



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

**PETITION NO. 26 OF 2016**

**JOSEPH KIPKOECH SIRMA.....PETITIONER**

**VERSUS**

**KENYA PIPELINE LIMITED.....1<sup>ST</sup> RESPONDENT**

**THE BOARD OF DIRECTORS**

**KENYA PIPELINE COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By a Petition dated 17<sup>th</sup> March, 2016 the Petitioner sought the following orders:

- a. That this honourable court be pleaded to issue conservatory orders restraining the respondents or their agents, staff and/or any person from advertisement, interviewing, recruiting or in any other manner filing the alleged vacancy in the office of Chief Engineer (I&C) held by the petitioner pending the hearing and final determination of the Anti-Corruption case against the petitioner.*
- b. That a declaration that the 2<sup>nd</sup> respondent lacks authority to exercise disciplinary powers against the petitioner do issue.*
- c. That an order of certiorari do issue bringing to this honourable court for purposes of quashing the letter by the 2<sup>nd</sup> respondent's chairman to terminate the services of the petitioner as it is ultra vires, illegal, irregular, unlawful, unconstitutional and nullity.*
- d. That this honourable court issue a declaration that the purported termination of the petitioner's employment by the 2<sup>nd</sup> respondent on account of appearing in court and being charged is illegal and unlawful and that the petitioner remains on employment but under suspension pending the determination of the Anti-Corruption case against him.*

2. The Petition was supported by the affidavit of the Petitioner in which he deponed among others that:

- a. That the 2<sup>nd</sup> respondents by a letter dated 8<sup>th</sup> March, 2016 have purported to terminate my services from employment of the 1<sup>st</sup> respondent.*
- b. That the 2<sup>nd</sup> respondent by a letter dated 20<sup>th</sup> January, 2016 required me to show cause why my employment should not be terminated and indicated in the said letter that "your appearance and being charged in court amounts to gross misconduct and on offence in accordance with the company's rule.*
- c. That on receiving that letter, I responded to the said letter to show cause by a letter dated 23<sup>rd</sup> January, 2016 and delivered on the same date where I indicated that although I took a plea of not guilty, the hearing of the case is yet to start and that having taken a plea of not guilty the constitution guaranteed me a right to be deemed innocent until proven otherwise. I also informed the 2<sup>nd</sup> respondents that I am seeking legal counsel and that my advocates shall respond to the notice to show cause soon.*
- d. That my advocates, the firm Messrs Kithi & Company Advocates under my instructions and by a letter dated 25<sup>th</sup> January, 2016 and received by the respondents on even date wrote to the respondents in response to the 2<sup>nd</sup> respondent's notice to show cause letter dated 20<sup>th</sup> January, 2016 and addressed the following issues;*

i. That the 2<sup>nd</sup> respondent and or its chairman lacked authority either under the Company Regulations or State Corporations Act to exercise disciplinary proceedings and control over me or any employee of the 1<sup>st</sup> respondent.

ii. That the 2<sup>nd</sup> respondent would be acting in blatant disregard of the law in assuming that my appearance in court and being charged in court amounts to gross misconduct and the same is an offence.

iii. That the 2<sup>nd</sup> respondent would be acting in misapprehension of the law by assuming that section 44(4) (g) of the employment Act creates an offence of gross misconduct.

iv. That the letter and alleged procedure that the 2<sup>nd</sup> respondent attempted to carry out was in contravention of the constitution and the very provisions of the law that they sought to rely on in justifying their actions.

v. That I enjoyed the inalienable right to be presumed innocent until proven otherwise.

vi. That I require adequate time and facilities to prepare for my defence and as such I needed at least seven days to prepare and later appear for the hearing when called upon.

vii. That the principle of sub judice prevents any one including the 2<sup>nd</sup> respondent from discussing matters that are subject to court proceedings until the same is determined.

viii. That I was already suspended from work and on half pay pending the hearing and determination of my case.

e. That the 2<sup>nd</sup> respondent having not responded to my letter and that from my advocates, I wrote another letter dated 2<sup>nd</sup> February, 2016 addressed to the 2<sup>nd</sup> respondent calling for a feed back.

f. That the 2<sup>nd</sup> respondent did not respond until 14<sup>th</sup> March, 2016 by a letter dated 18<sup>th</sup> March, 2016 when I received a letter purporting to terminate my employment. The letter deliberately failed to acknowledge or mention my letter dated 2<sup>nd</sup> February, 2016 and that of my advocates dated 25<sup>th</sup> January, 2016.

3. The respondent filed a replying affidavit through one Thomas Ngira in which he deponed on the main that:

a. That I am the Human Resources Manager of the 2<sup>nd</sup> respondent company herein and as such I am acquainted with the matters relating to this petition.

b. That on 10<sup>th</sup> October, 2013 vide a letter of the same date, the petitioner was appointed as the Chief Engineer (Instrumentation & Control).

c. That the letter of appointment at clause 17 enumerates the duties and the code of conduct, to which the petitioner was required to adhere to, which included inter alia duties to:

i. Observe the Corporations rules and regulations, code of conduct and Ethics and Corruption Prevention Policy

ii. Perform his duties diligently and faithfully.

d. That the said letter of appointment similarly provides that the petitioner was subject to the Company's staff rules and regulations as issued and or amended from time to time.

e. That the petitioner was charged with 2 Counts of making a false document contrary to section 347(a) as read with Section 349 of the Penal Code, and 1 Count of Abuse of Office contrary to the Anti-Corruption and Economic Crimes Act No 3 of 2003 on 19<sup>th</sup> November, 2016.

f. That the petitioner is according to the said charge sheet, alleged to have on or about 30<sup>th</sup> January, 2014 with intent to deceive, made a false document, namely certificate of completion dated 30/1/2014 certifying the works in respect of tender reference SU/QT/3097F/13 for supply, installation, testing and commissioning of line 2 station autotransformers (No. 3) had been satisfactory completed purporting it to be the genuine Certificate of Completion for supply, installation, testing and commissioning of Line 2 station autotransformers (No. 3).

g. That the petitioner is similarly according to the said charge Sheet alleged to have on or about 3<sup>rd</sup> February, 2014, with intent to deceive, made a false document, namely Material Arrival Advise Note/Inspection Report No 43368 of 3/2/2014 purporting it to be a genuine inspection report certifying works in respect of tender reference SU/QT/3097F/13 for supply, installation, testing and commissioning of Line 2 station autotransformers (No 3) had been completed successfully.

h. That under count 6 of the charge sheet, the petitioner is further alleged to have used his position to improperly confer a benefit of Euros 8695.65 in respect of a tender for supply, installation, testing and commissioning of Line 2 station autotransformers by preparing misleading documents allegedly showing Redline Limited had performed installation, testing and commissioning work of

the autotransformers, which facilitated the said payments.

i. That following the petitioner being charged in court and in line with the Anti-Corruption and Economic Crimes Act, government circular Ref: OP.CAB.3177A and KPC Staff Rules and Regulations, the petitioner was suspended from duty on 20<sup>th</sup> November, 2015.

j. That the Company's Staff Rules and Regulations, particularly Clause 8.5.5 sub clause (v) provides that an employee is subject to summary Dismissal if they commit or on reasonable and sufficient ground is suspected to have committed a Criminal offence against or to the substantial detriment or his employer or his employer's property.

k. That being charged before a criminal court constitutes reasonable and sufficient grounds of being suspected to have committed a criminal offence.

l. That pursuant to the 2<sup>nd</sup> Defendants Staff Rules and Regulations Section 8.1.5, 8.5.5. (iv) and the Employment Act, Section 44 (4) (g) the petitioner was on 20<sup>th</sup> January, 2016 issued with a letter to showcause.

m. That by the letter dated 20<sup>th</sup> January, 2016 the petitioner was informed the basis upon which the show cause letter was issued; that being charged in court amounts to gross misconduct and an offence in accordance with the Company's staff Rules and Regulations and Employment Act, 2007.

n. That the petitioner, in the said letter was informed of and availed an opportunity to show cause and give reasons as to why disciplinary action should not be taken against him.

o. That the petitioner was further to the request for a written response, provided with opportunity to make a personal before the Board of directors on 25<sup>th</sup> January, 2016.

p. That the petitioner vide letters dated 23<sup>rd</sup> January, 2016, 25<sup>th</sup> January, 2016 and 2<sup>nd</sup> February, 2016, responded to the show cause letters.

q. That having reviewed the petitioner's responses and having found that the responses did not adequately address the issues raised, Kenya Pipeline Corporation through its Board of Directors made the decision to summarily terminate the petitioner's employment.

r. That the petitioner over and above being afforded an opportunity to make representations in his defense, was vide letter dated 8<sup>th</sup> March 2016 informed that he would receive the following:

i. Payment of three month's salary in lieu of notice of termination.

ii. Payment of unpaid salary as at the time of termination.

iii. Payment of the half salary withheld during the period of suspension.

iv. Payment of outstanding leave days as at date of termination if any

v. Payment of pension benefits in line with KPC retirement benefits schemes' trust Deed & Rules

s. That adequate consideration was made, and the petitioner granted opportunity to show cause why his employment should not be terminated and due process was followed.

4. In his closing submissions Mr Kithii for the Petitioner submitted that the set of the Chairman of the Board as sanctioned by the respondent was illegal and ultra vires. According to counsel, Kenya Pipeline Staff rules and Regulations (SRR) specifically creates staff Disciplinary Committee which is informed by the job group of respective staff. Mr Kithii submitted that under regulation 8.4 the MD together with Heads of Division shall preside over disciplinary cases affecting staff in job group 3-4 and thereafter make recommendation to the full Board. The petitioner's submission therefore was that the acts of the chairman of the Board and even the Board of Directors to purport to preside over disciplinary proceedings of the petitioner were in blatant disregard of the SRR the very regulations the respondent relied on to as justification for their action.

5. Counsel further submitted that at the material time there was an acting Managing Director who had exercised his prerogative and suspended the petitioner pending the hearing and determination of the charges he was facing. According to counsel, the 2<sup>nd</sup> respondent's Board only had powers to exercise disciplinary authority against the MD and any action not in consonance with the provisions of the SSR amounted to interference with internal running of the company's affairs.

6. Mr Kithii further submitted that section 44(4) of the Employment Act only gives ground for summary dismissal when an employee is found to have committed a criminal offence or on reasonable and sufficient ground. According to counsel, the respondent never adduced any reasonable and sufficient grounds to warrant a finding that the petitioner was guilty of gross misconduct. The burden of proof that the petitioner was not guilty of gross misconduct. The burden of proof that the petitioner was not guilty of gross misconduct rested on him but when he sought for time to prepare for the hearing and seek legal representation, his letter were never responded to.

7. According to counsel, the fact that the Petitioner was facing criminal charges at the Anti-corruption and Economic Crime Court did not prove he was guilty of the charges. The law provided that he should be on suspension on half pay until the case was concluded. The law according to counsel further provided that in case the employer wished to carry out further disciplinary action, then it should carry independent investigations from the charges the petitioner was facing and afford the petitioner a fair hearing as provided under article 47 of the Constitution and the Fair Administrative Action Act, 2015. According to counsel, the letter of summary dismissal never mentioned anything that pointed to sufficient and reasonable ground of finding that the petitioner was guilty of the charges he was facing.

8. Mr Ouma for the respondent on the other hand submitted that it was wrong to condemn an employer to forcefully retain an employee when it was no longer tenable to do as this would amount to servitude. According to counsel, clause 8.5.5 of the SRR which governed summary dismissal and provided for the definition of gross misconduct was buttressed by the Employment Act by providing for summary dismissal of an employee if he commits or on reasonable and sufficient grounds was suspected of having committed a criminal offence against or the substantial detriment of his employer or his employers property.

9. Mr Ouma submitted that on 19<sup>th</sup> November, 2016, the petitioner was charged before Anti-Corruption Court with two counts of making false documents and one count of Abuse of office. In line with the Anti-Corruption and Economic Crimes Act (ACECA) and government circular Reg OP.CAB.3177A and the respondents SRR, the petitioner was suspended from duty. Three months after suspension and pursuant to 2<sup>nd</sup> respondents SRR sections 8.1.5, 8.5.5 and the employment Act section 44(4)(9) the petitioner was on 20<sup>th</sup> January, 2016 issued with a letter to show cause. The same letter informed the petitioner the basis upon which the show cause letter was issued being that court charges amounted to gross misconduct and an offence according to respondent's SRR and the Employment Act.

10. Counsel further submitted that in the same letter the petitioner was informed and availed an opportunity to show cause and give reason's as to why disciplinary action should not be taken against him. He was further given an opportunity to give a written response and appear before the Board personally on 25<sup>th</sup> January, 2016. According to Mr Ouma the petitioner through letters dated 23<sup>rd</sup> January, 2016 and 2<sup>nd</sup> February, 2016 responded to the show cause letters. Counsel therefor submitted that having reviewed the petitioner's responses did not adequately address the issues raised, the 2<sup>nd</sup> respondent through its Board of Directors made the decision to terminate the Petitioners employment. According to counsel, the letter of termination stated that the petitioner's employment was terminated for gross misconduct.

11. On the question, whether the 2<sup>nd</sup> respondent's Chairman and Board of Directors acted ultra vires, counsel submitted that it was indisputable that the highest decisions making body in a company was the board of directors. Further it was similarly admitted by the petitioner that the 1<sup>st</sup> respondent did not have a substantive CEO to implement the decisions and policies of the board. According to counsel the 1<sup>st</sup> respondent's Board represented the direct mind and will of the 1<sup>st</sup> respondent and the highest decision making organ which controlled what it does and given the senior position the petitioner held, the requisite authority to terminate the petitioners employment was the Board.

12. Mr Ouma further submitted that an employer by law had the right to institute disciplinary action against its employees on its own motion. It was not necessary to enquire whether there was gross misconduct or not. Rely on the case of **Geoffrey Kiragu Njogu Vs the PSC**. Counsel submitted that an internal disciplinary process by an employer is distinct from the criminal process and that an acquittal in a criminal proceeding does not bar an employer from instituting disciplinary proceedings against an employee as such acquittal does not settle the issue of misconduct if any against such employee.

13. Having summarized the evidence and submissions only three issues appear to me that require to be decided. First, was the respondent's Board competent to take disciplinary action against the petitioner? Second, if they did was the procedure as laid down in SSR, the Employment Act and Rules of natural justice generally followed in dealing with the petitioners' case? Third, were there valid and justifiable reasons for terminating the petitioner's services. In other words, was it proper for the respondent to terminate the petitioner's services for the same reasons and facts over which he was undergoing prosecution? As a natural consequence what would be the appropriate orders to make?

#### **a. Competence of the respondents Board.**

It was submitted by the petitioner that SSR creates staff disciplinary committee, which is informed by the job group of respective staff. According to counsel, the Managing Director together with Heads of Division were the ones to preside over the petitioner's case and indeed the Managing Director had dealt with the matter and suspended the petitioner pending the outcome of the criminal charges the petitioner was facing. It was according to counsel, therefore wrong for the Board to assume jurisdiction over the matter.

14. Clause 8.4 of the respondent's SRR makes provision for membership to various staff disciplinary committees of relevance to this matter, for employees in job Group 3-4 where the petitioner fell, the Managing Director together with heads of division shall preside over disciplinary cases affecting staff in the petitioner's category and thereafter make recommendation to the full board.

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. It is undisputed that the petitioner was charged with corruption offences arising from activities in the course of his duties as the respondent's employee. There was therefore nothing wrong with the Board getting involved in a matter of such magnitude touching on the respondent's property and business. In any event the respondent's SRR provided that the disciplinary committee to deal with an employee of 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.

17. On this issue the court therefore finds and holds that the respondent's Board and its Chairman did not act ultra-vires by involving itself in the petitioner's disciplinary case and eventually dismissing him.

18. Was the procedure followed in terminating the petitioner's services in tandem with the Employment Act and Rules of Natural Justice?

The petitioner was suspended from duty through a letter dated 20<sup>th</sup> November, 2015 in line with what was stated in the letter as section 62 of the Anti-Corruption and Economic Crimes Act, Government circular Ref. OP.CAB.3/77A dated 24<sup>th</sup> May, 2010 and Section 8.3.4 of the KPC staff Rules and regulation. The suspension letter further informed the petitioner that the respondent was entitled to exercise its right to administratively conclude its internal related disciplinary process notwithstanding, the pending criminal court case. By a letter dated 20<sup>th</sup> January, 2016 the respondent made reference to the petitioner's arraignment in court on corruption charges and stated that such charges amounted to gross misconduct and an offence under the respondent's SRR section 8.1.5 , 8.5.5 and the Employment Act sections 44 (4) (g).

19. The petitioner was therefore called upon to provide written explanation why disciplinary action should not be taken against him for the alleged misconduct. The letter in addition gave the petitioner opportunity to make a personal appearance before the Board on 25<sup>th</sup> January, 2016. The letter further informed the petitioner that should no explanation be received, the Board would be at liberty to proceed with reviewing his case and a decision made thereon without further reference to him.

20. The petitioner responded through a letter dated 23<sup>rd</sup> January, 2016 in which he stated that the case in respect of which he took the plea was yet to be concluded and it was therefore not possible to comment on the matter. He nevertheless reiterated his innocence and further that in fullness of time his innocence would be known. In reference to section 44(4)(g) of the Employment Act the petitioner contended that an act can only be deemed to amount to gross misconduct where there is reasonable evidence and that reasonable evidence in the cases against him could only be proved after the prosecution witnesses have testified and the court found him guilty. The petitioner further stated that under section 62 of the Anti Corruption and Economic Crimes Act when a State (sic) Officer like him was facing corruption and economic crime charges, he should be suspended at half pay with effect from the date of the charge until the conclusion of the case. The position taken by the petitioner was further elaborated on by his advocates letter dated 25<sup>th</sup> January, 2016.

21. From the foregoing, it would seem the petitioner took the view that the respondent could not ask him to show cause on issues subject of a criminal trial as those issues were yet to be proved against him. In other words the petitioner desired that the criminal trial be concluded before any disciplinary action could be taken against him.

22. A criminal trial is a distinct and separate process from internal disciplinary process. Further, the standard of proof in a criminal case is higher than in an ordinary civil case and administrative process. That is to say in order to sustain a conviction the evidence must support the offence charged beyond reasonable doubt. This is not the case in civil and administrative trials where the evidence only needs to satisfy the threshold of balance of probability. That is to say it must be more probable than not that the accused committed or omitted to do what is charged.

23. The Court of Appeal in the case of **Geoffrey Kiragu Njogu Vs Public Service Commission** held that an internal disciplinary process by an employer was distinct from the criminal process and that an acquittal in criminal proceedings does not bar an employer from instituting the disciplinary proceedings against an employee as an acquittal of an employee of criminal charges does not settle the issue of misconduct against such employee.

24. Further, section 62 of the Anti-Corruption and Economic Crimes Act though requires a person facing corruption charges to be suspended on half pay with effect from the date of the charge until the conclusion of the case, the Act seems silent hence does not bar an employer in appropriate cases to escalate a suspension to a dismissal. It would be *onerus* for an employer to keep and pay an employee whose acquittal will have no relevance on whatever disciplinary action the employer would desire to take in view of the misconduct.

25. The intention of section 62 of Anti-Corruption and Economic Crimes Act was to keep such employee on suspension in order to avoid any possible interference with investigation and evidence but such suspension does not bar an employer from terminating such employee's services without awaiting the outcome of the criminal charge. An employee on suspension is still in employment hence subject to employer's disciplinary process. The provisions of section 62 of Anti-Corruption and Economic Crimes Act then are therefore not an injunction against an employer from dealing with an employee's case as per employer's human resource policy and procedures and the Employment Act.

26. In conclusion, the court finds and hold that there existed justifiable and valid grounds terminating the petitioner's services and that the procedure followed was in accordance with the respondent's SRR and the Employment Act.

27. The petition is therefore found without merit and is hereby dismissed with costs.

28. It is so ordered.

**Dated at Nairobi this 13<sup>th</sup> day of July, 2018**

**ABUODHA JORUM NELSON**

**Judge**

**Delivered this 13<sup>th</sup> day of July, 2018**

**ABUODHA JORUM NELSON**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.