by the Appellant avails it a reasonable ground to establish compliance by its products and that the CoC in the circumstances is not diminished. The inspection for conformity as was done in the country of origin and the issuance of Pre-Export Verification of Conformity (PVOC) vide a certificate of conformity No. s-2018/05/479416 issued on 4th May, 2018 is hereby upheld.

19. The Respondent submitted that the present appeal was incompetent and in contravention of Section 16G of the Act and Rule 28 of the Rules. In rebuttal it was submitted that the ruling delivered by this Tribunal was on an interlocutory application and not the main appeal. We agree with the appellant that as already alluded elsewhere in this judgement, there has been no other finding on merit other than the finding on the notice of motion.

20. Since the specifications to the standard were approved KS 2662:2016 and ICS 59.080.30 that required ascertainment in testing to include the rate of absorbency, absorptive capacity and delivery moisture content and in the present case, these were met by the Applicant's products and were not disputed by the Respondent, and having pronounced ourselves on compliance with packaging and markings, we find that the decision of the Respondent communicated in the letter of 6th June, 2018 was illegal and unlawful in the circumstances.

21. Having found as we have above, the final orders that comments to us are as follows:-

1. That the Applicant's goods and or consignment did comply with the set Kenya Standard Specifications for Disposable Diapers Adult Diapers KS-2662:2016
2. That we hereby issue an order setting aside the decision of the Respondent communicated in the letter Ref. No. KEBS/COR/KLD/23/5/VOL54 (84) of 6th June, 2018 and allow the appeal.
3. Each party to bear their own cost.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2019.



GLADYS MUTHONI MBURU - (CHAIRPERSON)

MOSES SANDE MAKHANDIA - (MEMBER)

HILLARY SIGEI - (MEMBER)

PETER MUNGAI - (MEMBER)

LUL ABDIWAHID - (MEMBER)

Delivered in the presence of:

