**Sirma v Kenya Pipeline Company Limited & another (Civil Appeal 337 of 2018) [2023] KECA 1136 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1136 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 337 OF 2018**

**DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA**

**SEPTEMBER 22, 2023**

**BETWEEN**

**JOSPHAT KIPKOECH SIRMA ..... APPELLANT**

**AND**

**KENYA PIPELINE COMPANY LIMITED ..... 1ST RESPONDENT**

**THE BOARD OF DIRECTORS KENYA PIPELINE COMPANY LIMITED ..... 2ND RESPONDENT**

***(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Nelson J. Abuodha, J.) delivered on 13th July 2018 in)***

**JUDGMENT**

**Judgment of Dr. K. I. Laibuta**

1. The appellant, Josphat Kipkoech Sirma, was employed by the 1st respondent, Kenya Pipeline Company Limited, as its Chief Engineer (Instrumentation and Control) on 10th December 2013. The express terms of the appellant's short-lived employment are contained in a letter dated 10th December 2013.

2. On 19th November 2015, the appellant was charged in the Chief Magistrates' Court at Nairobi, Anti-Corruption Case No. 22 of 2015 with three counts of making false documents contrary to section 347 (a) as read with section 349 of the *Penal Code*; and of abuse of office contrary to section 46 as read with section 48 of the *Anti-Corruption and Economic Crimes Act*, 2003.

3. Following the charge, the appellant was suspended by the 1st respondent from employment vide its letter of 20th November 2015 pending disciplinary action notwithstanding the criminal proceedings.

4. By its show-cause letter dated 20th January 2016, the 1st respondent addressed the appellant thus:

> " Reference is made to your appearance in court on 19th November 2015, the particulars of the charges being within your knowledge.
>
> Your appearance and being charged in court amounts to gross misconduct and an offence in accordance with the Company's Staff Rules and Regulations section 8.1.5, 8.5.5 and the *Employment Act*, section 44(4) (g).
>
> This letter therefore seeks to obtain your written explanation giving reasons as to why disciplinary action should not be taken against you for the alleged gross misconduct. The said explanation should reach the undersigned within forty-eight hours of receipt of this letter.
>
> If you elect to and in addition to the written response, you may make a personal appearance before the Board on 25th January 2016 at 2.00 pm at the Company's headquarters. Please do confirm your attendance to the office of the Managing Director.
>
> Please note that in the event of no explanation is received as sought, the Board will be at liberty to proceed with reviewing your case and making a decision thereon without any further reference to you."

5. In the third paragraph of his letter dated 23rd January 2016, the appellant responded as follows:

> " That I would wish to state that the case in which I took plea is yet to be concluded, it is therefore not possible for me to comment on a matter that is still ongoing in court. Nevertheless, I would wish to reiterate my innocence of all the charges against me and state that in the fullness of time, I shall be vindicated. I am equally alive to my fundamental constitutional right especially my right to be deemed innocent until proven guilty and not to undergo a trial process for the same offence twice."

6. In addition to the appellant's response to the 1st respondent's show-cause letter, learned counsel for the appellant, Mr. George Kithi, also responded in paragraphs 4, 5, 6, 7 and 8 of his letter dated 25th January 2016 thus: that the 1st respondent's letter and alleged procedure that it intended to carry against the appellant flew in the face of the *Constitution* and provisions of the law that it sought to rely on in justifying its actions; that the appellant had the right to be presumed innocent until the contrary was proved; that the principle of subjudice prevents anyone from discussing matters that are subject to court proceedings until the same are determined; that the appellant had been suspended on half pay awaiting the outcome of the criminal case and, therefore, should not be subjected to disciplinary action; that the Chairman of the 2nd respondent had no mandate to carry out disciplinary proceedings; and that this was the mandate of the Chief Executive officer.

7. By a letter dated 2nd February 2016, the appellant requested the 1st respondent to give him 8 months before taking any disciplinary action against him. However, the record of appeal does not contain any response to the appellant's request in that regard. It is noteworthy, though, that the 1st respondent terminated the appellant's employment vide its letter dated 8th March 2016 in which it stated that the appellant's response was reviewed and noted by the Board of Directors; that the contents thereof was found not to have exonerated him from blame; that, consequently, the Board of Directors resolved that the appellant's services in the company be terminated with immediate effect for gross misconduct; and that the decision aforesaid was in accordance with the Company's Staff Rules and Regulations, 2014 sections 8.1.5 and 8.5.5 (iv), and section 44(4) (g) of the *Employment Act*.

8. Dissatisfied by the respondents' decision, the appellant petitioned the ELRC at Nairobi in Petition No. 26 of 2016, seeking conservatory orders restraining the respondents from recruiting a replacement in the office of Chief Engineer in which the appellant served; a declaration that the 2nd respondent lacked authority to exercise disciplinary powers against the appellant; an order of certiorari to issue quashing the letter by the 2nd respondent's Chairman terminating the appellant's services; a declaration that termination of the appellant was unlawful, and that the appellant remains in employment, but under suspension; a declaration that the fundamental rights and freedoms guaranteed to the appellant under Articles 2, 3, 20(1) and (2), 21(1), 22(1), 23(1), 28, 47, 48 and 50(1) of the *Constitution* had been contravened by the respondents; a declaration that the 1st respondent was bound by the national values and principles enumerated in Article 10 of the *Constitution*; costs; and any other relief as the court deemed just and fit to grant.

9. The appellant's petition dated 17th March 2016 was supported by his annexed affidavit sworn on 17th March 2017, and was anchored on 4 main grounds set out on the face of the petition relating to his claim on the right to fair administrative action; the alleged illegality and unconstitutionality of the decision to terminate his services; alleged bias, abuse of power, selective justice and malice on the part of the respondents; and his legitimate expectation to be presumed innocent until the court holds otherwise.

10. The appellant's petition was opposed vide the replying affidavit of Thomas Ngira, the 2nd respondent's Human Resource Manager, sworn on 19th July 2016. According to Ngira: the appellant declined to appear before the 2nd respondent despite having been given the opportunity to do so; the appellant declined to address any issues relating to the allegations of gross misconduct; the respondents' decision to summarily dismiss the appellant was on account of breach of the Company's Staff Rules and Regulations, particularly clause 8.5.5 (iv), which justifies summary dismissal for committal, or on reasonable ground that an employee was suspected of committing a criminal offence; adequate communication was given to the appellant before his dismissal and due process followed; the 2nd respondent had authority to discipline an employee on recommendation of its Human Resource Committee; every employer has the right in law to institute disciplinary action of its own motion; the internal disciplinary process and the criminal proceedings in court were separate and distinct from each other and, accordingly, the respondents did not have to wait for the determination of the criminal proceedings before taking disciplinary action; and the appellant had failed to prove the alleged constitutional violations or any procedural impropriety leading to his termination.

11. In its judgment dated 13th July 2018, the ELRC (Abuodha Jorum Nelson, J.) dismissed the appellant's petition with costs to the respondents. In his judgment, the learned Judge held that the 2nd respondent was competent to take disciplinary action against the appellant; that the procedure followed was as laid down in the Staff Rules and Regulations, the *Employment Act* and the Rules of Natural Justice; and that there were valid and justifiable grounds for terminating the appellant's services.

12. Aggrieved by the said judgment, the appellant moved to this Court on appeal on a whopping 13 grounds set out on the face of his Memorandum of Appeal dated 11th September 2018, but which we need not replicate here. However, we take the liberty to summarise them as follows, namely that the learned Judge erred in law and fact: by holding that the 2nd respondent did not act ultra vires in carrying out the impugned disciplinary proceedings and summarily dismissing the appellant; in failing to find that the appellant was not accorded a fair hearing; by holding that there existed justifiable and valid grounds for terminating the appellant's services; by holding that the procedure followed was in accordance with the respondents' Staff Rules and Regulations and the *Employment Act*; by failing to

consider that the ruling delivered on 24th October 2017 relating to the corruption charges was in favour of the appellant; and by disregarding the appellant's pleadings and submissions.

13. In support of the appeal, learned counsel for the appellant filed written submissions dated 18th April 2019 addressing themselves to two main issues: whether the learned Judge erred in upholding the appellant's dismissal; and whether there are any outstanding benefits to the appellant. Counsel cited 12 authorities, which I have carefully considered, and to which I will shortly return in consideration of the issues of both law and fact falling to be determined in this appeal. They urge the Court to: allow the appeal with costs of the appeal and costs in the lower court to the appellant; set aside the judgment of the ELRC and substitute therefor an order reinstating the appellant to his position without any loss of benefits; and to direct that any accruing entitlements be paid within 30 days.

14. In response, learned counsel for the respondents, M/s. Murgor and Murgor, filed written submissions dated 21st August 2019 citing 8 authorities, which I have considered in my decision as rendered below. Counsel urged the Court to dismiss the appeal with costs to the respondents.

15. I need to point out at the onset that, this being a first appeal, it is also this Court's duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v. West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v. Associated Motor Boat Co*. [1968] EA p.123.

16. In *Selle's case* (*ibid*), the Court held:

> " An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

17. Having examined the record of appeal and the grounds on which it is founded, the written submissions of learned counsel for the appellant and learned counsel for the respondents, I am of the considered view that the appeal turns upon the Court's finding on four main issues, namely: whether the learned Judge was correct in upholding the appellant's termination; whether the process leading to the decision to terminate the appellant was lawful and in accord with the rules of Natural Justice, the 1st respondent's Staff Rules and Regulations, the *Employment Act*, and the *Constitution*; whether the appellant is entitled to the orders sought; and what orders ought we to make in determination of this appeal, including orders as to costs.

18. The 1st issue as to whether the learned Judge was correct in upholding the appellant's termination is interwoven with the 2nd issue relating to the propriety of the disciplinary process. The appellant faults the trial court's judgment and contends that the disciplinary process undertaken by the 2nd respondent was unprocedural; that the 1st respondent's Staff Rules and Regulations specifically creates staff disciplinary committees informed by the job group of respective staff; that he was in job group 3; that regulation 8.4 required a committee of the Managing Director together with Heads of Division to preside over disciplinary cases affecting staff in job groups 3 and 4 and, thereafter, make

recommendations to the 2nd respondent; and that the actions of the Chairman of the 2nd respondent were in disregard of the Staff Rules and Regulations.

19. In their written submissions dated 18th April 2019, learned counsel for the appellant cited the cases of *Pastoli v. Kabale District Local Government Council and Others* [2008] 2 EA p.300; *Kenya Ports Authority v. Mary Saru Mwandaniro* [2017] eKLR; *Iyego Farmers Co-Operative SACCO v. Kenya Union of Commercial Food and Allied Workers* [2015] eKLR; and *Phirinyane v. Spie Batignolles* [1995] BLR 1 (IC) for the proposition that failure to adhere to procedural rules amounts to procedural impropriety.

20. On the authority of *The Youth Agenda v. Rita Kijala Shako* [2017] eKLR and *Bamburi Cement Limited v. William Kilonzo* [2016] eKLR, counsel submitted that in all claims arising out of termination of contracts, an employer must prove the reasons for termination, and that termination shall be deemed unfair where an employer fails to do so. According to counsel, the respondents did not substantiate the allegations levelled at the appellant.

21. The respondents' defence was that the 2nd respondent was the highest decision-making body of the 1st respondent; that the 1st respondent did not have a substantive CEO to implement the 2nd respondent's decisions and policies; that, in any event, the 2nd respondent had requisite authority to conduct disciplinary proceedings and terminate the appellant' employment.

22. In their written submissions dated 21st August 2019, learned counsel for the respondents cited the case of *Peter Gichuki King'ara v. IEBC and 2 Others* [2013] eKLR in response to the appellant's contention that the 2nd respondent's decision ought to have awaited recommendations of the disciplinary committee.

23. In his considered view, the learned Judge correctly observed that the 2nd respondent was the ultimate decision maker and could not be faulted for the action taken to terminate the appellant's employment. According to the learned Judge:

> "15. The respondent's Board is the highest decision-making organ for the respondent. They oversee the affairs of the respondent on behalf of the shareholders. Ordinarily, they have the power to be involved in the day to day affairs of the respondent but since this may not be practical, the day to day affairs are delegated to the management headed by the Chief Executive officer. The fact of delegation does not however deprive the Board from involvement in a matter the Board considers serious and touches on the interest of the respondent
>
> 16. In any event the respondent's SRR provided that the disciplinary committee to deal with an employee of the petitioner's job group would be headed by the Managing Director and thereafter make recommendation to the Board. That is to say, the Board had the ultimate decision in the matter."

24. I agree with the learned Judge. As the ultimate decisionmaker, the 2nd respondent was not obligated to first delegate any matter to a committee headed by the Managing Director before making its decision. To my mind, the 2nd respondent had authority and power to make decisions of its own motion without reliance on recommendations of a committee of the 1st or 2nd respondents. In any event, the appellant opted not to appear before the 2nd respondent as advised in the 1st respondent's letter dated 20th January 2016. He elected to respond to the allegations of gross misconduct vide a letter dated 23rd January 2016

by which he stated that it was not possible for him to comment on a matter that was still ongoing in court. According to him, he was innocent until proved guilty, and that he

> " ... should not undergo a trial process for the same offence twice."

25. In his second letter dated 2nd February 2016, the appellant requested to be given 8 months before submission to disciplinary proceedings. In effect, the appellant declined to appear before the 2nd respondent and submit to the impugned disciplinary process.

26. The appellant's first written response was followed by his advocates' letter of 25th January 2016 in which they reiterated the appellant's position and contended that the 2nd respondent had no mandate to carry out disciplinary proceedings against the appellant. That presumably explains why the appellant elected not to appear before the 2nd respondent thereby compromising his right to be heard.

27. The appellant having declined to submit to the disciplinary process, it defeats reason to claim that he was not accorded a fair hearing in accord with the principles enunciated in *Kenfreight (EA) Limited v. Benson K. Nguti* [2016] eKLR.

28. Indeed, a distinction must be drawn as between criminal proceedings over which the respondents had no control, and their internal disciplinary processes, which are not dependent on a court's finding as to whether the appellant was guilty as charged. To my mind, all that the respondents was required to demonstrate was that there were reasonable suspicions that the appellant had committed a criminal offence or otherwise engaged in gross misconduct in contravention of the Staff Rules and Regulations. Once such suspicions are raised, the appellant would then assert his fundamental right to be heard; to be given an opportunity to state his case. However, when that opportunity was given, he declined to submit to the process.

29. Addressing itself on the right to be heard and the consequences of refusal or failure to submit to a disciplinary process, the Court had this to say in *Union Insurance Company of Kenya Limited v. Ramzan Abdul Dhanji* [1998] eKLR:

> " The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

30. Having carefully examined the record of appeal, I find nothing to fault the learned Judge's conclusion that

> " ...there existed justifiable and valid grounds for terminating the petitioner's [the appellant's] services and that the procedure followed was in accordance with the respondent's SRR and the *Employment Act*."

In view of the foregoing, I reach the inescapable conclusion that the learned Judge was correct in upholding the appellant's termination; and that the process leading to the decision to terminate the appellant was lawful and in accord with the rules of Natural Justice, the 1st respondent's Staff Rules and Regulations, the *Employment Act*, and the *Constitution*. That settles the 1st and 2nd issues and, by extension, the 3rd and the 4th.

31. In view of the foregoing, I reach the inescapable conclusion that the appeal herein fails and, accordingly, order and direct that:

The appeal be and is hereby dismissed;

1. The judgment of the ELRC at Nairobi (Abuodha Jorum Nelson, J.) dated 13th July 2028 in ELRC Petition No. 26 of 2016 be and is hereby upheld; and

2. The cost of the appeal be borne by the appellant.

Orders accordingly.

**Concurring Judgment of D. K. Musinga, (P).**

1. I have had the benefit of reading, in draft, the opinion of Dr. K. I. Laibuta, J.A. I am in full agreement with the reasoning and the conclusion arrived at by the learned Judge.

2. As Gachoka, J.A. also agrees, the final orders of the Court shall be as proposed by Dr. K. I. Laibuita, J.A.

**Judgment of M. Gachoka, JA**

1. I had the advantage of reading the lead judgment of Laibuta J.A. which sets out the background to the appeal and therefore I need not rehash the facts.

2. The 13 grounds of appeal raise questions as to: whether the disciplinary process was conducted in accordance with the law; whether the appellant was accorded a fair hearing in accordance with the Staff rules and regulations of the respondent company and the *Employment Act*; whether the respondent could initiate the disciplinary process before the finalization of the criminal trial; and whether there were justifiable and valid grounds to terminate the appellant's services.

3. It is not denied by the appellant that he was served with a notice to show cause which clearly set out the grounds of misconduct that he faced and the breaches of the staff rules and regulations and the *Employment Act*. The appellant failed to appear before the disciplinary committee and instead wrote letters to justify his grounds for non – appearance.

4. I have carefully read the grounds of appeal, the supporting documents, the parties' submissions and the authorities cited by the parties. As held by the trial Judge, the appellant was accorded an opportunity to defend himself before the disciplinary committee and the decision of that committee was ratified by the Board.

5. The appellant failed to appear before the disciplinary committee to defend himself and upon consideration of the grounds of misconduct, the committee recommended termination of his services. In our legal architecture, an employee should be accorded an opportunity to be heard before his services are terminated. The procedure for the disciplinary process should be done in accordance with the relevant manuals, rules and regulations and the *Employment Act*.

6. The law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between the employer and the affected employee. The *Employment Act*, 2007 has clear procedures on the disciplinary and termination process of an employee and as found by the trial Judge that procedure was adhered to. This raises the question whether an employee can decide on his own whims on the day or time and how his disciplinary process should take place. I think not. An employee is also bound during a disciplinary process to follow the procedures as set out in the staff manuals and the *Employment Act*.

7. In this appeal, I note that the appellant was informed of the grounds of misconduct and was afforded an opportunity to make representations in terms of section 41 of the *Employment Act*, 2007 and the respondent cannot be faulted on that account. The evidence before the court, was clear that he had been given ample opportunity to defend himself before his services were terminated.

8. In *Kenya Ports Authority v Fadhil Juma Kisuwa* [2017] eKLR, this Court held:

> " We have said earlier that where dismissal is on the grounds of misconduct, poor performance or physical incapacity the employer, by the provisions of section 41 is bound, not only to explain the reason for which the employee's dismissal is contemplated but also to hear and consider any representations he may have. At the disciplinary hearing the employee is entitled to have in attendance, if he/she wishes, another employee or a shop floor union representative of his choice..... It must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular case."

9. The appellant was given a chance to be heard but opted otherwise. In view of the foregoing, I reach the conclusion that the respondent was in compliance with both the statutory and contractual requirements as to procedural fairness. I agree with the reasoning and the final orders of Laibuta J.A. and dismiss the appeal in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.**

**DR. K. I. LAIBUTA**

**.....**

**JUDGE OF APPEAL**

**D.K. MUSINGA, (P.)**

**.....**

**JUDGE OF APPEAL**

**M. GACHOKA CIArb, FCIArb**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

*signed*

**DEPUTY REGISTRAR**