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THE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE TOBACCO CONTROL REGULATIONS, 2014

Clerk's Chambers,
First Floor,
Parliament Buildings,
NAIROBI.

Hon. Speaker
You may approve
for tabling
28/05/15

MAY, 2015

*Paper laid
on the table
of the Senate by
Sen. Sang
28/05/15*



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ABBREVIATIONS

BAT	British American Tobacco (K) Ltd.
FCTC	Framework Convention on Tobacco Control
KAM	Kenya Association of Manufacturers
PERAK	Pubs, Entertainment and Restaurants Association of Kenya
SEN.	Senator
TCA	Tobacco Control Act

PREFACE

Establishment of the Committee on Delegated Legislation

The Sessional Committee on Delegated Legislation is established pursuant to the Senate Standing Order 214 which states:

- 1) There shall be a select Committee to be known as the Committee on Delegated Legislation.
- 2) Whenever a statutory instrument is submitted to the Senate pursuant to the Constitution, any law or these Standing Orders, the statutory instrument shall, unless a contrary intention appears in the relevant legislation, be laid before the Senate by the Chair of the Senate Committee on Delegated Legislation and thereafter stand referred to the Committee.
- 3) The Committee shall consider in respect of any statutory instrument whether the statutory instrument-
 - a) is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written law;
 - b) infringes on fundamental rights and freedoms of the public;
 - c) contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;
 - d) directly or indirectly bars the jurisdiction of the courts;
 - e) gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;
 - f) involves expenditure from the Consolidated Fund or other public revenues;
 - g) is defective in its drafting or for any reason, the form or purport of the statutory instrument calls for any elucidation;
 - h) appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

- i) appears to have had unjustifiable delay in its publication or laying before Parliament;
- j) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- k) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
- l) inappropriately delegates legislative powers;
- m) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
- n) appears for any reason to infringe on the rule of law;
- o) inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and
- p) accords to any other reason that the Committee considers fit to examine.

(4) If the Committee-

- a) resolves that the statutory instrument, be acceded to, the Clerk shall convey that resolution to the relevant state department or the authority that published the statutory instrument;
- b) does not accede to the statutory instrument, or part of a statutory instrument, the Committee may recommend to the Senate that the Senate resolves that all or any part of the statutory instrument, as the case may be, be annulled.

(5) If the Senate-

- a) fails to agree to the recommendation of the Committee under paragraph (4)(b), the statutory instrument shall be deemed to have been approved by Parliament;
- b) resolves to annul a statutory instrument, or part of a statutory instrument, the resolution shall, within seven days of the passage of the resolution, be referred to the National Assembly for concurrence.

Membership of the Committee on Delegated Legislation

The Membership of the Committee is as follows:

- | | | |
|-----------------------------|---|------------------|
| 1. Sen. Stephen Sang | - | Chairperson |
| 2. Sen. Judith Sijeny | - | Vice-Chairperson |
| 3. Sen. (Dr.) Boni Khalwale | - | Member |
| 4. Sen. Emma Mbura | - | Member |
| 5. Sen. Daniel Karaba | - | Member |
| 6. Sen. Liza Chelule | - | Member |
| 7. Sen. Godliver Omondi | - | Member |
| 8. Sen. Joy Gwendu | - | Member |
| 9. Sen. Boy Juma Boy | - | Member |

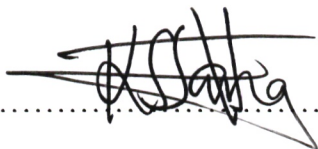
Acknowledgement

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it.

Mr. Speaker Sir,

It is my pleasant duty, pursuant to Section 17 of the Statutory Instruments Act, 2014 and Standing Order 214, to present the Report of the Sessional Committee on Delegated Legislation on the Tobacco Control Regulations, 2014.

Signed.....



Date.....

28/05/2015

SEN. STEPHEN SANG,

CHAIRPERSON

SESSIONAL COMMITTEE ON DELEGATED LEGISLATION.

outlined in the Explanatory Memorandum, as well as the Committee's scrutiny of the Regulations. Chapter two gives an account of the submissions received from stakeholders in the industry. Chapter three highlights the Committee's Observations while Chapter four outlines the Committee Recommendations, specifically the provisions that the Committee proposes to annul.

EXECUTIVE SUMMARY

On 5th December 2014, the Kenyan Ministry of Health published the Regulations in the Kenya Gazette under Legal Notice 169 of 2014. The Tobacco Control Regulations, 2014 were tabled in the Senate on 5th May, 2015 pursuant to section 12(1) of the Statutory Instruments Act, 2013 and the Senate Standing Order 214(2); and subsequently stood referred to the Sessional Committee on Delegated Legislation for scrutiny.

In light of the public discourse on the Regulations, the Committee, at its meeting held on 5th May, 2015, resolved to invite stakeholders in the tobacco industry to submit issues that they may have on the Regulations. At its meeting held on Thursday, 21st May, 2015, the Committee received submissions on from various stakeholders including the British American Tobacco (K) Ltd., Mastermind Tobacco (K) Ltd., Kenya Association of Manufacturers (KAM) and Pubs, Entertainment and Restaurants Association of Kenya (PERAK).

The Committee further invited the Cabinet Secretary, Ministry of Health for a consultative meeting to discuss the issues raised on the Regulations. However, by a letter dated 26th May, 2015, from the office of the Principal Secretary, the Ministry stated that they were unable to address the matters raised as they were currently before the High Court in Petition No. 143 of 2015 filed on 14th April, 2015 and therefore *sub judice*.

Chapter one of the report gives a summary of the purpose and legal basis of the Regulations. It also outlines the Ministry's submission on stakeholder consultations as

outlined in the Explanatory Memorandum, as well as the Committee's scrutiny of the Regulations. Chapter two gives an account of the submissions received from stakeholders in the industry. Chapter three highlights the Committee's Observations while Chapter four outlines the Committee Recommendations, specifically the provisions that the Committee proposes to annul.

CHAPTER ONE INTRODUCTION

1.1 The Tobacco Control Regulations, 2014

The Tobacco Control Regulations were gazetted on 5th December 2014 under Legal Notice No. 169 of 2014. The key purpose of the Regulations is to give effect to the Tobacco Control Act 2007. The Regulations specifically address the control of tobacco production, manufacture, sale, labeling, advertising, promotion, sponsorship and use of tobacco products including exposure to tobacco smoke. The Regulations shall come into operation on 5th of June 2015.

1.2 Legal Basis of the Tobacco Control Regulations, 2014

Section 53 of the Tobacco Control Act No. 41 of 2007 provides for the Cabinet Secretary's power to make Regulations in the following terms:

(1) The Minister may, on recommendation of the Board, make regulations—

(a) for prescribing anything required by this Act to be prescribed;

(b) prohibiting anything required by this Act to be prohibited;

(c) generally for the better carrying out of the objects of this Act.

(2) The Minister may, in consultation with the Ministers for the time being responsible for matters relating to agriculture, trade and industry, finance, education, information and communication, foreign affairs, internal security and any other relevant ministry, formulate the policy framework regarding—

(a) the multidisciplinary and inter-sectoral implementation of this Act; and

(b) any other matter which is necessary or expedient to prescribe in order to achieve or promote the objects of this Act.

1.3 Stakeholder Consultations on the Tobacco Control Regulations, 2014

The Ministry of Health in the Explanatory Memorandum indicated that several consultative meetings were held with various stakeholders during the development of the Regulations. A national stakeholders meeting was held on 18th March, 2014, where the industry was represented. Issues raised included solatium contribution, product disclosure and packaging and labeling requirements. The Ministry also indicated that a public forum was held on 14th August, 2014 to share the Pictorial Health Warnings under the First Schedule on the Regulations and that concerns were raised that some of the pictures did not communicate effectively. In summary, the Ministry asserts that consultative meetings were held in line with Section 7 of the Statutory Instrument Act, 2013.

Contrary to this assertion, the stakeholders claim that unsatisfactory stakeholder participation was carried out during the development of the Regulations and concerns raised were not incorporated before publication.

1.4 Committee Scrutiny of the Tobacco Control Regulations, 2014

The Committee scrutinized the Tobacco Control Regulations at its meetings held on 5th May, 2015 and 21st May, 2015. In light of the public discourse on the Regulations, the Committee resolved to invite stakeholders in the tobacco industry to submit contentious issues that they may have on the Regulations. At its meeting held on Thursday, 21st May,

2015, the Committee received submissions from various stakeholders including the British American Tobacco (K) Ltd., Mastermind Tobacco (K) Ltd., Kenya Association of Manufacturers (KAM) and Pubs, Entertainment and Restaurants Association of Kenya (PERAK).

Pursuant to section 16 of the Statutory Instruments Act, 2013, the Committee subsequently invited the Cabinet Secretary, Ministry of Health for a consultative meeting on 26th May, 2015 to discuss the concerns raised on the Regulations. However, by a letter dated 26th May, 2015, from the office of the Principal Secretary, the Ministry stated that they were unable to address the matters raised as they were currently before the High Court in Petition No. 143 of 2015 filed on 14th April, 2015 and were therefore *sub judice*.

CHAPTER TWO SUBMISSIONS FROM STAKEHOLDERS IN THE TOBACCO INDUSTRY

At its 12th sitting, held on 21st May, 2015, the Committee received submissions from the following stakeholders:

1. British American Tobacco (K) Ltd. (BAT);
2. Mastermind Tobacco (K) Ltd.;
3. Kenya Association of Manufacturers (KAM); and
4. Pubs, Entertainment and Restaurants Association of Kenya (PERAK).

2.1 Submissions from British American Tobacco (K) Ltd. (BAT)

The BAT stated that their views and submissions were not taken into account during the drafting of the Regulations. They raised the following concerns:

1. Regulation 37- Solatium Compensatory Contribution:

- a) Tobacco manufacturers and importers are already subjected to a high level of taxation. Currently, the total tax burden in the cigarette industry is approximately 50%.
- b) The proposed solatium compensation contribution is in essence a tax/levy to be unilaterally levied on legitimate businesses by the Cabinet Secretary.
- c) The Cabinet Secretary does not have the powers to unilaterally set up and approve this solatium compensatory contribution.

- d) A solatium compensatory contribution presupposes the liability/guilt of licensed cigarette manufacturers or importers to pay “compensation”. No such liability has been established. In anyevent, as a matter of fundamental fairness, such liability can only be established after due process isobserved not unilaterally by administrative fiat.

2. Part V- Public Tobacco Industry Interactions

- a) Part V of the Regulations proposes to unjustifiably ban and criminalize interaction, engagement and participation of the tobacco industry with the Government and public officials. This is manifestly discriminatory and wholly unconstitutional for reasons that include the ones listed below:
- i. It seeks to limit, restrict and ban public participation and engagement and stakeholder involvement in public participation contrary to the Constitution.
 - ii. Part V of the Regulations cannot be legally introduced through subsidiary legislation as the principles therein are neither contained nor contemplated in the parent legislation i.e. the Tobacco Control Act, 2007.
 - iii. The Regulations have a negative presumption that characterizes any interaction between the tobacco industry and public officials as “interference” which is an offence punishable under the Tobacco Control Act, 2007. This in effect criminalizes the actions of the tobacco industry and public officials without a fair hearing.
 - iv. The Regulations are designed to disenfranchise and divest counties that rely on tobacco growing and the industry.

- v. In seeking to ban tobacco industry engagement with government and public officials, it appears that the Ministry and the Board have misinterpreted and gone beyond Article 5.3 of the FCTC (which is subordinate to the Constitution). In reality there is no international obligation to ban wholesale interaction with the industry hence no other signatory to the FCTC has implemented such draconian measures.

3. Regulation 45 - Severe Criminal Sanctions

- a) The Regulations introduce more criminal offences and sanctions than those contemplated under the Tobacco Control Act, 2007. The sanctions are extremely severe and are disproportionate to the nature of the offences.
- b) Criminal sanctions to employees, directors and suppliers of tobacco companies for breaches of what are ostensibly administrative actions would seem to be severe, unreasonable and unfair.
- c) The criminal sanctions are designed to criminalize an erstwhile legal tobacco industry based on an unconstitutional theory of presumption of guilt. This will increase the administrative burden on legal business and instead promote illicit trade which deprives Government of much needed revenue.

4. Pictorial Health Warnings on Cigarette Packs

- a) From a practical point of view, tobacco manufacturers are unable to comply with the new pictorial health warning requirements on cigarette packs from the scheduled deadline of 5th September 2015.

- b) The BAT has on several occasions requested the Ministry to issue them with the technical repositories and digital storage devices that are necessary for the implementation of the Regulations. However, the Attorney General, the Cabinet Secretary for Health and the Board have declined to issue the repositories and devices on the grounds that the Regulations are pending parliamentary scrutiny.
- c) The BAT does not seek to challenge the existing text health warnings and health messages within the current surface coverage of 30% front panel and 50% back panel. However, there is concern that the failure by the Ministry to share or disclose the contents of the technical repositories and digital storage devices makes it impossible for the industry to comment on or plan for expected packaging changes. This exposes the industry to unreasonable, impractical, expensive and disproportionate packaging requirements.
- d) The Ministry should incorporate and publish the contents of the technical repositories and digital storage devices within the Regulations themselves. This is necessary to ensure certainty and consistency on packaging requirements, which represents a huge complexity and cost element for any manufacturer of fast moving consumer goods. It is unfair for the Regulations to impose such high costs and complexities on manufacturers with no corresponding public health benefit.

5. Other General Issues of Concern

The Regulations are oppressive, punitive and unreasonable

Some of the regulations do not serve any legitimate tobacco control objective. For example, the mandatory disclosure of product ingredients, all toxicological data and their full effects on health is onerous as the design and specifications of cigarettes in Kenya are prescribed by law i.e. the East African Standards (EAS) 110:2005 – Cigarette

Specifications. In addition to this all cigarettes manufactured in Kenya are subjected to laboratory testing by the Kenya Bureau of Standards under the EAS.

The Regulations go against the interests of Kenya

- a) The Regulations will have a direct impact on the British American Tobacco Kenya Limited (BAT Kenya) business, investments and dealings in the Kenyan market and beyond. BAT Kenya is a public company listed on the Nairobi Securities Exchange with over 4,000 local shareholders. BAT Kenya is also a leading manufacturer and the top exporter in Kenya and exports high quality tobacco products to 18 countries in COMESA and the EAC.
- b) The Regulations would undermine the sovereign and economic interests of Kenya in favor of neighboring EAC states which have more balanced legislation for the following (non-exhaustive) reasons:
 - i) Kenya is a net exporter of tobacco in the EAC and COMESA trade blocs with over 50% of Kenya's tobacco being exported as a cash crop. This positively impacts Kenya's balance of payments to the tune of over Ksh. 9 billion (USD 100M) per annum;
 - ii) Kenya is also the strategic hub for the tobacco industry within the Region which directly employs over 80,000 people, engages 47,000 farmers and supports over 3 million livelihoods;
 - iii) The Regulations go against the pledge by the Government to increase foreign direct investments and attract, create and retain jobs in line with Vision 2030;

- iv) The Regulations represent a barrier to free trade and go against the spirit of Kenya's treaty obligations to the EAC and the World Trade Organization (WTO);
- v) The Regulations threaten livelihoods and investments and makes Kenya less competitive;
- vi) The Regulations will increase the tax and administrative burden on legitimate business and in turn promote illicit trade; and may potentially lead to the loss of jobs, livelihoods, investments, forex inflows and government revenue.

2.2. Submissions from Mastermind Tobacco (K) Ltd.

1. Solatium Compensatory Contribution

Section 7(2) (f) of the Tobacco Control Act (TCA) creates the Tobacco Control Fund and obliges the Industry players to make a solatium compensatory contribution to the Tobacco Control Board, without a justification.

Regulation 37 of the Tobacco Control Regulations further require tobacco manufacturers and importers to pay an annual solatium compensatory contribution to the Tobacco Control Fund consisting of 2 percent (2%) of the value of tobacco products manufactured or imported in that financial year.

(i) Unconstitutionality

In addition to this 'compensatory' contribution being unclear as to the computation of the rate, mechanisms of raising, collecting and disbursement of the funds, it is also

unconstitutional as it purports to impose a tax that is otherwise unlawful and unprocedural.

Regulation 37 violates Article 210 of the Constitution which provides that “No tax or licensing fee may be imposed, waived or varied except as provided by legislation.”

The solatium compensatory contribution is a tax or licensing fee within the meaning of Article 210 of the Constitution. The imposition of a tax or licensing fee is not provided for by Section 7(2) (f) of the TCA or otherwise provided for under the TCA. It therefore violates Article 210 of the Constitution and is consequently unconstitutional and void.

Regulation 37 further violates Article 114 of the Constitution which provides for the imposition of taxation. It provides for a money bill, which has to go through the National Assembly, considered by the relevant committee of the Assembly, after taking into account the views of the Cabinet Secretary responsible for finance. The solatium compensatory contribution is a tax within the meaning of Article 114. The rate of 2% imposed under the Regulations has not followed the set out procedure, thus making the same unconstitutional.

(ii) Ultra vires the powers and authorities under the TCA

Regulation 37 is ultra vires the powers and authority donated to the Tobacco Control Board (TCB) by Section 7(2) (f) of the TCA.

The solatium compensatory contribution is further ultra vires the scope of Section 7(2) (f) of the TCA because:

- (a) Section 7(2) (f) of the TCA does not provide for the imposition of an annual contribution; and
- (b) The term 'solatium compensatory contribution' in Section 7 (2) (f) of the TCA requires that there exists a right for the State to receive recompense for a wrong.

The State has not asserted or proved any wrong on the part of any tobacco manufacturer or importer that caused injury to the State.

The solatium compensatory contribution is ultra vires the powers and authority of the Cabinet Secretary under the TCA and therefore unlawful and void.

(iii) Lack of Public & Industry Participation

Contrary to Article 10(2) of the Constitution which provides for "participation of the people" as a national value and a principle of governance, the tobacco industry was not involved in the determination of the rate and basis of this contribution, neither was it furnished with information relating to the same.

This goes against Principle 2 of the FCTC Guidelines for Implementation which provides that Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent. Parties should ensure that any interaction with the tobacco industry on matters related to tobacco control or public health is accountable and transparent.

(iv) Meaning of 'Solatium'

The meaning of 'solatium' is a compensation for wrong doing, which implies that the industry has been taken to be culpable of wrong offences that make it liable to a penalty and compensation.

Kenya will be the first country to introduce this tax, which is inconsistent with the guidelines for the implementation of the FCTC as set out herein.

(v) Impact

The rate of 2% is too high and will heavily burden the industry in the wake of the high taxes already in place. The imposition of this punitive compensation, in addition to the

high taxes the tobacco industry already pays, has the potential of causing consumers of tobacco products to resort to otherwise unlawful substitutes.

It also encourages cross-border shopping of tobacco products by consumers with the risk of loss of revenue by the Government, as well as promoting smuggling and counterfeiting. This provision imposes a financial burden and vilifies the operations of a legal industry and is discriminatory.

2) Graphic Health Warnings

Regulation 3 provides for the placing of warning labels and information required under Section 21 of the Act and specified in the Schedule to the Act, on every package containing a tobacco product, and the corresponding pictures and pictograms set out in the First Schedule to the Regulations.

(i) Lack of Consultation

The formulation of the graphic health warnings lack both public and industry participation, which goes against the spirit of the Constitution. The Industry has not been involved in the development of the proposed changes in the packaging and labeling as set out in Part II of the Regulations and has not received the CD containing the same to date. The industry was entitled to participate in the formulation of the changes at an early stage so that it could give its input, particularly on the practicability and timing of these changes.

(ii) Unrealistic Images

The graphic health warnings set out in the First Schedule to the Regulations are grotesque images which are not a true reflection of the effects they purport to portray. The graphic health warnings should be balanced and evidence based backed by scientific research. They should be factual and realistic.

(iii) Cost Implications

The changes in packaging and labeling of tobacco products will have heavy cost implications on industry operations. This is due to the specifications as to the colours, fonts and dimensions to be used when printing. This will entail the industry incurring huge costs in addition to the already hefty taxes levied on it, which may eventually trickle down to the consumers.

(iv) Time-frame for implementation

The graphic health warning set out in the Regulations need a long period of time to implement. This is due to the technology involved, as well as the specifications as to the colours and dimensions. The images should either be simplified to allow for implementation within the set time frame under the Act and the Regulations, or the commencement period be varied to a later date, to enable the industry comply.

(v) Complexity in terms of implementation

The technology required for the printing of the graphic health warnings is not available locally. The industry will be forced to source for the same abroad.

3) Restriction on Industry Interaction

Part V (Public-Tobacco Industry Interactions) of the Regulations also limits the Tobacco industry's interaction with the Government and other Public Institutions through imposing a ban on any form of interaction between Government Departments, Agencies and Public Bodies with the tobacco industry.

The Regulations further define 'tobacco industry' to include any entity that has even a remote relationship with tobacco products and dealers. This restriction will severely

affect parties directly or indirectly associated with the tobacco industry and that includes farmers, distributors, business associations, employees among others.

Unconstitutionality

The purported criminalization of such interactions is unfounded and goes beyond the purview of our constitution which guarantees basic fundamental Rights and Freedoms. These include:

- a) **Right to Equality and Freedom from Discrimination:** The Regulations are discriminatory against the tobacco industry and anyone affiliated to it as set out hereunder:-
- (i) **Regulation 25** prohibits a public authority from awarding contracts for carrying out any work related to setting and implementing public health policies with respect to tobacco control to candidates or tenderers who have conflicts of interest with established tobacco control policies.
 - (ii) **Regulation 26** also requires a public officer who has or had a role in setting and implementing public health policies with respect to tobacco control to-
 - Inform the respective public authority where the person served about any intention to engage in an occupational activity within the tobacco industry, whether gainful or not within a period of at least three years after leaving service; and
 - Not engage in such occupational activity within a period of three years from the time the person ceases being a public officer.

This provision is discriminatory against persons who have had any interaction with the tobacco industry and is an infringement of the freedom of movement of labour. It should thus be struck out for its unconstitutionality.

(iii) **Regulation 29** further provides that a person employed by the tobacco industry or any setting working to further the interests of the tobacco industry shall not serve on Kenyan delegations to meetings of the Conference of Parties, its subsidiary bodies or any other bodies established pursuant to decisions of the Conference of the Parties.

b) **Freedom of Expression:** The Regulations violate the freedom of commercial expression as provided for in Article 33 of the Constitution. The Industry also deserves to be construed as a good corporate citizen on an equal footing with other corporate citizens. The Government has sanctioned the industry operations and it should in the same breadth facilitate the enjoyment of the constitutionally given rights and freedoms, including the freedom of commercial expression and corporate association with consumers of its products and other interested parties.

c) **Freedom of Association:** The restriction of industry interaction is a clear infringement of this fundamental freedom. Regulation 20 defines “interactions” as meetings, correspondences and other exchanges between public authorities and the tobacco industry or its affiliates that arise when public authorities meet in a common forum with the tobacco industry or its affiliates whether directly or through third parties.

Regulation 22 sets out the limitations on industry interaction with respect to Public Officers. This provision is greatly discriminatory, unrealistic and very difficult to implement and should thus be deleted.

c) **Freedom of Movement:** Regulation 26 violates the freedom of movement (free movement of labour) in as far as the limitation on employment is concerned.

This provision should therefore be done away with as it is an unreasonable provision that almost impossible to enforce. It is discriminatory and against the spirit of the Kenyan law.

4) Criminalization of an Otherwise Legal Business

The Regulations criminalize a legal and critical sector of the Kenyan economy based on a misunderstanding of how relevant or otherwise to Kenya, some international obligations are. The Regulations impose criminal sanctions for offences not included in the Act.

Regulation 36 stipulates that a person performing services for or on behalf of a tobacco company or its affiliate, a commercial organization or other corporate body who, in connection with the business of the tobacco industry, subverts or was negligent in failing to prevent the subversion of a tobacco control and related public health policy commits an offence.

Regulation 45 further turns the entire Regulations to a Penal Code as it criminalizes the commercial exercise of an otherwise legal industry as it provides that any person who contravenes or facilitates the contravention of the Regulations commits an offence punishable under the Act.

It then proceeds to provide that any person who contravenes any provisions of the Regulations commits an offence and is liable, on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years.

This means that any person working for or otherwise affiliated to a tobacco company shall be liable to criminal sanctions for any purported breach of the Regulations. Such provisions are unreasonable and unnecessarily punitive. Moreover, they go

against the principles of Company Law where individual members or employees of a limited liability company cannot be held liable for offences committed by the body corporate.

Impact

This will in effect create an operating environment that is only conducive for criminal gangs, creating an avenue for easier funding of illegal and terrorist activities in an already insecurity-prone Kenya.

5) Product Disclosure

Regulation 12 requires manufacturers & importers of tobacco products to disclose the ingredients in the products, including information on the characteristics of the tobacco leaves used in the products, toxicological data on the same and even a statement on the reasons for the inclusion of those ingredients in the tobacco products manufactured.

Impact

- (i) The enforcement of this regulation may infringe Intellectual Property Rights.
- (ii) In addition, the requirement on disclosure of the effects of combinations of the ingredients of the product that are not produced by the ingredient alone, imposes a responsibility on the manufacturer to conduct intensive research that does not serve any commercial interests.

6) The Regulations are not in Line with the FCTC'S Guidelines For Implementation

As earlier mentioned, Principle 2 of the FCTC Guidelines for Implementation provides for the accountability and transparency of Parties when dealing with the tobacco industry or those working to further its interests. It further requires the said

Parties to ensure that any interaction with the tobacco industry on matters related to tobacco control or public health is accountable and transparent.

The manner in which the Tobacco Control Board, in conjunction with the Ministry of Health, has gone about formulating the Regulations leaves a lot to be desired. This is due to their lack of adherence to this particular guideline in the activities they have so far conducted in formulation of the Regulations.

Under the FCTC Guidelines for the Implementation of the FCTC “Guidelines for the Implementation of Article 8 of the FCTC – Protection from Exposure to Tobacco Smoke”, it is emphasized that raising awareness among the public and opinion leaders about the risks of second-hand tobacco smoke exposure through ongoing information campaigns is an important role for government agencies, in partnership with civil society, to ensure that the public understands and supports legislative action.

The above guideline also provides that key stakeholders include businesses, restaurants and hospitality associations, employer groups, trade unions, the media, health professionals, organizations representing children and young people, institutions of learning or faith, the research community and the general public. It further notes that awareness-raising efforts should include consultation with affected businesses and other organizations and institutions in the course of developing the legislation.

This remains elusive in as far as the formulation of the Regulations is concerned. Under the Constitution, any person who makes or applies the law is required to sufficiently consult people and institutions that stand to be affected by that law.

8) Offences and General Penalties

Regulation 45 of the Tobacco Control Regulations is *ultra vires* the Statutory Instruments Act, 2013. It provides that any person who contravenes any provisions of the Regulations commits an offence under the Act and is liable on conviction to a fine not exceeding five hundred thousand shillings (500,000/=) or imprisonment for a term not exceeding three years (3 yrs) or both.

Section 24(5) of the Statutory Instruments Act allows to be annexed to the breach of a statutory instrument a penalty "not exceeding twenty thousand shillings (20,000/=) or such term of imprisonment not exceeding six months (6 months), or to both, which the Regulation making authority may think fit."

By prescribing a penalty that is inconsistent with the requirements of **Section 24(5)** of the SIA, Regulation 45 is *ultra vires* the Statutory Instruments Act, unlawful and void.

Impact

Regulation 45 turns the entire Regulations into a Penal Code. It criminalizes the commercial exercise of an otherwise legal industry as it provides that any person who contravenes or facilitates the contravention of the Regulations commits an offence punishable under the Act.

2.3 Submissions from the Pubs, Entertainment and Restaurants Association of Kenya (PERAK)

The Pubs, Entertainment and Restaurants Association of Kenya (PERAK) highlighted that the Tobacco Control Regulations will gravely affect their businesses, as they will have to expand their facilities to include the smoking areas as per the Regulations.

They stated that they were not adequately consulted and the implementation date is too soon, to be able to implement the provisions of the Regulations on their facilities. Therefore, in not being able to comply with the Regulations, it would will result in harassment from health inspectors and Police and incur an unreasonable cost of doing business. PERAK urged the Committee to annul the Regulations.

2.4 Submissions from the Kenya Association of Manufacturers

KAM stated that they were not adequately consulted in the development of the Regulations. The organization only received an invitation a day to the stakeholder forum in August 2014 and the Regulations were not availed despite several requests. The organization only got a copy once they were published. It was their view that the Regulations would have a negative impact on business and urged the Committee to intervene.

CHAPTER THREE COMMITTEE OBSERVATIONS

The Committee observed the following:

1. Section 5 of the Statutory instruments Act, 2013 provides that before the making of a statutory instrument particularly where the proposed statutory instrument is likely to have a direct, or substantial indirect effect on business or restrict competition, the regulation making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument. This section further provides that the consultation shall involve notification, either directly or by advertisement of bodies or organizations representative of persons who are likely to be affected by the proposed instrument; and invite submissions by a specified date or hold public hearings on the proposed instrument.

Further, Article 10(2) of the Constitution of Kenya provides for public participation. In light of these provisions, the Committee observed that the consultations were carried out by the Ministry of Health during the development of the Regulations, which is inconsistent with the provisions outlined above and were unsatisfactory;

2. Regulation 3 provides for Health warnings in pictures and pictograms. However, the required technical repositories and digital storage devices that are necessary for the implementation of the Regulations have not been provided by the Ministry to the industry stakeholders. Further, the technology required for the printing of the health warnings is not available locally hence the industry will require more time to comply with the provision.

3. Regulation 12 requiring product disclosure to the Cabinet Secretary annually for each type of tobacco product and for each brand manufactured or imported would infringe on the intellectual property rights of the manufacturers and importers. In addition, the industry complies with standards set by the Kenya Bureau of Standards (KEBS) hence any additional disclosure would require adequate consultation and agreement with the industry stakeholders.
4. Regulation 37 which requires manufacturers and importers to pay a solatium compensatory contribution of the sum of 2% of the value of tobacco products manufactured or imported every financial year is unconstitutional as contains the imposition of a tax and goes beyond the scope of the powers of the Cabinet Secretary. The quantum of 2% arbitrarily imposed by the Cabinet Secretary is also high hence stakeholder consultations would be required to arrive at a mutually agreeable sum.
5. Part V of the Regulations which restricts interactions between the tobacco industry and the public officials contravenes the provisions of the Constitution and infringes on fundamental rights and freedoms of the public;
6. Regulation 45 provides that a person who contravenes any provisions of the Regulations is liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years. This provision is inconsistent with section 24(5) of the Statutory Instruments Act which provides that a penalty

not exceeding twenty thousand shillings or a term not exceeding six months, or both, may be imposed.

CHAPTER FOUR COMMITTEE RECOMMENDATIONS

In light of the observations made, the Committee recommends that Regulation 3, Regulation 12, Regulation 37, Regulation 45(2) and Part V of the Regulations be annulled.

APPENDICES

EXPLANATORY MEMORADUM

EXPLANATORY MEMORADUM TO THE TOBACCO CONTROL REGULATIONS

2014 NO.....

PART I

Name of the statutory Instrument: Tobacco Control Regulations 2014

Name of the Parent Act: Tobacco Control Act 2007

Enacted pursuant to: Section 53. (1) (a), (b), (c), and (2) (a) and (b)

Name of the Ministry/Department: Ministry of Health

Gazetted on:

Tabled on:

1. Purpose of the statutory instrument

1.1 These regulations are to make effective the Tobacco Control Act 2007 for the control of the production, manufacture, sale, labeling, advertising, promotion, sponsorship and use of tobacco products including exposure to tobacco smoke.

2. Legislative Context

There are seven parts of the regulations.

2.1 Part 1: Basically contains citations and interpretations.

2.2 Part 2: Contains expected regulations on packaging and labelling of tobacco and tobacco products. This part seeks to implement the following as required in TCA;

- a) Use of both health messages and pictorial warnings
 - b) Stipulates that health messages to be on both wrapper and packet
 - c) Requires health messages, pictures or pictogram not to be damaged, concealed etc.
 - d) Requires rotation of specified health warnings and messages in accordance with Section 21(3) of TCA
-

- e) Stipulates a standard format of health warnings and messages
- f) Prohibition on certain product descriptions e.g. any name, brand name, text, trademark or pictorial or any other representation or sign which suggests that that tobacco product is less harmful to health than other tobacco products.
- g) Requires tobacco industry to have product identification markings e.g. code marking to determine among others country of origin or manufacture.
- h) Technical repository for pictorial health warnings shall be the Cabinet Secretary for Health
- i) Stipulates the display of signs at point of sale prohibiting sale of tobacco products to persons under the age of 18yrs.

2.4 Part 3: Stipulates the information to be given by tobacco industry to the Cabinet Secretary for health. The information required shall include product disclosure e.g. ingredients and industry disclosure e.g. production, sales, revenue etc. It shall be an offence to give false information.

2.5 Part 4: Stipulates regulations with regard to protection of the public from second hand tobacco smoke.

- a) Prohibits smoking in private vehicles and near public place
- b) Stipulates the requirement of a notice in prohibited area.
- c) Stipulates the need for supervision of non-smoking area by the owner or manager of the prohibited area
- d) There shall be need for certification of compliance of designated smoking area in accordance with Section 35 of TCA.
- e) The Cabinet Secretary for health shall maintain a technical repository for required no smoking warnings.

2.6 Part 5: This part seeks to domesticate Article 5.3 of WHO Framework Convention on Tobacco Control. It stipulates requirements to be fulfilled in interactions of public authorities with the tobacco industry. This includes;

- a) Limiting interactions
- b) Need for disclosure of prior interactions or intentions of such interactions
- c) Code of conduct to be prescribed by the Cabinet Secretary for health.

- d) Public officer to declare and divest interest with the tobacco industry
- e) Prohibition of participation by the tobacco industry as Kenyan delegation in conference of Parties
- f) Prohibits public officers or public authorities from receiving non-monetary and monetary gifts from the tobacco industry or its agents.
- g) Public authority shall prevent interference by the industry in fulfilling its mandate
- h) No preferential treatment of tobacco industry
- i) Annual reports of public authorities involved in tobacco control.
- j) Offences committed by public officers and by the tobacco industry under this part.

2.7 Part 6: This part stipulates matters relating to tobacco control fund.

- a) Stipulates the Solatium contributions payable to the fund by tobacco industry
- b) Stipulates action to be taken in forfeiture of property to the fund

2.8 Part 7: Enforcement

- a) Stipulates the authorized officers to enforce the regulations
- b) Prescribed forms (A-G) to be used in discharging their duties are stipulated

2.9 Part 8: Miscellaneous

- a) Public Hearings: Annual public hearings shall be convened by the board at National and County Level.
- b) Access to information: Information on implementation of the Act shall be accessible to the public.
- c) Monitoring and reporting: The board shall monitor implementation of the Act and submit annual reports to the Cabinet Secretary for health
- d) Public reporting: Mechanisms to report contravention of the Act shall be developed by public authorities involved in tobacco control.

- e) General offences: Shall be subjected to penalties stipulated under Section 54 of the Act.

First Schedule: Contains prescribed pictorial health warnings as prescribed in the Act.

Second Schedule: Health warnings for display

Third Schedule: Seizure and sampling forms

Fourth Schedule: Certificate of compliance of designated smoking areas

4. Consultation outcome

4.1 Several consultative meetings were held with various stakeholders. A national stakeholders meeting was held on 18th March 2014. The Industry was also represented. Some of the emerging concerns from the industry were the issues of solatium contribution, product disclosure, and packaging and labeling requirements. It was noted that the concerns are anchored to the Tobacco Control Act 2007. On 14th August 2014, a public forum was held to share the Pictorial Health Warnings under the first schedule on the regulations. There was concern that some of the pictures did not communicate effectively. The Board resolved to review the pictures and input various comments from the public. Pretesting of the pictures was also done in eight Counties namely; Mombasa, Kilifi, Machakos, Kiambu, Nairobi, Nakuru, Kisumu and Kakamega. It was noted that the pictures were very effective and largely understood by various stakeholders who included children in Primary schools, secondary schools, Colleges, Universities and various members of the public. The Ministry further engaged various committees of Parliament to share the regulations and seek views from the members. It was noted that the regulations would effectively implement the Tobacco Control Act 2007. The comments given from the members were considered appropriately and notably pretesting of the pictorial health warnings.

5. Guidance

5.1 The Ministry is in the process of developing guidelines for implementation of the regulations. The guidelines will be submitted to the Library of the National Assembly upon completion and also disseminated to the county governments. The Ministry will also embark on nationwide awareness creation and engage the media to educate the public of the existence of the regulations upon approval by parliament.

6. Impact

6.1 The impact on fundamental Rights and freedoms

The Constitution of Kenya guarantees fundamental rights, which have bearing on tobacco control. These are the-

- (a) Right to life
- (b) Right to the highest attainable standard of health
- (c) Consumer protection
- (d) Right to clean and health environment on which the prevention of second hand smoke is anchored
- (e) Right of children to basic health care and to be protected from harm
- (f) Right of citizen participation in governance and management of public affairs.
- (g) Right to information which empowers the public to access the information held by government on tobacco control

6.2 The impact on Private sector

The regulations will trigger economic development and Healthy workforce because low tobacco consumption will free health related financing to development vote

6.3 The impact on public sector

These regulations will lead to the principle of sustainable development. This principle calls for a convergence between the three pillars of economic development, social equity, and environmental protection in order to meet the

needs of the present generation without compromising the needs of future generations.

6.4 An impact assessment is attached to this memorandum.

7. Monitoring and Review

7.1. The Board shall monitor the implementation of these regulations among other functions as stipulated under section 6(e) of the Act and section 43.

8. Contact

8.1 (Dr. Khadija Kassachoon) and the (Ministry of Health) Tel (020-2717077) or email: (ps@health.go.ke) can answer any queries regarding the statutory instrument

SPECIAL ISSUE

1147

Kenya Gazette Supplement No. 161

5th December, 2014

(Legislative Supplement No. 56)

LEGAL NOTICE NO. 169

THE TOBACCO CONTROL ACT

(No. 4 of 2007)

IN EXERCISE of the powers conferred by section 53 of the Tobacco Control Act, 2007, the Cabinet Secretary for Health makes the following Regulations—

THE TOBACCO CONTROL REGULATIONS, 2014

PART I-PRELIMINARY

1. These Regulations may be cited as the Tobacco Control Regulations, 2014 and shall come into operation, upon the expiry of six months from the date of its publication in the Gazette.

Citation and
commencement

2. In these Regulations, unless the context otherwise requires—

Interpretation

“Act” means the Tobacco Control Act, 2007;

“exposure” means the subjection of a person to an environment where smoking is taking place, has taken place or that contains the remains of any used tobacco product including, among others, cigarette stubs;

“financial year” means the period of twelve months ending on the 30th of June in each year;

“health warnings and messages” means the health warnings and messages referred to in section 21 and the Schedule to the Act and such other health messages as may be specified by the Cabinet Secretary from time to time;

“partially covered” means any space covered by a roof or enclosed by one or more walls or sides, regardless of the type of material used for the roof, walls or sides and regardless of whether it is permanent or temporary;

“point of sale” means any place where tobacco products are distributed, or sold as wholesale or retail;

“predominant local language” means any other language that is not a national language but is commonly used by the majority of the population residing in a particular area;

“principal display area” includes in the case of—

- (a) box type packages, two equal sized largest surface areas of the box that may be displayed or visible under normal conditions of sale or use;

- (b) pouch type packages, the entire surface area of the pack that may be displayed or visible under normal conditions of sale or use;
- (c) conical or cylindrical type of packages, the entire curved area of the pack that may be displayed or visible under normal conditions of sale or use;
- (d) any other form or type of package, the entire surface area of the pack that may be displayed or visible under normal conditions of sale or use;

“second-hand smoke” means smoke emitted from the burning end of a cigarette or any other tobacco products in combination with the smoke exhaled by the smoker;

“pictures or pictograms” means such graphics as are specified under these Regulations or as the Cabinet Secretary may from time to time specify;

“workplace” means any place used by people in their employment or work and all attached or associated places including vehicles used in the course of employment, geriatric homes and residential houses.

PART II – PACKAGING AND LABELING

3. (1) A person who manufactures, sells, distributes or imports a tobacco product shall ensure that every package containing the tobacco product bears warning labels and information required under section 21 of the Act and specified in the Schedule to the Act and the corresponding pictures and pictograms set out in First Schedule.

Health warnings and messages in pictures and pictograms

(2) The manufacturer, seller, distributor or importer of a tobacco product shall ensure that the health warning and message including a pictogram or picture required under paragraph (1) is not distorted or likely to be damaged, concealed, obliterated, removed or rendered permanently unreadable when the package on which it is printed is opened in the normal way.

(3) A picture and pictogram required under paragraph (1) shall be in full colour with contrasting colours for the background in a manner that maximizes noticeability and legibility of elements of health warnings and messages in the approved layout and design.

4. (1) No person shall manufacture, sell, distribute, or import a tobacco product, device or any other thing that is intended to be used to cover, obscure, mask, alter, or otherwise detract from the display of specified health warnings and messages including pictures and pictograms under the Act or these Regulations.

Prohibition against dealing in devices used to cover, obscure etc Health messages

(2) A person shall not design the package or parts of the package, or accessories thereto, with an cover that may obscure the prescribed health warnings and messages including pictograms or pictures.

5. Where the health warnings and messages including pictograms that are required to be printed on packages are likely to be obscured or obliterated by a wrapper on the package, the manufacturer, seller,

Health message to be on both wrapper and packet

distributor or importer of the tobacco product shall ensure that the health warnings and messages shall be printed on both the wrapper and the packet.

6. (1) The manufacturer, seller, distributor or importer of a tobacco product shall ensure that the specified health warnings and messages including pictograms required under these Regulations are rotated in accordance with section 21 (3) of the Act.

Rotation of specified health warnings and messages

(2) When an old set of health warnings and messages including pictures and pictograms are being replaced by a set of new ones, both sets may continue to be used during the transition period.

(3) For the purposes of paragraph (1), the twelve month rotational period referred to in section 21(3) of the Act shall be a period of twelve months ending on the 31st December in each year.

7. (1) The health messages required under these Regulations on all packages shall be in the form of a text message specified in the Schedule to the Act and a prescribed pictorial message set out First Schedule.

Format of health warnings and messages

(2) The text of the health message on the front face of a package shall—

- (a) be printed in white on a black background;
- (b) be printed in the type face known as Helvetica, in upper-case and lower-case letters as set out in the Second Schedule;
- (c) be in type that is—
 - (i) clear and legible;
 - (ii) subject to paragraph (d), of the same font size throughout the message;
 - (iii) white;
 - (iv) of normal and bold weight as set out in the Second Schedule; and
 - (v) of a size that makes the text as nearly as possible fill the background on which it is printed; and
- (d) bear the word "WARNING" which shall be in type of a font size not greater than fifty per cent of the font size of the type used for the text message.

(3) A warning message on the back face of a package shall be—

- (a) printed on a white background;
- (b) printed in the type face known as Helvetica, in upper-case and lower-case letters as set out in the Second Schedule;
- (c) in type that is—
 - (i) clear and legible;

- (ii) subject to paragraph (d), of the same font size throughout the message;
 - (iii) black;
 - (iv) of normal weight;
 - (v) of such a size that the text as nearly as possible fills the background on which it is printed; and
- (d) the word "WARNING" which shall be in type of a font size not greater than fifty per cent of the font size of the type used for the text message.

(4) The health message place on the front face of the package shall be in English and a Kiswahili version of the health message shall be placed on the back face of the package.

8. A person shall not manufacture, sell, distribute, or import a tobacco product, for sale in Kenya, whose package carries a name, brand name, text, trademark or pictorial or any other representation or sign which suggests that the tobacco product is less harmful to health than other tobacco products.

Prohibition on
certain product
descriptions

9. (1) The package of every tobacco product shall contain a code marking, whether by batch numbering or otherwise through which the place, the date of manufacture and country of origin may be determined.

Product
identification
markings

(2) A manufacturer shall, upon request, provide the Cabinet Secretary with such information as shall be required to enable the Cabinet Secretary interpret the code marking on a tobacco product for the purpose of any of the Cabinet Secretary's functions under the Act or these Regulations.

10. The Cabinet Secretary shall maintain—

Technical
Repository

- (a) a technical repository containing the required pictures, pictograms, health warnings and messages as well as related technical information to facilitate the implementation of Act and these regulations; and
- (b) a digital storage device which shall have the required pictures and pictograms and guidance documents on the application of the pictograms under this Part which shall be available to any interested person.

11. (1) Any sign pursuant to section 16 of the Act shall—

Display of signs at
point of sale

- (a) bear the words 'The sale of or the availing of a tobacco product to a person under the age of eighteen years is prohibited by law';
- (b) be predominantly displayed at the point above the level of the counter, shelf or container from which these products are stored for sale or sold; and
- (c) bear a black border around it.

PART III-INFORMATION TO BE PROVIDED BY
MANUFACTURERS AND IMPORTERS

12. (1) A manufacturer or importer shall, at the end of each calendar year, provide the Cabinet Secretary, for each type of tobacco product and for each brand manufactured or imported—

Product disclosure.

- (a) a list of all the ingredients that the tobacco product contains including the quantities of those ingredients per unit of tobacco product and ingredients present in tobacco product components such as filters, glue and papers for each brand;
- (b) a statement of the reasons for the inclusion of those ingredients which shall indicate for each ingredient—
 - (i) its function; and
 - (ii) its category
- (c) all toxicological data available to the manufacturer concerning the ingredients of that tobacco product in the case of products intended to be burnt or unburnt or of products not intended to be burnt or unburnt which shall for each ingredient—
 - (i) refer in particular to their effects on health;
 - (ii) include any effects produced in combination with any of the other ingredients of that product that are not produced by that ingredient alone; and
 - (iii) include any addictive effects.
- (d) information on the characteristics of the tobacco leaves used including—
 - (i) the type of tobacco leaves and percentage of each type used in the tobacco product;
 - (ii) the percentage of reconstituted tobacco used;
 - (iii) the percentage of expanded tobacco used; and
 - (iv) any changes to tobacco product ingredients when any change is made; and
- (e) information concerning the renaming or discontinuation of any brand produced by the manufacturer within the preceding twelve months.

13. A manufacturer shall, at the end of every calendar year, submit a report to the Cabinet Secretary on—

Industry disclosure

- (a) the quantity of tobacco products produced in the immediately preceding calendar year;
- (b) market share;
- (c) sales made and revenues earned;
- (d) quantities exported where applicable; and
- (e) affiliated organizations and its agents or persons acting on its behalf.

14. A person who declares false information under this Part commits an offence.

Offence under this part

PART IV-PROTECTION AGAINST EXPOSURE TO SECOND-HAND TOBACCO SMOKE

15. Pursuant to section 32 and without prejudice to section 33 (1) of the Act on second-hand tobacco smoke, no person shall smoke in—

Prohibition of smoking in private vehicles and near public place

- (a) a private vehicle where children are on board; or
- (b) streets, walkways, verandas adjacent to a public place.

16. A notice displayed pursuant to section 34 of the Act shall—

Notice on prohibited smoking area

- (a) bear the word 'WARNING' in capital letters, in red colour on a white background and in Helvetica type font;
- (b) bear the words 'It is an offence to smoke in this premises' in black colour on a white background and followed by a no smoking sign composed of a black burning cigarette encircled in red as set out in the First Schedule;
- (c) bear the words 'Penalty, Kshs. 50,000/- or imprisonment for a term of 6 months or both' appearing at the bottom of the notice;
- (d) consist of at least A3 paper size;
- (e) be posted at the main entrance, other entrances and appropriate locations of a prohibited smoking area; and
- (f) have a black border around it.

17. The manager or owner of a prohibited smoking area shall—

Supervision of non-smoking area.

- (a) ensure that ash trays and all other accessories used to consume tobacco products are removed from the area;
- (b) supervise observance of a smoke free environment;
- (c) take steps to discourage individuals from smoking on the premises including,—
 - (i) require a person not to smoke or to stop smoking in the area;
 - (ii) discontinue services to the person smoking in the area;
 - (iii) require a person to leave the premises; or
 - (iv) contact an authorized officer or law enforcement officer and authorities to enforce the law if a person refuses to comply.

18. The manager or owner of premises who intends to establish a designated smoking area in accordance with section 35 of the Act shall obtain a certificate of compliance from the Director of Medical Services in the form set out in the Fourth Schedule.

Certification of compliance on designated smoking area.

19. The Cabinet Secretary shall establish and maintain—

Technical repository.

- (a) a technical repository of required No Smoking Warnings and any other related technical information to facilitate their printing; and
- (b) a digital storage devise with the required No Smoking Warnings and any other related technical information to facilitate their printing which shall be available to any interested person.

PART V-PUBLIC-TOBACCO INDUSTRY INTERACTIONS

20. In this part-

Interpretation.

"business" includes trade or profession;

"company" includes any body corporate;

"Conference of Parties" means the Conference of Parties established under Article 23 of the World Health Organization Framework Convention for Tobacco Control ;

"director", in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate;

"holding company" or "subsidiary company" have the meanings assigned to the under the Companies Act, Customs and Excise Act;

Cap. 486
Cap. 472

"interactions" means meetings, correspondences and other exchanges between public authorities and the tobacco industry or its affiliates that arise when public authorities meet in a common forum with the tobacco industry or its affiliates whether directly or through third parties;

"public authority" means a body or legal and natural persons whose functions are of a public nature and any person acting on behalf of a public authority and includes all bodies and persons whose ownership, funding and control vests in the State;

"public officer" has the meaning assigned to it under the Article 260 of the Constitution of Kenya, 2010.;

"relevant contractual arrangement" means any contractual arrangement pursuant to which all or some of the affairs of a party to that arrangement, which is incorporated or otherwise organised outside Kenya, are conducted in accordance wholly or partly with the wishes of a company, incorporated in Kenya is also party directly or indirectly to the arrangement;

"senior officer" in relation to-

- (a) a body corporate, means a director, manager, secretary or other similar officer of the body corporate;
- (b) a partnership, means a partner or any person who has control or management of the business of the partnership;

"tobacco industry" means tobacco manufacturers, wholesale distributors, importers of tobacco products, tobacco growers and its

associations and includes other entities representing them, tobacco industry lobbyists or persons working to further the tobacco industry's agenda;

"tobacco industry interference" means any commercial or vested interest on the tobacco industry that subvert or undermine development, implementation and enforcement of public health policies, measures and laws for tobacco control.

21. This Part shall apply to all interactions between public authorities and the tobacco industry.

Application of Part

22. (1) Any interactions between public authorities or public officers and the tobacco industry shall be limited to the extent strictly necessary for effective tobacco control and enforcement of relevant laws.

Limitation on interactions.

(2) A minimum of two public officers shall be present in any interactions with the tobacco industry.

(3) Before commencing any interaction with the tobacco industry, the public officers shall state, in writing, that the interaction does not imply an endorsement of tobacco industry practices and that that no relationship, collaboration or partnership shall be construed whatsoever from the interaction.

(4) Any public officer participating in any interaction with tobacco industry shall prepare a formal record of the interaction and submit to the relevant public authorities including the Cabinet Secretary on request.

(5) Interactions with the tobacco industry initiated by a public authority at the national, regional, county, district, urban authority or local level shall take place in public venues determined by the public authority.

(6) Interactions with the tobacco industry shall not take place within offices or other facilities of the tobacco industry except in the course of enforcing or ensuring compliance with the law.

(7) A public authority or public officer shall not accept any offers of hospitality from the tobacco industry or its affiliates.

(8) A public authority shall not accept any direct or indirect funding from the tobacco industry or endorse projects, which are funded directly or indirectly by the tobacco industry.

23. (1) A public officer who has any interest whether pecuniary or business interest in tobacco industry shall disclose the nature of the interests to the respective public authority, on commencement of employment and as soon as the relevant facts have come to his or her knowledge in accordance with the Public Officers Ethics Act, 2003.

Disclosure.

(2) A disclosure of interest under paragraph (1) shall be recorded by every public authority.

No. 4 of 2003

(3) A public officer having made such disclosure shall subject to section 12 of the Public Officer Ethics Act, 2003, not under any circumstances-

- (a) be present during any interactions of the public authority with the tobacco industry;
- (b) take part in the decision making of the public authority relating to the tobacco industry;
- (c) be present during the deliberations of any public authority for the making of that determination; and
- (d) influence directly or indirectly any other member or decision making of the Public authority.

(4) A person who contravenes this Regulation commits an offence.

24. The Cabinet Secretary shall prescribe a code of conduct prescribing standards for any public officer including service providers, contractors consultants involved in setting or implementing public health policies for tobacco control.

Code of conduct

25. A public authority shall not award contracts for carrying out any work related to setting and implementing public health policies with respect to tobacco control to candidates or tenderers who have conflicts of interest with established tobacco control policies.

Award of contracts.

26. A public officer who has or had a role in setting and implementing public health policies with respect to tobacco control shall-

Disclosure on intention to engage with tobacco industry

- (a) inform the respective public authority where the person served, about any intention to engage in an occupational activity within the tobacco industry, whether gainful or not within a period of at least three years after leaving service; and
- (b) not engage in such occupational activity within a period of three years from the time the persons ceases being a public officer.

27. A person applying for a public office which has a role in setting and implementing public health policies regarding tobacco control shall declare any current or previous occupational activity with any tobacco industry whether gainful or not.

Disclosure of prior engagement with tobacco industry

28. A public officer who has a role in setting and implementing public health policies with respect to tobacco control shall declare interest in the tobacco industry to the Cabinet Secretary and divest himself or herself of direct interests in the tobacco industry.

Public officer to declare and divest interests.

29. A person employed by the tobacco industry or any setting working to further the interests of the tobacco industry shall not serve on Kenyan delegations to meetings of the Conference of Parties, its subsidiary bodies or any other bodies established pursuant to decisions of the Conference of the Parties.

Prohibition on participation as delegate in Conference of Parties

30. A public authority shall -

Prevention of
interference

- (a) promote tobacco control and prevent tobacco industry interference within its mandate, plans and activities;
- (b) adopt mechanisms to raise awareness within its mandate about the interference and vested interests of tobacco industry with the development and enforcement of tobacco control legislations and policies;
- (c) not accept, support or endorse partnerships, sponsorships, services and any monetary or non-monetary assistance from the tobacco industry except for compensations due to legal settlements or as mandated by applicable law;
- (d) not enter into or endorse non-binding or non-enforceable agreements or any voluntary arrangement or joint tobacco control and other activities with the tobacco industry;
- (e) not accept, support or endorse the tobacco industry organizing, promoting, participating in, or performing, children, youth or public education or any initiatives that are directly or indirectly related to tobacco control;
- (f) not endorse, support, form partnerships with or participate in activities of the tobacco industry described as corporate social responsibility;
- (g) restrict involvement of tobacco industry in the development of tobacco control policies and laws except in public forums where the industry is presenting its views to the public authority on relevant tobacco control laws and policies;
- (h) not allow any person employed by the tobacco industry or any entity working to further its interests to be a member of any government body, committee or advisory group that sets or implements tobacco control or public health policy.

31. (1) Any entity which is part of the tobacco industry shall not grant any monetary and non-monetary payments, gifts and services to public authorities or a public officer.

Prohibition of
monetary and non-
monetary gifts.

(2) A public authority or officer shall not receive any monetary or non monetary payment, gift or favour from tobacco industry.

(3) A public authority or officer who contravenes this Regulation commits an offence.

32. A public authority shall not grant incentives, privileges, benefits or any other preferential treatment to the tobacco industry to establish or run their businesses.

No preferential
treatment of tobacco
industry.

33. (1) A public authority shall, while implementing investment and tax laws and other policies related to tobacco, be guided by the priority to tackle the adverse health, social, economic and environmental impacts of tobacco growing, manufacture, sale and consumption in Kenya.

Upholding of public
health policies.

(2) The Cabinet Secretary for the time being responsible of agriculture shall pursuant to section 13(1) of the Act put in place

policies to promote appropriate, economically viable alternatives for tobacco growers.

34. (1) Every public authority involved in tobacco control shall, at the end of every calendar year, prepare and submit an annual report on the implementation of this Part to the Board.

Annual reports of public authorities.

(2) A report prepared and submitted pursuant to paragraph (1) shall specify—

- (a) the measures undertaken during that period to implement this part;
- (b) the achievements and shortcomings relating to implementation of this part and actions proposed to improve performance in furtherance of this part;
- (c) any lobbying, philanthropy, political contributions and all other activities by the tobacco industry;
- (d) any business and non-business partners and supporters of tobacco industry involved with the public authority;

(2) The Board shall review the reports submitted pursuant to paragraph (1) and advise the Cabinet Secretary on the measures that may need to be adopted by the respective public authority to ensure comprehensive and effective implementation of this Part.

35. A public officer commits an offence under the Act if—

Offences of subverting tobacco control and related public health policies.

- (a) the officer offers, promises or gives financial or other advantage to another public officer with the intention of—
 - (i) inducing the public officer to improperly perform a function or activity under this Regulation; or
 - (ii) rewarding the public officer for the improper performance of any function or activity.

36. (1) A person performing services for or on behalf of a tobacco company or its affiliate, a commercial organization or other corporate body who, in connection with the business of the tobacco industry, subverts or was negligent in failing to prevent the subversion of a tobacco control and related public health policy commits an offence.

Offences committed by tobacco industry.

(2) These Regulations apply if the offence is proved to have been committed with the consent or connivance of a senior officer of the body corporate or a person purporting to act in such a capacity, that person as well as the body corporate commits an offence.

PART VI—TOBACCO CONTROL FUND

37. The solatium compensatory contribution payable under section 7 (2)(f) of the Act in every financial year shall be the sum of two per cent of the value of the tobacco products manufactured or imported by the manufacturer or importer in that financial year.

Solatium contribution

38. (1) The Cabinet Secretary may direct that the property forfeited to the State under section 52 of the Act, be transmitted to the Fund for disposal.

Forfeiture of property.

(2) The Officer Administering the Fund shall, upon the direction under paragraph (1), take possession of the property and make arrangements to dispose of the property in accordance with the Public Procurement and Disposal Act, 2003.

No. 12 of 2003

(3) All proceeds realized from the sale of the property under this regulation shall form part of the Fund.

PART VII-ENFORCEMENT

39. In addition to section 36 of the Act, an authorized officer includes Medical Officer of Health, customs officers, police officers and administration police officers, prisons officers and local authority inspectorate officers, Kenya forest rangers.

Authorized Officers and Responsible Persons

40. (1) Authorized officers shall use form A set out in the Third Schedule for the purposes of seizing any tobacco product pursuant to section 46 of the Act.

Forms.

(2) Where an authorized officer effects a seizure and stores any tobacco products in the same premises, the officer shall use form B set out in the Third Schedule.

(3) Where a product has been seized pursuant to section 46 of the Act and the owner, manufacturer, importer, distributor, dealer, of the seized tobacco products shall forfeit ownership to the State for destruction or disposal using form E set out in the Third Schedule.

(4) In discharging the powers conferred under section 37 and 38, an authorized officer shall collect samples of tobacco products using form F set out in the Third Schedule and forward the sample to an accredited and designated government laboratory for analysis using form G set out in the Third Schedule.

PART VIII-MISCELLANEOUS PROVISIONS

41. The Board shall convene annual public hearings at the national and county level to receive reports, public views and comments from any interested persons on matters related to the implementation of the Act.

Public hearings

42. The Cabinet Secretary shall ensure that all information, reports and documents related to the implementation of the Act are accessible to the public.

Access to information

43. The Board shall—

Monitoring and Reporting

(a) monitor the implementation of the Act; and

(b) every financial year, prepare and submit to the cabinet Secretary, an annual status report on the implementation of the Act.

44. (1) Every public authority involved in tobacco control shall establish mechanisms to enable any person to report the contravention

Public reporting

of the Act and these Regulations and expeditiously take action in accordance with these Regulations.

(2) No disciplinary or other adverse actions shall be instituted against any person who reports the contravention as required by these Regulations.

45. (1) Any person who contravenes or facilitates the contravention of these Regulations commits an offence punishable under the Act.

Offences and general
penalty.

(2) Any person who contravenes any provisions of these Regulations commits an offence and is liable, on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years.

FIRST SCHEDULE (r. 3 (1), 7(1), 16)

LIST OF PRESCRIBED HEALTH WARNINGS AND MESSAGES
INCLUDING CORRESPONDING PICTOGRAMS

The following health warnings and corresponding pictograms shall, in addition to the messages set out in the Schedule to the Act, be displayed on every package containing a smokeless tobacco product as provided for under Section 21(3) of the Act

This Product can cause gum diseases and tooth loss

This product causes mouth cancer

This product is not a safe alternative to cigarettes

Health messages and pictorials on packages

FRONT



WARNING

Smoking harms people next to you

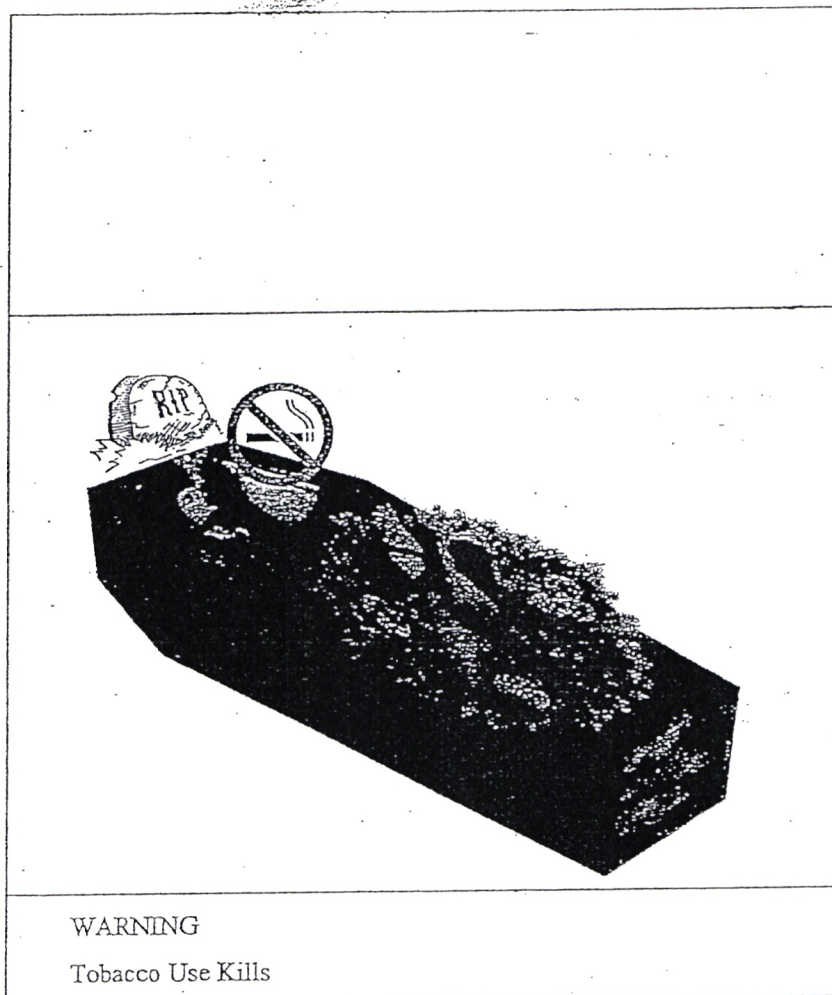
BACK



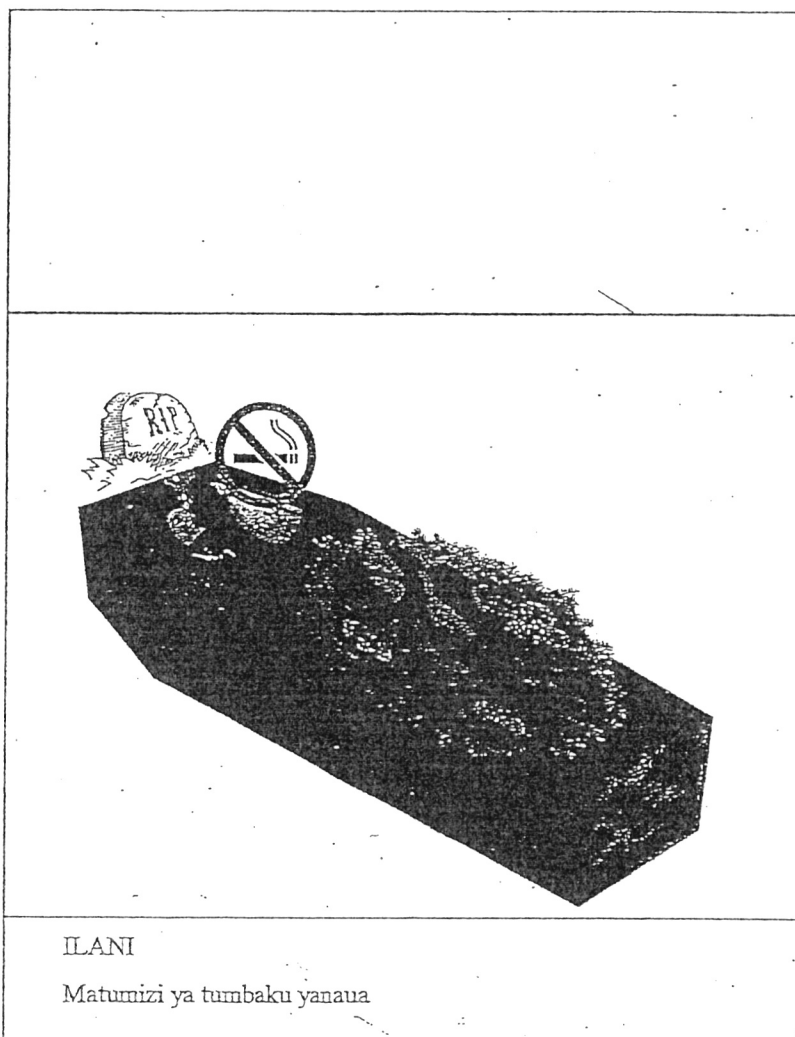
ILANI

Uvutaji wa tumbaku unawadhuru walio karibu nawe

FRONT



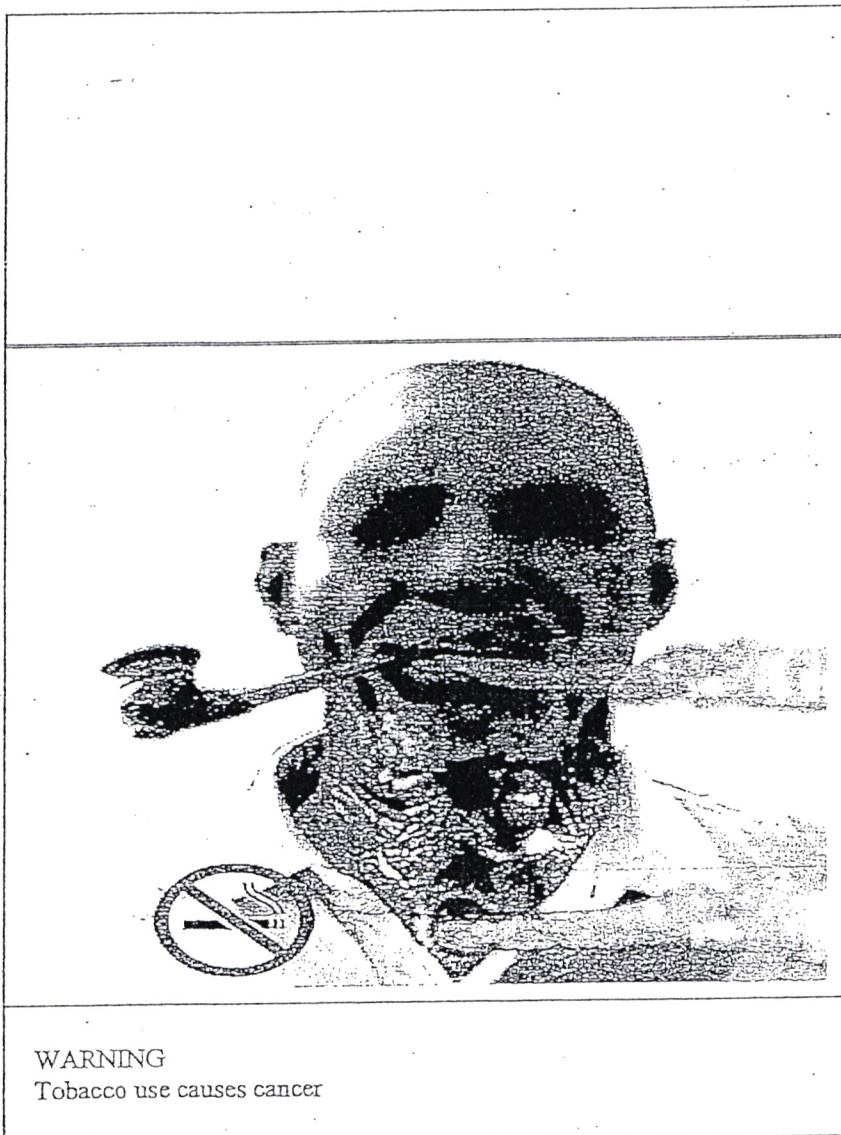
BACK



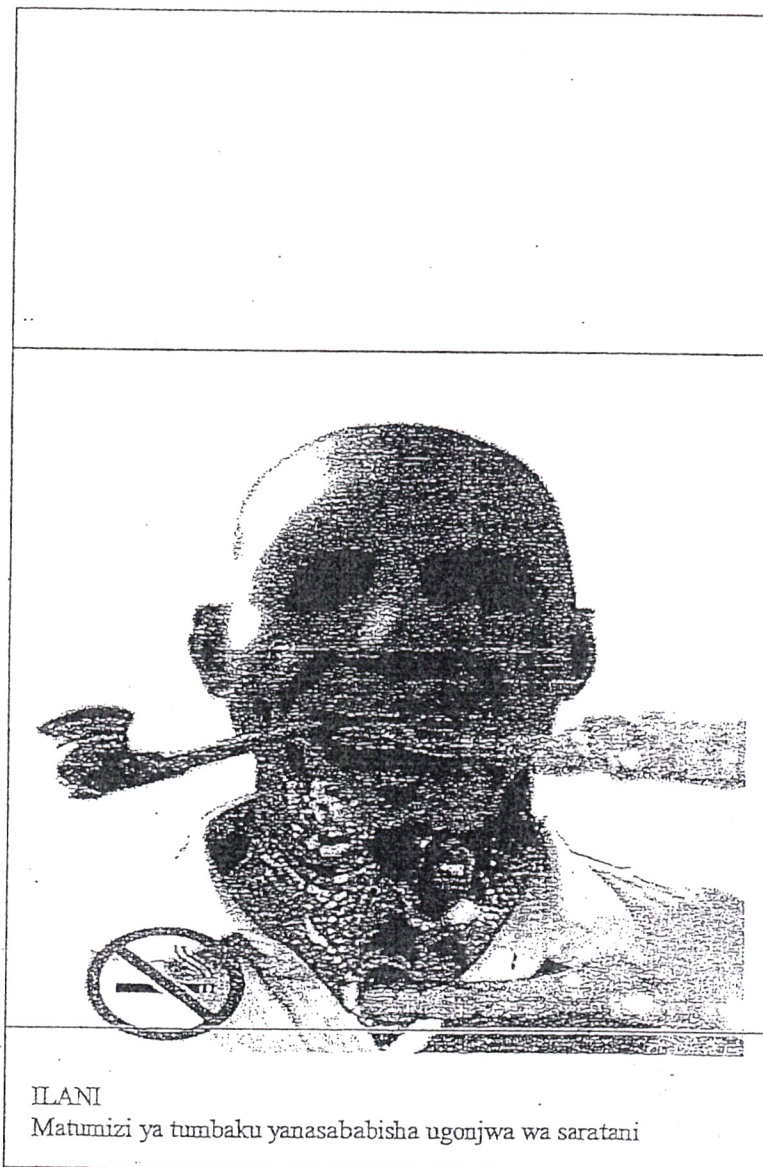
ILANI

Matumizi ya tumbaku yanaua

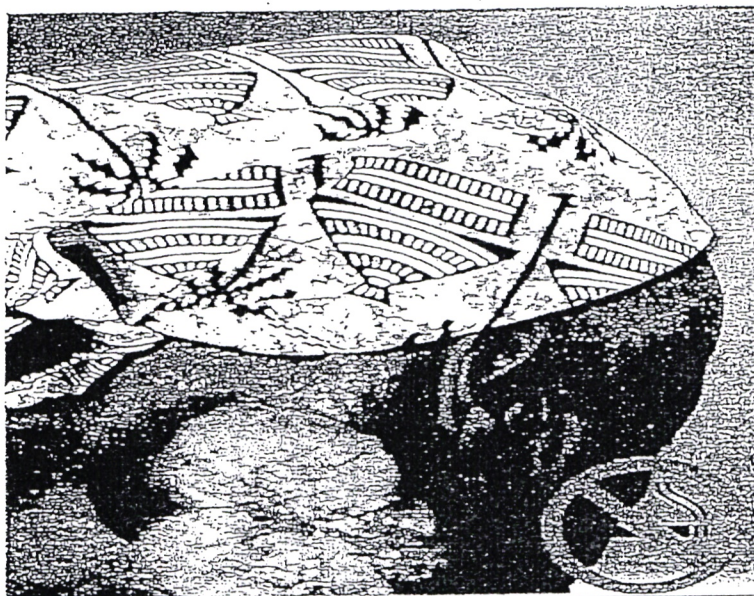
FRONT



BACK



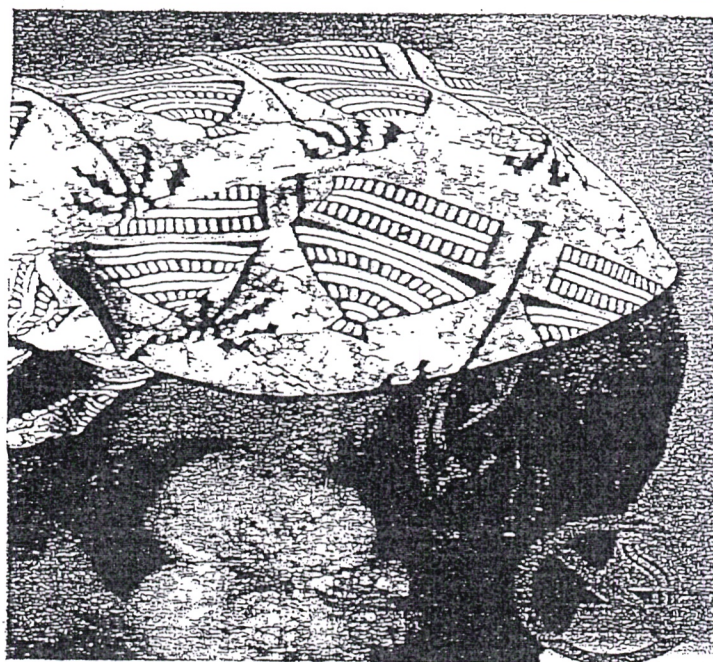
FRONT



WARNING

Tobacco use causes cancer

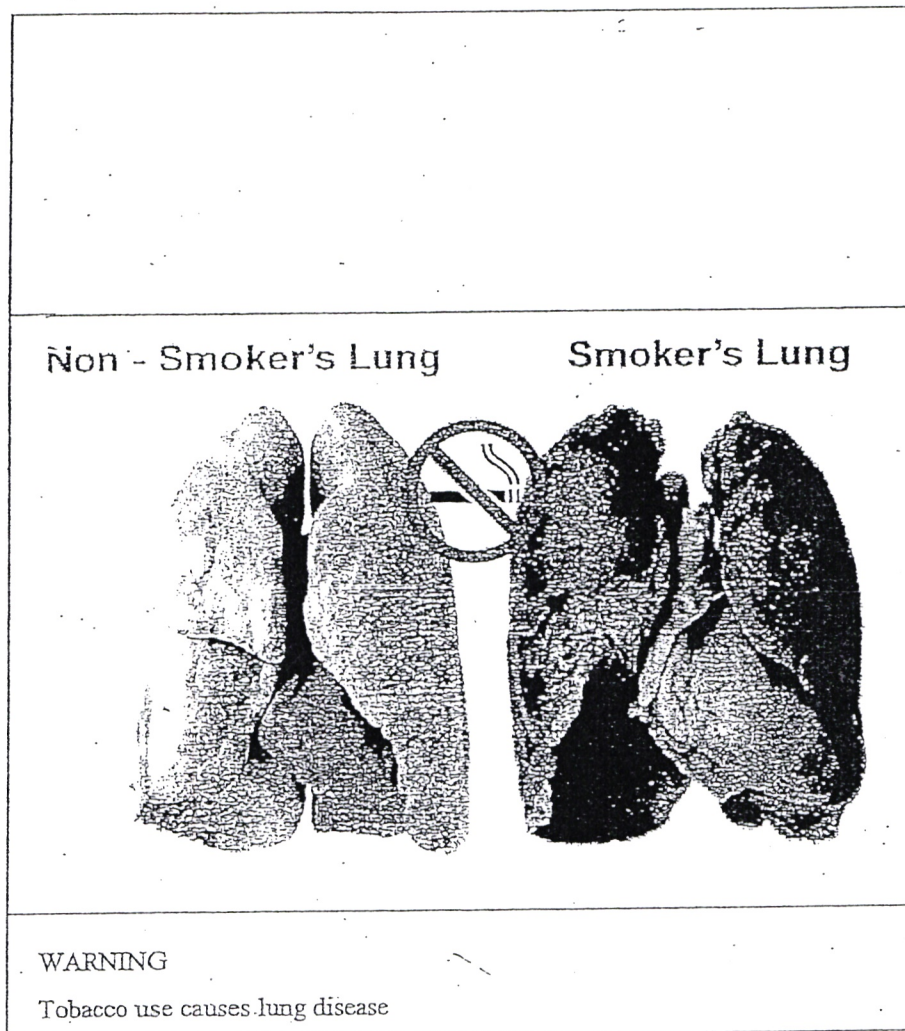
BACK



ILANI

Matumizi ya tumbaku yanasababisha ugonjwa wa saratani

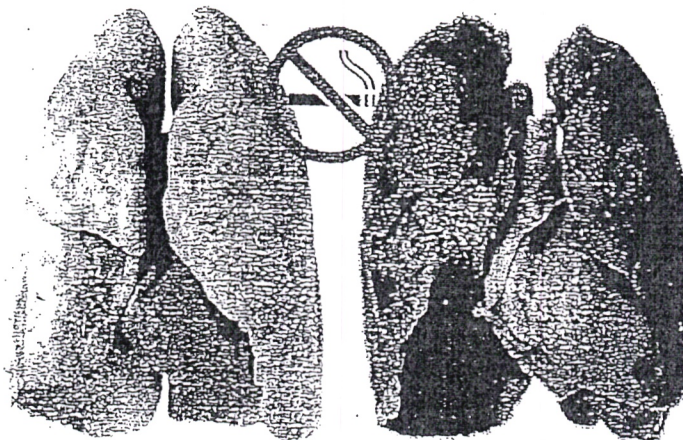
FRONT



BACK

Non - Smoker's Lung

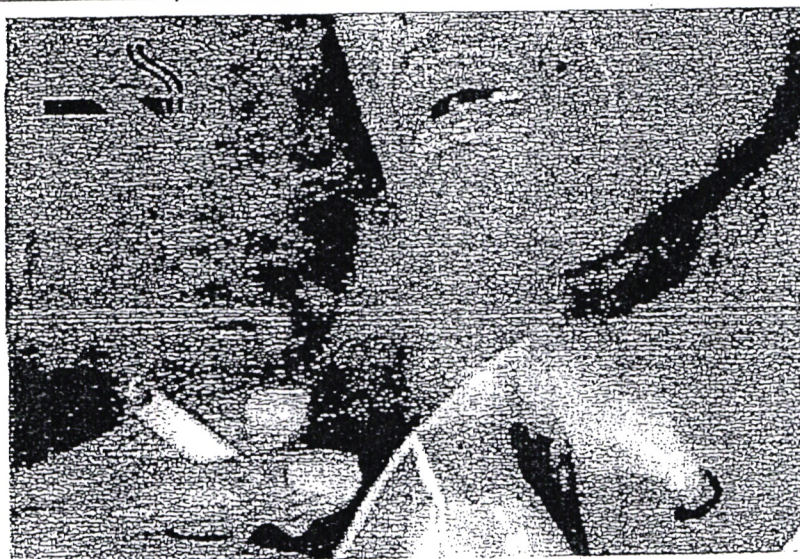
Smoker's Lung



ILANI

Matumizi ya tumbaku yanasababisha ungojwa wa mapafu

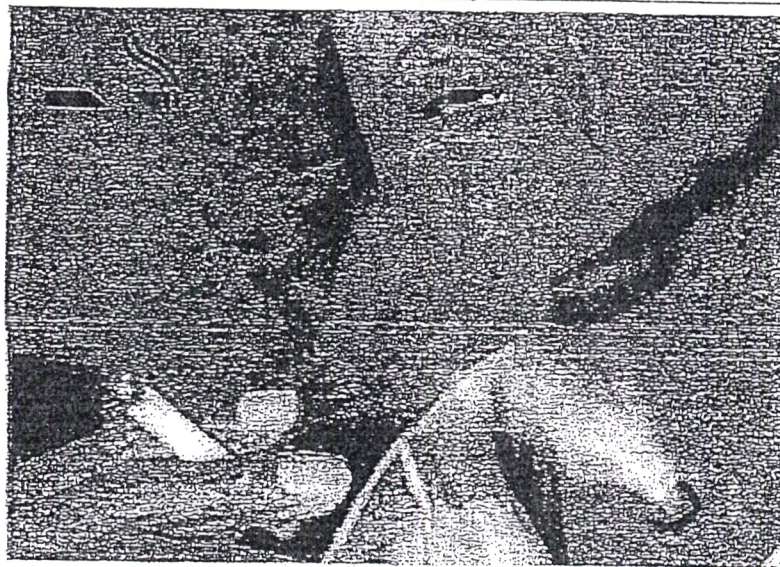
FRONT



WARNING

Tobacco use is addictive

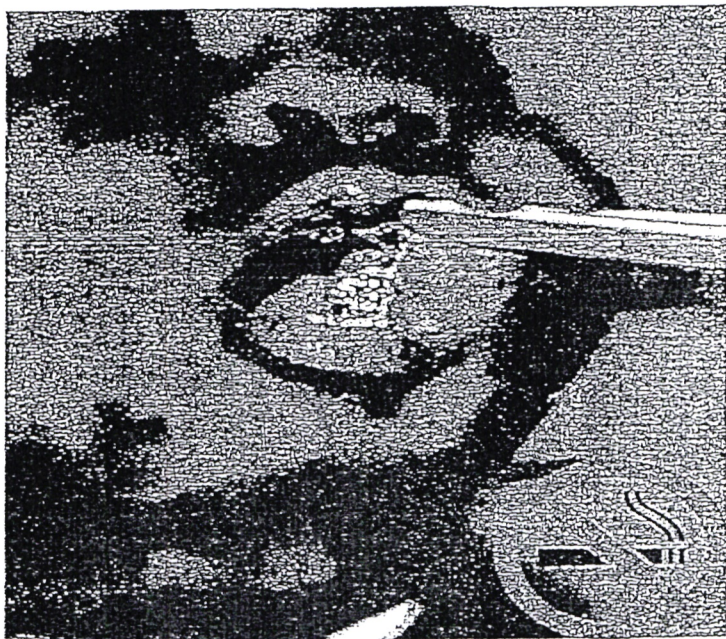
BACK



ILANI

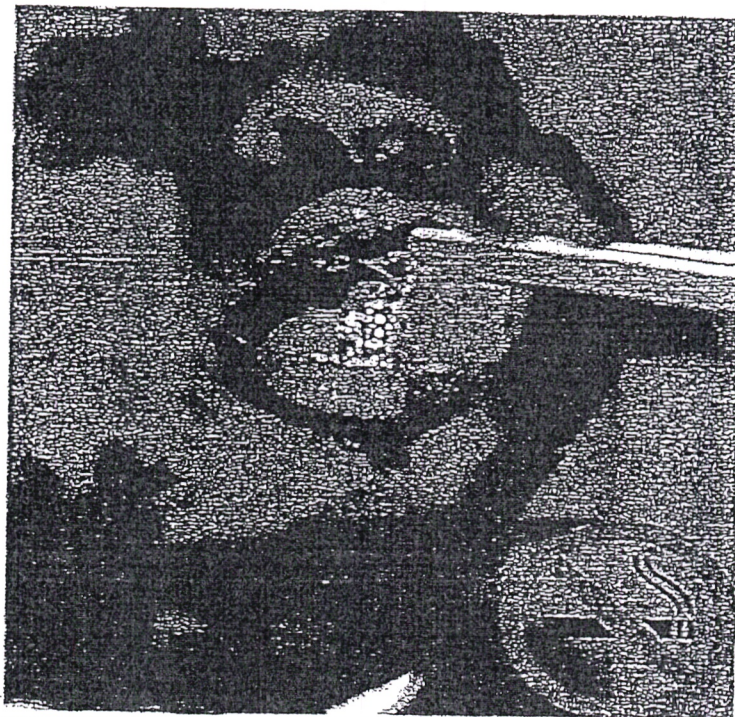
Matumizi ya tumbaku hufanya mvutaji kuizoea

FRONT

**WARNING**

Tobacco use causes gum disease and tooth loss (includes smokeless tobacco products)

BACK



ILANI

Matumizi ya tumbaku husababisha mangujwa ya meno au kupoteza meno (ikiwa ni pamoja na bidhaa ambayo inatumiwa bila kuvuta)

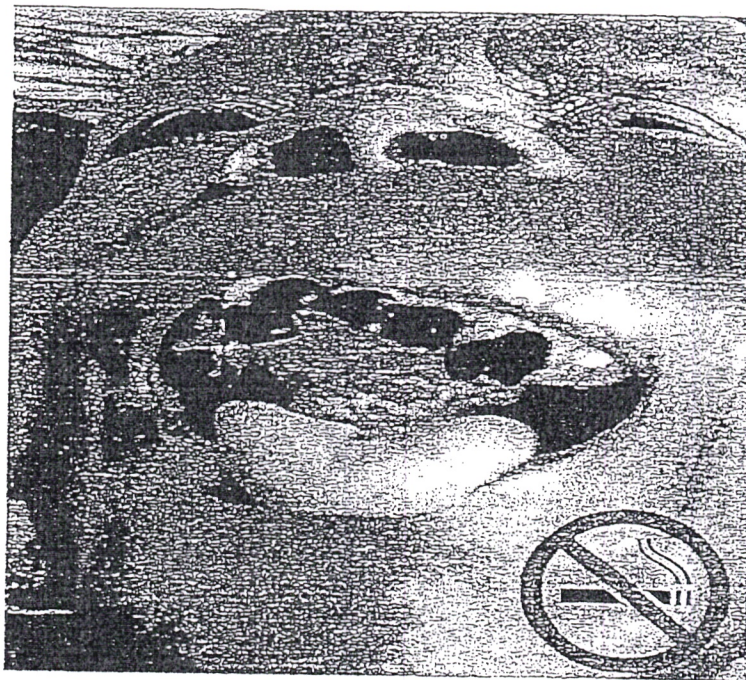
FRONT



WARNING

Tobacco use causes mouth cancer (includes smokeless tobacco products)

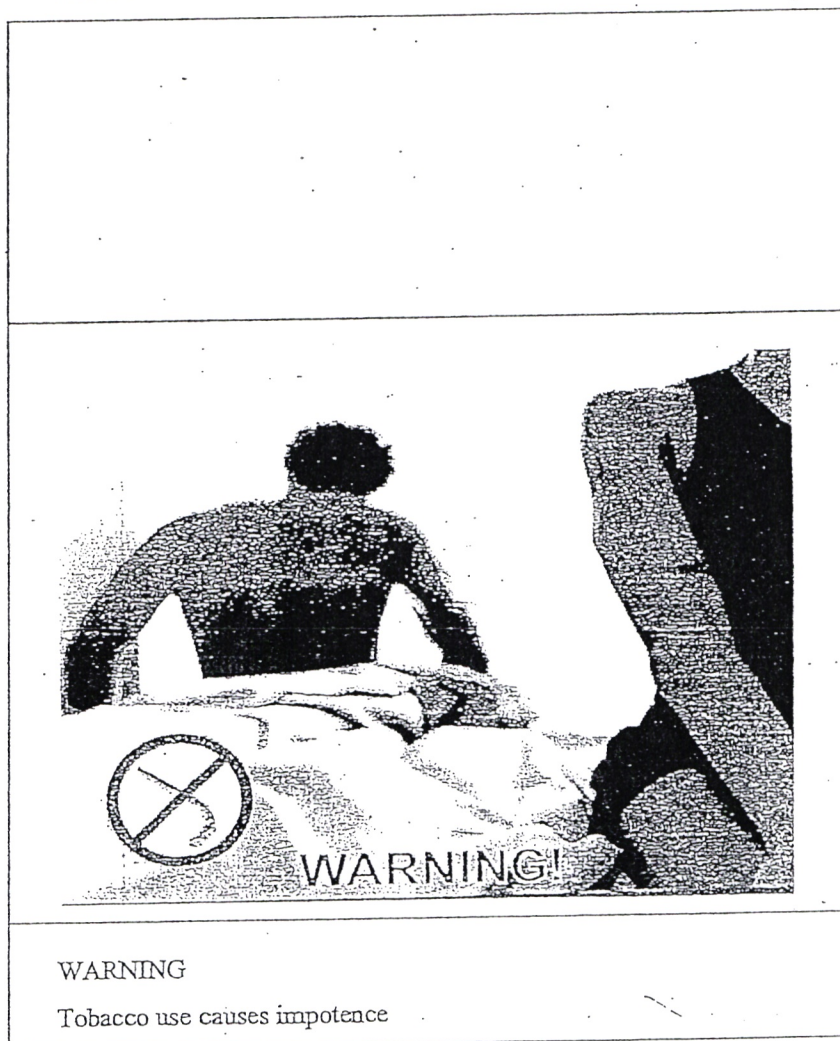
BACK



ILANI

Bidhaa hii husababisha saratani ya mdomo (ikiwa ni pamoja na bidhaa ambayo inatumiwa bila kuvuta)

FRONT



WARNING

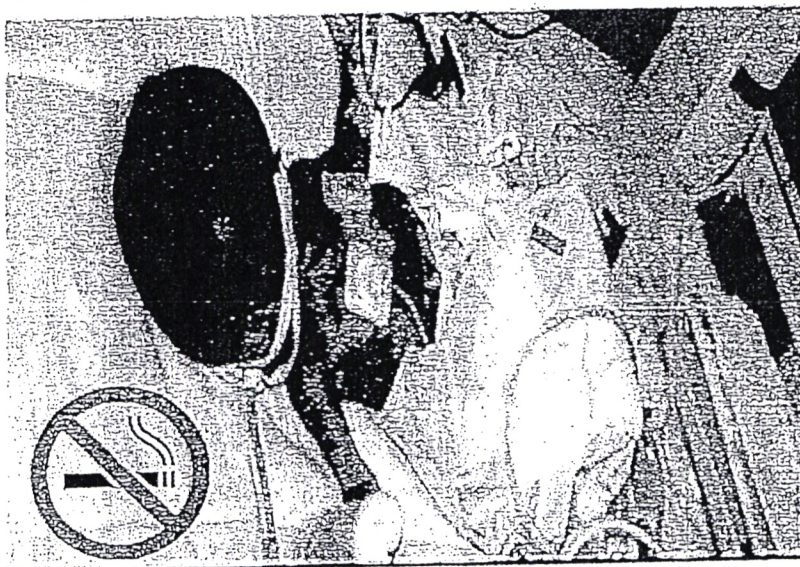
Tobacco use causes impotence

BACK



ILANI
Matumizi ya tumbaku yanasabisha uhanithi

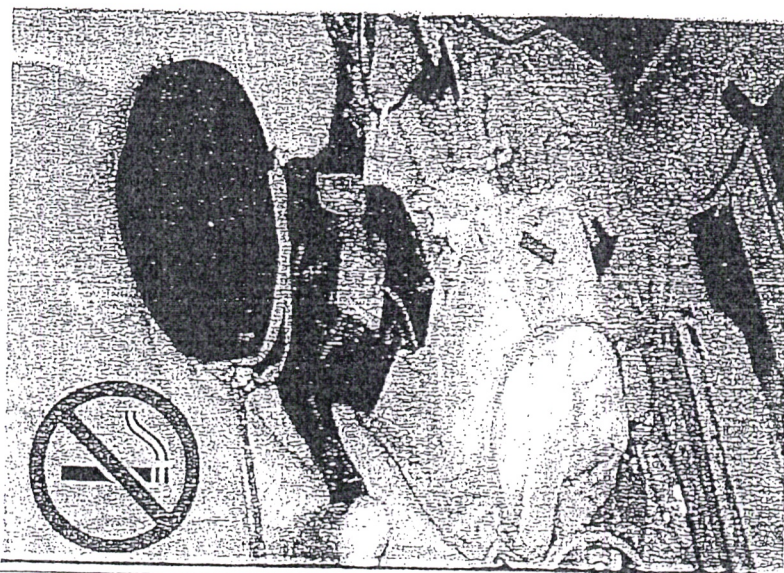
FRONT



WARNING

Tobacco use causes premature births

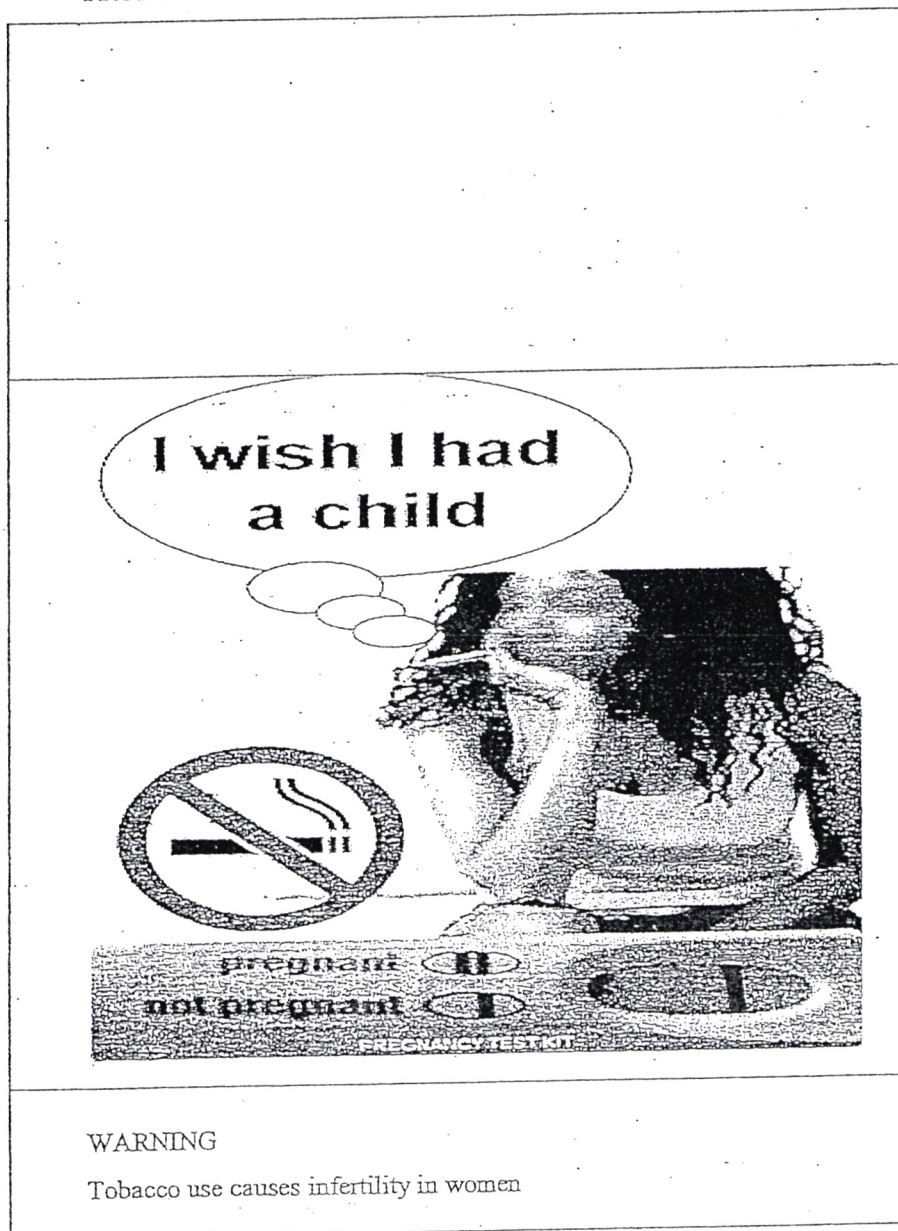
BACK



ILANI

Matumizi ya tumbaku yanasababisha uzazi mapema

FRONT



BACK



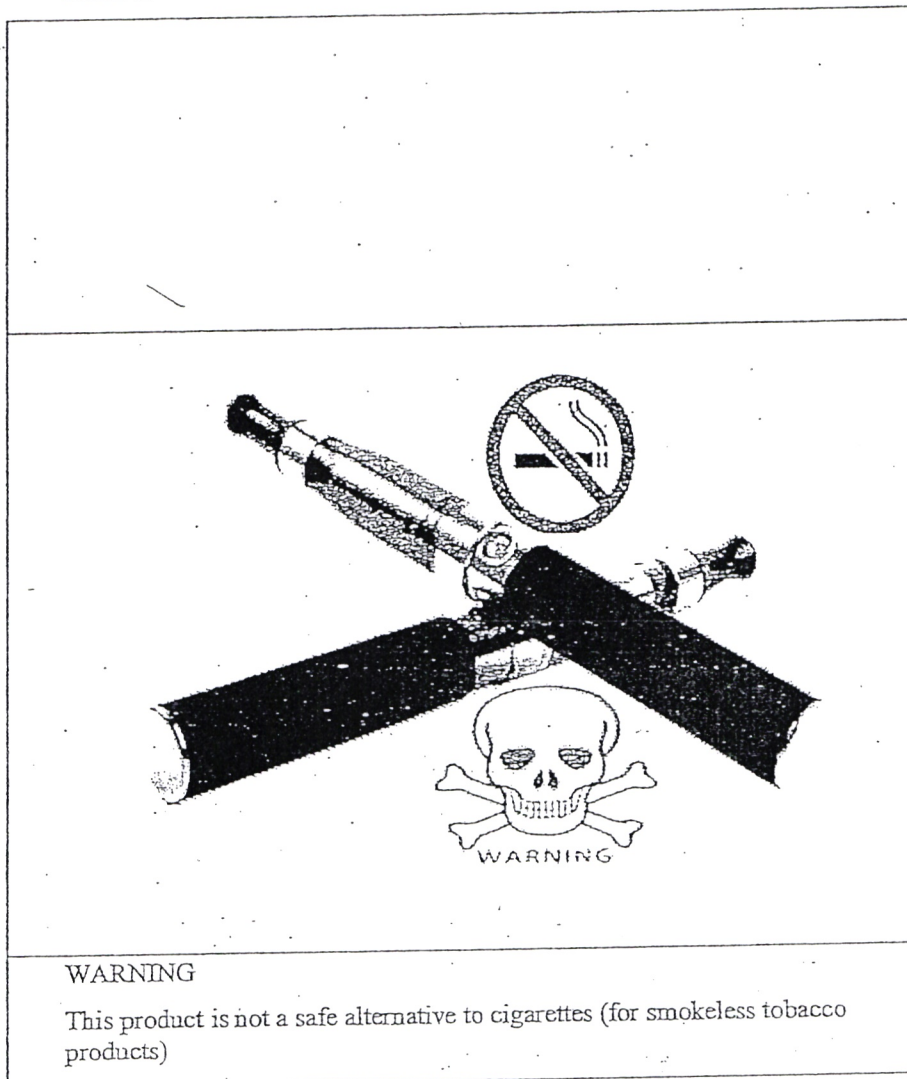
I wish I had
a child

pregnant
not pregnant
PREGNANCY TEST KIT

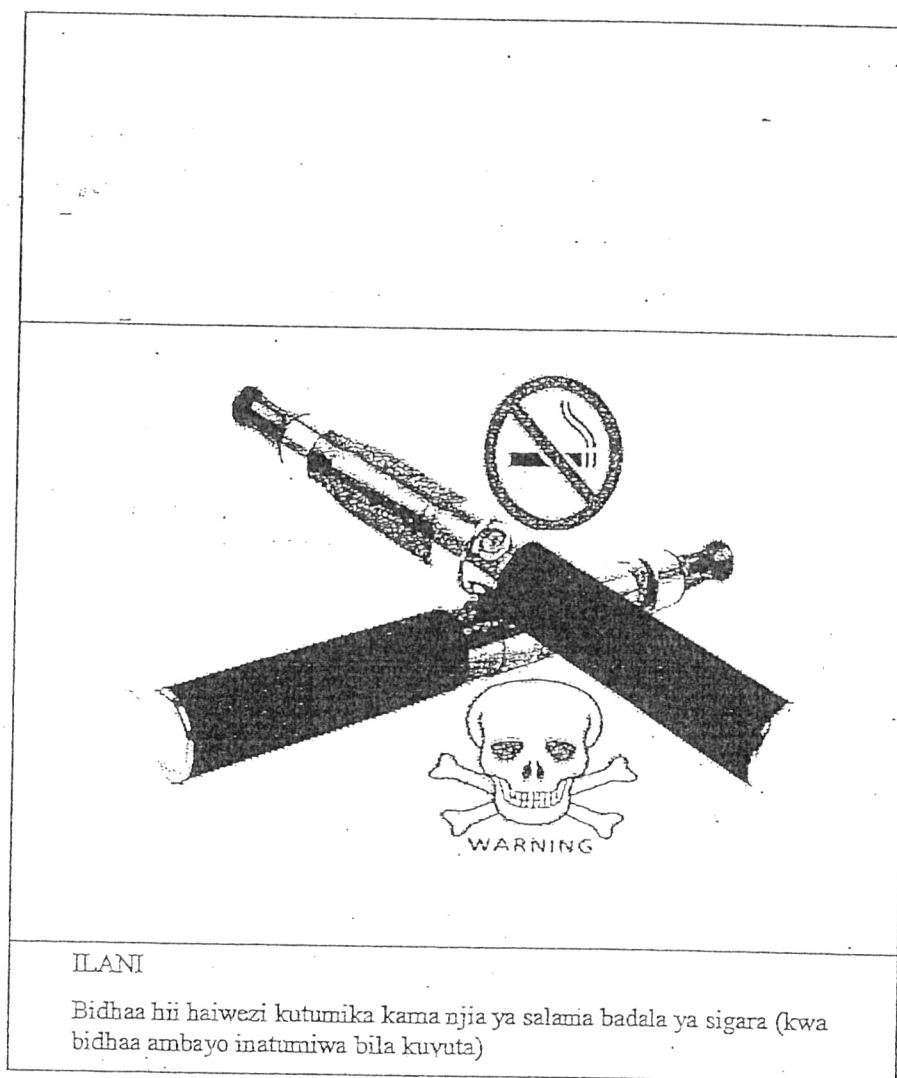
ILANI

Matumizi ya tumbaku yanasababisha utasa kwa wanawake

FRONT



BACK



ILANI

Bidhaa hii haiwezi kutumika kama njia ya salama badala ya sigara (kwa bidhaa ambayo inatumiwa bila kuyuta)

FRONT



WARNING

This product is not a safe alternative to cigarettes (for smokeless tobacco products)

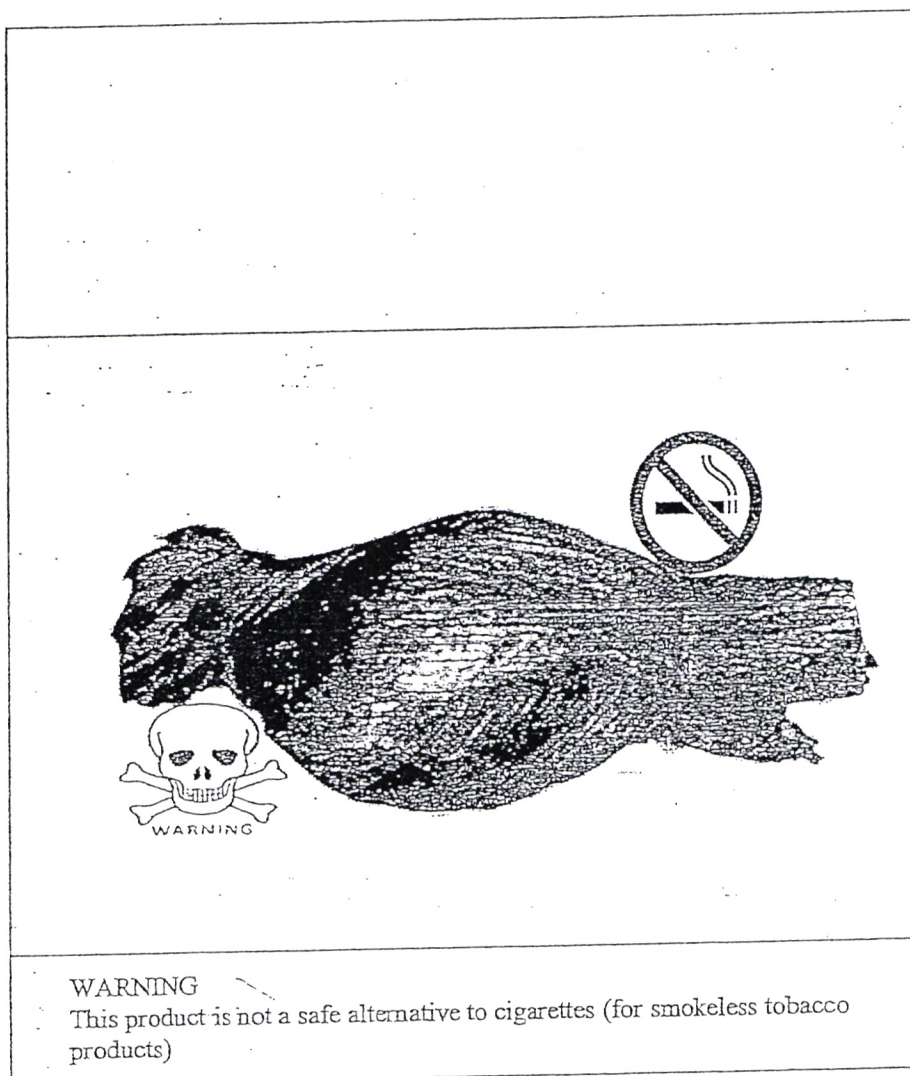
BACK



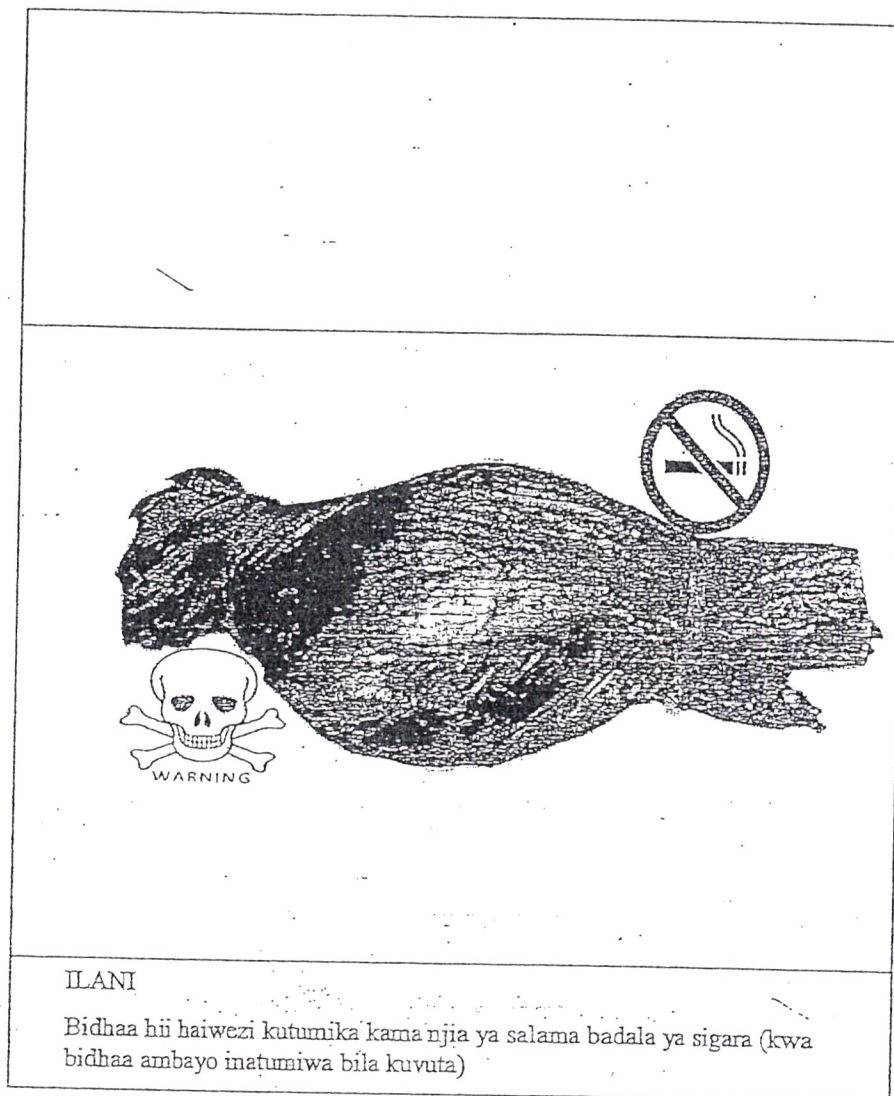
ILANI

Bidhaa hii haiwezi kutumika kama njia ya salama badala ya sigara (kwa bidhaa ambayo inatumiwa bila kuvuta)

FRONT



BACK



FRONT



WARNING

This product is not a safe alternative to cigarettes (for smokeless tobacco products)

BACK



ILANI

Bidhaa hii haiwezi kutumika kama njia ya salama badala ya sigara (kwa bidhaa ambayo inatumiwa bila kuvuta)

SECOND SCHEDULE (r. 7 (2)(b), 7(2)(c), 7(3))

HEALTH WARNINGS FOR DISPLAY

	WARNING	
Sale of tobacco products to any person under the age of eighteen (18) years is prohibited by law Tobacco Control Act 2007 (Sec. 16) TOBACCO KILLS		

	ILANI	
Uuzaji wa bidhaa za tumbaku kwa mtu yeyote aliye chini ya umri wa miaka kumi na minane (18) ni marufuku. Sheria ya udhibiti tumbaku ya 2007 (kifna. 16) Tumbaku inaua		

WARNING		
Smoking is prohibited in these premises		
		
Penalty: Ksh. 50,000/- or imprisonment for a term of six (6) months or both Tobacco Control Act 2007, (Sec. 34)		
30%		

THIRD SCHEDULE
SEIZURES AND SAMPLING FORMS

Form A

(r. 40(1))



Republic of Kenya
TOBACCO CONTROL ACT, 2007
SEIZURE FORM A

To.....
.....
.....
.....
.....

Whereas I have reason to believe that the stock of goods detailed below which is/are at the premises of

.....do
not meet the provision of Tobacco control Act, 2007.

DETAILS OF THE GOODS

Name of the manufacturer/distributor/importer

.....

Address.....

.....

Physical location

.....

Goods are marked/branded as follows.....

.....

Physical seal

.....

Description of goods

.....

Quantity

Now therefore I

an authorized officer under section 36 of the tobacco control Act(2007), hereby seize and detain the said goods under section 46 of the tobacco control Act (2007).

Name of authorized officer

Designation

Signature

Date

Manufacturer/Distributor/importer/trader

Name

Designation

Signature Date

OFFICIAL RUBBER STAMP

WITNESS

Name

Designation

Signature

To be filled in duplicate.

Form B

(r. 40(2))



Republic of Kenya

TOBACCO CONTROL ACT, 2007.

SEIZURE FORM B

(To be used incase of seizure of 'articles' where the 'articles' are to be kept or stored in the premises where they are seized)

To (Name and address of the vendor)

Whereas I have reason to believe that the stock of goods detailed below which is/are at the premises of

do not meet the provision of Tobacco control Act, 2007.

DETAILS OF THE GOODS

Name of the manufacturer/distributor/importer

Address.....

Physical location

Goods are marked/branded as follows

Physical seal

Description of goods

Quantity.....

Now therefore I

an authorized officer under section 36 of the tobacco control Act, 2007, hereby seize and detain the said goods under section 46 of the tobacco control Act (2007). And direct you to keep the sealed stock in safe custody subject to such orders as may be issued subsequently in relation thereto.

Be it known to you that removal or alteration or interference in any way with the said article(s) without any authority is an offence under section 47 and 48 of the Act.

Name of authorized officer

Designation

Signature

Date

Manufacturer/Distributor/importer/trader

Name

Designation

Signature

Date

OFFICIAL RUBBER STAMP

WITNESS

Name

Designation

Signature

To be filled in duplicate

Form E

(r. 40(3))



Voluntary Forfeiture Form

To: The Authorized officer

.....
.....
.....

(Designation and full address of the Authorized Officer)

I hereby agree to the voluntary forfeiture of the article(s) mentioned below located at the
premises of situated
at

I AGREE THESE MAY BE destroyed or otherwise disposed of as may be directed
pursuant to section 52(c) of the Tobacco Control Act.

Name of article(s) with quantity and /or number.

.....

Date

Signature

Name and address of the owner representative or the person in whose possession the
article was at the time of seizure.

(r. 40(4))



SAMPLE COLLECTION FORM

- [illegible]

Form G

(r. 40(4))



Republic of Kenya

SAMPLE SUBMISSION FORM

Product

Packaging

Labeling/Identification

Trade mark

Date of manufacture

Date expiry

Content declared

Batch No

Any other marking

Quantity submitted

Purposes of testing

Name of laboratory

Parameters to tested

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

Name of submitting officer

.....

Address

Tel..... E-mail.....

Sample reference number

Receiver's name.....

Signature..... Date

**MINUTES OF THE 7TH SITTING OF THE SENATE SESSIONAL COMMITTEE ON
DELEGATED LEGISLATION HELD ON TUESDAY, 5TH MAY, 2015 AT 9.00 A.M. IN
THE 2ND FLOOR BOARDROOM, KICC**

PRESENT

- | | |
|-----------------------------|--------------------|
| 1. Sen. Stephen Sang | - Chairperson |
| 2. Sen. Judith Sijeny | - Vice-Chairperson |
| 3. Sen. Daniel Karaba | |
| 4. Sen. Joy Gwendu | |
| 5. Sen. Liza Chelule | |
| 6. Sen. Godliver Omondi | |
| 7. Sen. Emma Mbura | |
| 8. Sen. (Dr.) Boni Khalwale | |
| 9. Sen. Boy Juma Boy | |

IN ATTENDANCE

1. Ms. Josephine Kusinyi
2. Ms. Beatrice Kapei
3. Ms. Carol Kirorei

SENATE

- Legal Counsel
- Legal Counsel
- Committee Clerk

MIN. NO. 66/2015

- PRELIMINARIES

The Chairperson called the meeting to order at 11.20 a.m. followed by a word of prayer.

MIN. NO. 67/2015

- ADOPTION OF THE AGENDA

The agenda of the sitting was adopted as presented having been proposed by Sen. Gwendu and seconded by Sen. Mbura

MIN. NO. 68/2015

- CONFIRMATION OF PREVIOUS MINUTES

- i. The minutes of the 4th sitting were confirmed as a true record of the proceedings after being proposed by Sen. Godliver and seconded by Sen. Juma Boy.

- ii. The minutes of the 6th sitting were confirmed as a true record of the proceedings after being proposed by Sen. Chelule and seconded by Sen. Karaba.

MIN. NO. 69/2015 - CONSIDERATION OF THE NATIONAL TRANSPORT AND SAFETY AUTHORITY (OPERATION OF MOTORCYCLES) REGULATIONS, NTSA (OPERATION OF TOURIST SERVICE VEHICLES) REGULATIONS, 2015, THE TRAFFIC AMENDMENT RULES, 2015 AND THE DRAFT KENYA INFORMATION AND COMMUNICATIONS (REGISTRATION OF SIM-CARDS) REGULATIONS, 2015

Ms. Kusinyi gave a brief to Members on the National Transport and Safety Authority (Operation of Motor Cycles) Regulations, 2015 considered at the previous meeting. Ms. Kapei then took Members through the National Transport and Safety Authority (Operation of Tourist Service Vehicles) Regulations, 2015 and the Traffic (Amendment) Rules 2015.

The key provisions of the Traffic (Amendment) Rules 2015 were summarized as follows:

1. Regulation 86A. (2) Provides that public service vehicles should operate on a commuter service route that has been determined by the Authority.
2. Regulation 86A. (3) Puts a condition to granting of a license by the Authority. The public service vehicles have to conform to prescribed construction standards as set out in the rules. Construction standard of KS.372:2014.
3. Regulation 86A(6) Requires that the public service vehicles shall display on real time the number of passengers on board on real time basis on an electronic screen on the front and rear of the vehicle.
4. Regulation 86A (8) Exempts standing passengers in public service vehicles from rule 22. From the reading it is not clear what rule 22 is on.
5. Regulation 86A (10) provides for penalties. An operator who contravenes the provisions of paragraph 9 commits an offence under the regulation and is liable upon conviction to

- (a) first offence to a fine of five thousand shillings for each passenger in excess of the licensed capacity and
- (b) for a second offence and subsequent offence to revocation or suspension of the license by the Authority.

She noted the following drafting issues in the Regulations:

1. Regulation 86A (2) does not outline the commuter routes and the license issued by the Authority fails to state the number of sitting and standing passengers.
2. Regulation 86A (3) is not clear on the requirement that public service vehicles comply to the prescribed construction standards of KS372:2014.
3. Regulation 86A (4) is not clear on the requirement to indicate on the license the maximum number of sitting and standing passengers, on whether this will be a different class of license as well as the cost implications.
4. Regulation 86A (6) does not state the system that will reconcile the number of passengers on board a public service vehicle at all times. Similarly the requirement that the number of passengers to be displayed is not elaborated and how such a system is to be installed.
5. Regulation 86A (8) makes reference to Rule 22. It is not immediately clear what rule 22 is about until reference is made to the previous regulations. The rule is not clear that the requirement is on the use of seat belts by passengers.

The key provisions of the National Transport and Safety Authority (Operation of Tourist Service Vehicles) Regulations, 2015 were summarized as follows:

1. Regulation 5(1) sets out the requirements and conditions to be met by an applicant.
2. A valid license issued by the Tourism Regulatory Authority is required for one to operate a tourist service vehicle. The rules require that an application for a license is made in a prescribed form and accompanied with a prescribed fee as set out in the first schedule.

3. Conditions to be met by applicant are set out as follows-

- (a) have a valid tour operator license issued by the Tourism Regulatory Authority;
- (b) have in place a code of conduct approved by the Authority, this code is to govern its employees, agents and subcontractors;
- (c) have in place a documented management system, safety management system based on road traffic safety management system or equivalent and customer complaint handling system;
- (d) comply with labor laws and regulations including those relating to statutory deductions, health, safety of the workplace, work injuries Benefits Act, insurance statutory leave days and written contract of employment for staff ;
- (e) subscribe to an accident and emergency mutual aid system.

4. Regulation 7 sets out the documents every operator of a licensed tour operator should have in place-

- (a) the requirement to have in place a fleet or outsource of management system capable of recording speed and location of the vehicle. This system needs to be elaborated and operators given guidelines on what kind of system they should be installing or outsourcing;
- (b) subscribe to a data storage system capable of storing data on vehicle speed and location and operation for a period of thirty days;
- (c) provide the data stored in (b) to the Authority before the expiry of the prescribed storage period;
- (d) in case of any accident resulting in a fatality, submit an investigation report to the Authority within fourteen days containing details of the driver, passengers ,time of accident, probable cause and corrective measure undertaken;
- (e) boldly display on a conspicuous place on the vehicle an identification mark approved by the Authority;
- (f) except for private car hire, boldly display on the vehicle the name of the company under which the vehicle operates ;and
- (g) maintain a passenger manifest

The following drafting issues were noted:

1. Regulation 5(2)(a) does not state the mandatory requirements to be complied with or provide a period within which the applicant should comply with the requirements.
2. Regulation 5(2)(b) does not state the stipulated period needed for compliance before the issuance of a conditional license.
3. Regulation 7 is not clear on the data storage system and the specification.

Members resolved to invite the Cabinet Secretary, Ministry of Transport and Infrastructure to a meeting on Tuesday, 12th May, 2015, to discuss the concerns raised on the Regulations.

Ms. Kusinyi then took Members through the draft Kenya Information and Communications (Registration of Sim-Cards) Regulations, 2015 as follows:

1. Regulation 4(2) provides that only telecommunications ~~operators~~ or their agents shall be allowed to sell sim-cards. The operator is obligated to ~~submit~~ to the Communications Authority of Kenya, on a quarterly basis, a record of all its agents, sim-cards sold, registered subscribers[4(4)(a)], deactivated and suspended subscribers[15(7)].
2. A minor upon attaining the age of majority is required to register his/her personal details within ninety days to avoid suspension of telecommunication services [8(4)].
3. In terms of penalties, Regulation 12 states that a person who commits an offence under the Regulations shall, on conviction be liable to a fine not exceeding 300,000/= or imprisonment not exceeding six months or both.

4. A subscriber registered before commencement of the Regulations is required to fulfill requirements contained therein within six months to avoid disconnection of services. On the other hand, unregistered subscribers are required to comply within thirty days to avoid disconnection.

The following drafting issues were highlighted:

1. The Regulations are enacted pursuant to Section 27(2)(gg) & (h) and not 27D as stated.
2. Regulation 5(1)(l) needs to be clarified further by adding a corporate body as well, as it gives an assumption that only statutory bodies will be require a letter from the CEO before registration.
3. Regulation 6(2)(e)(ii), realignment of the words at one least partner, to at least one partner & 6(2)(e) (iii), there should be more clarity on what legislation or gazette notice is required.
4. Regulation 7(1), the Form in the Schedule is not marked A, the letter A may be deleted, as it's the only form in the Schedule.
5. Regulation 15(2), refers to the wrong paragraph, the 14(1)(c), should be 15(1)(c).
6. Regulation 18 should refer to the 2014 Regulations, as the 2013 Regulations had already been revoked by Legal Notice No. 10 of 2014.
7. In the Schedule, the use of the term mentally handicapped at (i) and (k) should be deleted and a more friendly term such as persons with disabilities that may hinder them from

undertaking the registration process, be adopted. This will also ensure that persons with other severe disabilities (blind, maimed) are covered.

8. In (l) still under the Schedule reference should be made to (j) and not (i).
9. The Authority could consider adding a requirement on the agent's details in the Schedule, which could assist in records in terms of keeping a tab on rogue agents.

The Committee resolved to communicate the drafting issues noted to the Communication Authority of Kenya before the publication of the final Regulations.

MIN. NO. 70/2015

-ANY OTHER BUSINESS

i. Regulations

Members were informed that the Basic Education Regulations, 2015 and the Tobacco Control regulations had been tabled in the House.

Members resolved to consider the Regulations on Thursday, 7th May, 2015. Further, in light of the public discourse on the Regulations, the Committee, resolved to invite stakeholders in the education and tobacco sectors, on Thursday 14th May, and Thursday, 21st May respectively, to give their submissions on the Regulations.

ii. County Visits and meetings with Counties

Members resolved to undertake county visits to Lamu and Kilifi Counties between 31st May and 3rd June, 2015. The Secretariat was tasked to summarize the counties visited and engaged through meetings with the Committee, and those pending by the next meeting.

MIN. NO. 71/2015

-DATE OF NEXT MEETING

The next meeting would be on Thursday, 7th May, 2015.

MIN. NO. 72/2015

-ADJOURNMENT

There being no other business, the meeting was adjourned at 10.30 a.m.

SIGNED:



(CHAIRPERSON)

DATE:

7/5/2015

**MINUTES OF THE 11TH SITTING OF THE SENATE SESSIONAL COMMITTEE ON
DELEGATED LEGISLATION HELD ON WEDNESDAY, 20TH MAY, 2015 AT 10.00
A.M. IN THE BIG BOARDROOM, 4TH FLOOR BOARDROOM, KICC**

PRESENT

- | | |
|-----------------------|--------------------|
| 1. Sen. Stephen Sang | - Chairperson |
| 2. Sen. Judith Sijeny | - Vice-Chairperson |
| 3. Sen. Daniel Karaba | |
| 4. Sen. Boy Juma Boy | |
| 5. Sen. Liza Chelule | |

ABSENT WITH APOLOGY

1. Sen. (Dr.) Boni Khalwale
2. Sen. Joy Gwendu
3. Sen. Emma Mbura
4. Sen. Godliver Omondi

IN ATTENDANCE

1. Ms. Carol Kirorei
2. Ms. Beatrice Kapei
3. Mr. Francis Mutulu
4. Mr. Said Osman

SENATE

- | |
|---------------------------|
| - Committee Clerk |
| - Legal Counsel |
| - Media Relations Officer |
| - Research Officer |

MIN. NO. 92/2015

- PRELIMINARIES

The Chairperson called the meeting to order at 10.25 a.m. followed by a word of prayer.

MIN. NO. 93/2015

- ADOPTION OF THE AGENDA

The agenda of the sitting was adopted as presented having been proposed by Sen. Chelule and seconded by Sen. Karaba.

MIN. NO. 94/2015

**- CONSIDERATION OF THE TOBACCO CONTROL
REGULATIONS, 2015**

Ms. Kapei briefed Members on the Tobacco Control Regulations, 2015 as follows:

1. The Regulations are made pursuant to Section 53(1)(a),(b),(c), and (2)(a) and (b) of the Tobacco Control Act. The key purpose of the regulations is to give effect to the Tobacco Control Act. They specifically address the control of tobacco, production, manufacture, sale, labelling, advertising, promotion and sponsorship.
2. Part II regulates the following issues-
 - (a) The use of both health messages and pictorial warnings;
 - (b) Stipulates that health messages to be on both wrapper and packet;
 - (c) Requires health messages, pictures or pictorials not to be damaged or concealed;
 - (d) Requirement of rotation of specified health warnings and messages in accordance with Section 21(3) of the Act;
 - (e) Provides for a standard format of health warnings and messages;
 - (f) Prohibition on certain product description e.g. any name, brand name, text or pictorial that may suggest that the tobacco is less harmful to health than other tobacco products;
 - (g) Requirements on industry to have product identification code markings. This will help determine the country of origin or manufacturer of the product;
 - (h) Cabinet Secretary for Health is the technical repository for pictorial health warnings; and
 - (i) Requirement to display clear signs prohibiting the sale of tobacco products
3. Part III deals with information that is to be given by tobacco industry to the Cabinet Secretary for Health. This includes a list of all ingredients that the tobacco product contains including quantities per unit of tobacco product, industry disclosure e.g. production, sales and revenue earned. The part also provides for an offence for giving false information under the part.
4. Part IV sets out regulations with regard to protection of the public from second hand smoke e.g. it prohibits smoking in private vehicles where children are on board, and requires the display a notice in a prohibited smoking area.
5. Part V seeks to domesticate Article 5.3 of the World Health Organization Framework convention on Tobacco Control. Regulation 22 provides for the limits of interactions.

6. Regulation 37 states the Solutium contribution payable to the fund by the tobacco industry shall be 2% of the value of tobacco products manufactured or imported in that financial year.
7. The Board shall under regulation 41 convene annual public hearings at the national and county level to receive reports, public views and comments from interested persons.
8. Regulation 42 provides that the access to information on implementation of the Act shall be accessible to the public.
9. Regulation 45(2) provides that any persons who contravenes the regulations commits an offence and is liable, on conviction to a fine not exceeding five hundred thousand (Ksh500,000/) or to imprisonment for a term not exceeding three years.

The meeting was informed that the Committee would meet stakeholders in the tobacco industry including British American Tobacco and Mastermind Tobacco Ltd. on Thursday, 21st May, 2015.

MIN. NO. 95/2015

-DATE OF NEXT MEETING

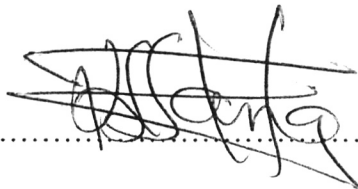
The next meeting would be on Thursday, 21st May, 2015.

MIN. NO. 96/2015

-ADJOURNMENT

There being no other business, the meeting was adjourned at 11.10 a.m.

SIGNED:



(CHAIRPERSON)

DATE:

26/05/2015

**MINUTES OF THE 12TH SITTING OF THE SENATE SESSIONAL COMMITTEE ON
DELEGATED LEGISLATION HELD ON THURSDAY, 21ST MAY, 2015 AT 9.00 A.M.
IN COMMITTEE ROOM 5, MAIN PARLIAMENT BUILDING.**

PRESENT

- | | |
|-----------------------|---------------|
| 1. Sen. Stephen Sang | - Chairperson |
| 2. Sen. Liza Chelule | |
| 3. Sen. Boy Juma Boy | |
| 4. Sen. Daniel Karaba | |

ABSENT WITH APOLOGY

- | | |
|-----------------------------|--------------------|
| 1. Sen. Judith Sijeny | - Vice-Chairperson |
| 2. Sen. (Dr.) Boni Khalwale | |
| 3. Sen. Joy Gwendu | |
| 4. Sen. Emma Mbura | |
| 5. Sen. Godliver Omondi | |

IN ATTENDANCE

- | | |
|---------------------------------|---|
| 1. Mr. Chris Burrell | - MD, British American Tobacco (BAT) |
| 2. Mr. Simon Cleverly | - BAT-UK |
| 3. Mr. Simukai Munjanganja | - Head of Legal, BAT |
| 4. Mr. Philip Lopokoyit | - Finance Director, BAT |
| 5. Mr. Daniel Kariuki | - Product Manager, BAT |
| 6. Mr. Stanley Mugwe | - Head of Legal Operation, BAT |
| 7. Ms. Emily Waita | - Regulatory Affairs, BAT |
| 8. Ms. Connie Anyika | - Head of Corporate Affairs, BAT |
| 9. Mr. Billy Tsuma | - Regulatory Affairs, BAT |
| 10. Ms. Nadida Rowlands | - Senior Legal Counsel, BAT |
| 11. Mr. Joshua Kirimania | - Corporate Affairs, Mastermind Tobacco |
| 12. Mr. Robert Mutuma | - Company Secretary, Mastermind Tobacco |
| 13. Ms. Lizangela Gikundi | - Legal Counsel, Mastermind Tobacco |
| 14. Mr. Jason Njenga | - Corporate Affairs, Mastermind Tobacco |
| 15. Mr. Patrick Muya | - PERAK |

16. Ms. Frida Mbugua

- Kenya Association of Manufacturers (KAM)

IN ATTENDANCE

1. Ms. Carol Kirorei

2. Ms. Beatrice Kapei

3. Mr. Francis Mutulu

4. Ms. Grace Wahu

5. Mr. Godana Mamo

SENATE

- Committee Clerk

- Legal Counsel

- Media Relations Officer

- Research Officer

- Serjeant-At-Arms

MIN. NO. 97/2015

- PRELIMINARIES

The Chairperson called the meeting to order at 9.22 a.m. followed by a word of prayer. He welcomed officials from British American Tobacco (BAT) and the Mastermind Tobacco Kenya Ltd. to the meeting. He then led in a self-introductory session.

The Chairperson informed those present that the purpose of the meeting was to receive the views of the various institutions on the Tobacco Control Regulations, 2015. He informed the meeting that the Committee is mandated under the Standing Orders and the Statutory Instrument Act, 2013 to scrutinize subsidiary legislation. The Cabinet Secretary or a Regulation making authority is given mandate to make Regulations, which are then published and transmitted to the responsible Clerk of Parliament, tabled and referred to the Committee on Delegated Legislation. The Committee then scrutinizes the Regulations, to ensure that they conform to the provisions of the Statutory Instruments Act, 2013. The Committee may annul or accede to the Regulations or parts thereof, however, prior to annulment, the Committee consults with the Cabinet secretary to seek consensus.

MIN. NO. 98/2015

- ADOPTION OF THE AGENDA

The agenda of the sitting was adopted as presented having been proposed by Sen. Boy Juma and seconded by Sen. Chelule.

Submissions from BAT

Mr. Chris Burrell thanked the Committee for the invitation and highlighted the concerns of BAT (K) Ltd. as follows:

1. Unsatisfactory stakeholder participation was carried out during the development of the Regulations and concerns raised were not incorporated before publication;
2. The Regulations would disrupt business and the industry is unable to comply with its provisions within the period stipulated;
3. The Regulations require tobacco manufacturers and importers to pay an annual Solatium Compensatory Contribution of 2% of the value of goods manufactured for sale in Kenya. The industry is already heavily taxed; and the Solatium Compensation implies wrong doing or liability, whereas the industry is legitimate. Further the cabinet secretary has no powers to set up this Contribution;
4. Near-ban restrictions of interactions between the tobacco industry and public officials and the Government are unconstitutional and impracticable;
5. The requirement of a new set of pictorial and text warnings on all cigarette packs is to be implemented by 5th September 2014, however, the health warnings have not been published or made available to the industry. There is also no printer in Kenya to supply compliant health warnings as per the Regulations;
6. Requirement of the industry to supply full toxicology reports of all brands manufactured in Kenya plus the effects is impractical. The organization already publishes its

ingredients on the website bat-ingerdients.com and are not secretive about the ingredients;

7. The Regulations introduce more criminal offences than those anticipated in the Tobacco Control Act, 2007;

Mr. Burrell concluded by stating that the Regulations take effect on 5th June, 2015. He urged the Committee to carry out urgent interventions to avoid disruption of businesses in the industry. He urged the Committee to annul specific provisions of the Regulations which were contentious. Ms. Anyika reiterated the concerns of Mr. Burrell and urged for balanced and evidence based Regulations.

Submissions from Mastermind Tobacco (K) Ltd.

Mr. Kirimania informed the meeting that Mastermind Tobacco Ltd. employs 3000 Kenyans and finances 7000 farmers by providing inputs and technological advice on tobacco farming. He added that 600 Million Kenya shillings is paid to farmers annually, and contributes significantly to the economy through taxation.

Mr. Mutuma summarized their concerns as follows:

1. Stakeholder consultation was unsatisfactory;
2. Regulation 37 which requires tobacco manufacturers and importers to pay an annual Solatium Compensatory Contribution to the Tobacco Control Fund levies legitimate businesses and violates Article 210 and Article 114 of the Constitution. Further the tax is ultra vires of the powers conferred on the Cabinet Secretary by the Act;
3. Graphic health warnings are unreasonable as no consultations were made. Issue was raised on the cost implications and time frame for the implementation;

MIN. NO. 100/2015

-DATE OF NEXT MEETING

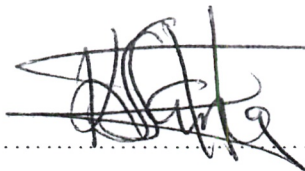
The next meeting would be on Tuesday, 26th May, 2015.

MIN. NO. 101/2015

-ADJOURNMENT

There being no other business, the meeting was adjourned at 11.05 a.m.

SIGNED:



(CHAIRPERSON)

DATE:

26/05/2015

**MINUTES OF THE 13TH SITTING OF THE SENATE SESSIONAL COMMITTEE ON
DELEGATED LEGISLATION HELD ON TUESDAY, 26TH MAY, 2015 AT 9.30 A.M. IN
THE 2ND FLOOR BOARDROOM, KICC.**

PRESENT

- | | |
|-----------------------|--------------------|
| 1. Sen. Stephen Sang | - Chairperson |
| 2. Sen. Judith Sijeny | - Vice-Chairperson |
| 3. Sen. Liza Chelule | |
| 4. Sen. Boy Juma Boy | |
| 5. Sen. Daniel Karaba | |
| 6. Sen. Joy Gwendu | |

ABSENT WITH APOLOGY

1. Sen. (Dr.) Boni Khalwale
2. Sen. Emma Mbura
3. Sen. Godliver Omondi

IN ATTENDANCE

1. Ms. Josephine Kusinyi
2. Ms. Carol Kirorei
3. Mr. Francis Mutulu
4. Ms. Grace Wahu
5. Mr. Charles Musera

SENATE

- Legal Counsel
- Committee Clerk
- Media Relations Officer
- Research Officer
- Serjeant-At-Arms

MIN. NO. 102/2015

- PRELIMINARIES

The Chairperson called the meeting to order at 9.42 a.m. followed by a word of prayer.

MIN. NO. 103/2015

- ADOPTION OF THE AGENDA

The agenda of the sitting was adopted as presented having been proposed by Sen. Sijeny and seconded by Sen. Karaba.

1. Minutes of the 11th sitting were confirmed as a true record of the proceedings after being proposed by Sen. Karaba and seconded by Sen. Boy.
2. Minutes of the 10th sitting were confirmed as a true record of the proceedings after being proposed by Sen. Sijeny and seconded by Sen. Sang.
3. Minutes of the 9th sitting were confirmed as a true record of the proceedings after being proposed by Sen. Boy and seconded by Sen. Karaba.
4. Minutes of the 8th sitting were confirmed as a true record of the proceedings after being proposed by Sen. Boy and seconded by Sen. Sijeny.

**-MEETING WITH THE CABINET SECRETARY
MINISTRY OF HEALTH ON THE TOBACCO
CONTROL REGULATIONS, 2015**

The meeting was informed that the Ministry was unable to attend and had responded to the Committee's invitation by stating that the matters raised were currently before the High Court in Petition No. 143 of 2015 dated 14th April, 2015 and therefore *sub judice*.

The Committee resolved to proceed with its consideration of the matter and report to the House on the Regulations. The Committee resolved to annul the following provisions of the Regulations:

1. Regulation 37 which requires manufacturers and importers to pay a solatium compensatory contribution of the sum of 2% of the value of tobacco products manufactured or imported every financial year
2. Part V of the Regulations which restricts interactions between the tobacco industry and the public officials
3. Regulation 45 which provides that a person who contravenes any provisions of the Regulations is liable to a fine not exceeding five hundred thousand shillings or to

imprisonment for a term not exceeding three years. This provision is inconsistent with section 24(5) of the Statutory Instruments Act which provides that a penalty not exceeding twenty thousand shillings or a term not exceeding six months, or both, may be imposed.

MIN. NO. 106/2015

-ANY OTHER BUSINESS

i. County Visits to Lamu and Kilifi

The meeting was informed that the County Visits to Lamu and Kilifi Counties was scheduled for 2nd to 5th June, 2015. Members present confirmed their attendance.

ii. Foreign Visits

The meeting was informed that the Ministry had responded to the proposed visits to Ghana, Botswana, Trinidad and Tobago and New Zealand requesting for the list of the respective delegations. The Committee nominated Members as follows:

- 1. Ghana:** Sen. Judith Sijeny, Sen. Boy Juma Boy, Sen. Liza Chelule, Sen. Joy Gwendu
- 2. Botswana:** Sen. Stephen Sang, Sen. Daniel Karaba, Sen. Godliver Omondi, Sen. Emma Mbura, Sen. Dr. Boni Khalwale
- 3. Trinidad and Tobago:** Sen. Stephen Sang, Sen. Boy Juma Boy, Sen. Dr. Boni Khalwale, Sen. Godliver Omondi, Sen. Emma Mbura
- 4. New Zealand:** Sen. Judith Sijeny, Sen. Joy Gwendu, Sen. Daniel Karaba, Sen. Liza Chelule, Sen. Stephen Sang

It was agreed that the nominations would be revised if necessary.

MIN. NO. 107/2015

-DATE OF NEXT MEETING

The next meeting would be on notice.

MIN. NO. 108/2015

-ADJOURNMENT

There being no other business, the meeting was adjourned at 10.10 a.m.

SIGNED:



(CHAIRPERSON)

DATE:

28/05/2015

**MINUTES OF THE 14TH SITTING OF THE SENATE SESSIONAL COMMITTEE ON
DELEGATED LEGISLATION HELD ON THURSDAY, 28TH MAY, 2015 AT 9.00 A.M.
IN 2ND FLOOR BOARDROOM, KICC.**

PRESENT

- | | |
|-------------------------|--------------------|
| 1. Sen. Stephen Sang | - Chairperson |
| 2. Sen. Judith Sijeny | - Vice-Chairperson |
| 3. Sen. Godliver Omondi | |
| 4. Sen. Liza Chelule | |
| 5. Sen. Joy Gwendu | |

ABSENT WITH APOLOGY

1. Sen. (Dr.) Boni Khalwale
2. Sen. Emma Mbura
3. Sen. Boy Juma Boy
4. Sen. Daniel Karaba

IN ATTENDANCE

1. Ms. Josephine Kusinyi
2. Ms. Carol Kirorei
3. Mr. Francis Mutulu
4. Ms. Grace Wahu
5. Mr. Charles Musera

SENATE

- Legal Counsel
- Committee Clerk
- Media Relations Officer
- Research Officer
- Serjeant-At-Arms

MIN. NO. 109/2015

- PRELIMINARIES

The Chairperson called the meeting to order at 9.30 a.m. followed by a word of prayer.

MIN. NO. 110/2015

- ADOPTION OF THE AGENDA

The agenda of the sitting was adopted as presented having been proposed by Sen. Sijeny and seconded by Sen. Godliver.

MIN. NO. 111/2015

- CONFIRMATION OF PREVIOUS MINUTES

1. Minutes of the 13th sitting were confirmed as a true record of the proceedings after being proposed by Sen. Sijeny and seconded by Sen. Sang.

MIN. NO. 112/2015

**-CONSIDERATION AND ADOPTION OF THE
REPORT ON THE TOBACCO CONTROL
REGULATIONS, 2015**

The Committee adopted the Report on the Tobacco Control Regulations, 2015 with amendments.

MIN. NO. 113/2015

-DATE OF NEXT MEETING

The next meeting would be on notice.

MIN. NO. 114/2015

-ADJOURNMENT

There being no other business, the meeting was adjourned at 10.00 a.m.

SIGNED:



(CHAIRPERSON)

DATE:

28/05/2015