REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2117 OF 2012

KENYA CHEMICAL & ALLIED WORKERS UNION…….....CLAIMANT

VERSUS

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED…….RESPONDENT

JUDGMENT

1. The Claimant union filed suit on 19th October 2012 seeking to have the Court determine the issue of termination of 3 grievants namely Mr. Benson Ngure Munjiru on 9th August 2010, Mr. Julius Mwaniki Ngare on 26th November 2010 and Mr. Calistus Kyalo Mbatha on 20th December 2010. The three were members of the Claimant union and were employed at different times by the Respondent. The Claimant averred that the first grievant was summarily dismissed without any cause or justification after having being cleared of any impropriety in relation to the forgery of some payment vouchers. The second grievant was dismissed for damage to a fuel tank for a vehicle he was operating and the Claimant averred that this was done without adherence to the dictates of the Employment Act. The third grievant was summarily dismissed in and in spite of recommendation by the conciliator that his dismissal be reduced to normal termination the Respondent had not made good the payment due. The Claimant averred that of the two grievants suspended and then summarily dismissed, there was effort to discuss the issue but to no avail. The Respondent, it was averred, failed to accord them a hearing as required in law. A trade dispute was reported to the Minister for Labour and a conciliator was appointed but the conciliator failed to perform and was replaced by Ms. P. Kanyotu who dealt with the matter. After a conciliation meeting in April 2012, the conciliator prepared a report issued to parties on 20th June 2012 and her report recommended that the first grievant be reinstated to his position without loss of benefits while the second and third grievants' dismissal be reduced to normal termination and their terminal dues paid in accordance with the CBA. The Respondent accepted the recommendation in respect of the third grievant but rejected the recommendations in respect of the other two grievants. The Claimant thus sought a declaration that the Respondent acted unfairly, unlawfully and wrongfully in dismissing the first and second grievants without following due and fair termination procedure and for failing to give the two grievants a hearing prior to dismissal. The Claimant also sought reinstatement of the two grievants to their employment without loss of benefit and in the alternative an order for payment of benefits and entitlements under the CBA as well as maximum compensation as provided for in law. To the Memorandum of Claim were attached various correspondences and documents in support of the case.

2. The Respondent filed a Memorandum of Defence on 5th April 2013. In it, the Respondent conceded that it had a recognition agreement with the Claimant and had negotiated a number of collective bargain

agreements with the union. The Respondent averred that the first grievant was suspended from duty pending investigations for submission of false claims to the Finance Department. He was given a letter of suspension detailing the reasons for suspension and was given notice to show cause why disciplinary action should not be taken against him for the gross misconduct. Investigations were undertaken by the Respondent and the report by Hawk Eye Investigators established there was no agreement in the signatures drawn from the first grievant and those on the questioned documents. The Respondent held a disciplinary meeting on 28th January 2010 and the Claimant's representatives raised unnecessary issues and eventually stormed out of the meeting. The Respondent averred that the committee deliberated on the case and found that the first grievant was the mastermind and direct beneficiary of the fraud and recommendation was made that he be summarily dismissed. This decision was upheld on appeal at which appeal the Claimant union had refused to attend. After conciliation the first grievant rejected the recommendation by the conciliator and sought payment of compensation for wrongful termination and for loss of employment. The Respondent submitted that the reason for the termination of the first grievant was justified. The Respondent averred that in respect of the second grievant there was an accident leading to damage of underground wires leading to his suspension pending investigations. He was asked to show cause and after the Respondent considered his remorsefulness he was reinstated to his position and he continued to serve and on 21st September 2010 he was again suspended from duty as a result of damage to the fuel tank of the loader under his care. He was given a letter to show cause and was invited to a disciplinary hearing after the explanation was considered. The Claimant attended and at the hearing insisted the accident was a normal accident and not as a result of negligence. After deliberations the committee found that the second grievant had been negligent in spite of the stern warning issued after the prior incident and thus recommended his termination and payment of terminal dues. The second grievant also was granted opportunity to appeal and the appeal was considered on 15th April 2011 and the Claimant union refused to attend inspite of being invited. The appeal committee found the dismissal was justified and that due process had been followed. The Respondent rejected the recommendation of the conciliator just as it had done in respect of the first grievant, it communicated this to the Claimant and the conciliator. The Respondent averred that it was lenient to the second grievant as it terminated his services instead of summarily dismissing him. In regard to the third grievant, the Respondent averred that the grievant was suspended from employment after he was found to have issued cement to customers beyond their Kshs. 1 million limit. He was informed of the specific allegations in his letter of suspension and was requested to show cause why disciplinary action should not be taken against him for this. The Claimant and the grievant were invited to attend the disciplinary meeting on 8th December 2010 and they did attend and the grievant and the Claimant failed to account for the missing cement. The committee found the grievant had prepared the delivery notes, checked and collected the cement in question. This was considered criminal and theft by servant and recommendation was made for summary dismissal. The third grievant appealed his summary dismissal and his appeal was considered. At the appeal, the Claimant union failed to appear and after deliberations the committee upheld the decision to summarily dismiss him. The Respondent averred that it accepted the recommendation by conciliator to reduce the termination to normal termination in place of summary dismissal and paid the terminal dues. The Respondent thus submitted that the suit be dismissed for lack of merit.

3. After a series of attempts to proceed to hearing parties agreed to dispose of the suit by way of written submissions. The Claimant filed its written submissions on 27th February 2015. In the submissions the Claimant submitted that the facts of each grievants case were as contained in the memorandum of claim. The Claimant submitted that prior to institution of the suit the issue had been referred to conciliation and after meetings held in presence of the grievants the conciliator recommended changes to their termination. The Claimant submitted that on basis of recognition agreement which dates back to 6th September 1961 the conciliators decision would have been final as the Recognition Agreement made provision that the decision of the industrial relations officer would be final. The Claimant asserted that prior to the suspensions there ought to have been a forum convened where the accusations leveled against the grievants would have been discussed. The Claimant submitted that none of the grievants was issued with a copy of the investigation report before disciplinary action was taken. The Claimant denied that any meetings were held prior to the dismissal. The Claimant submitted that the meeting minutes annexed were of a management affair and did not meet the threshold of Section 41 of the Employment Act. The Claimant relied on the authority of **Peter Maroko Omondi v Pandya Memorial Hospital Cause No.**

332 of 2013 and **Tailors & Textiles Workers Union v Vaja's Manufacturers Cause No. 1386 of 2011**.

4. The Respondent filed its written submissions on 17th March 2015. The Respondent submitted that the grievants were suspended for good cause and given a hearing as required in law. The Respondent submitted that each grievant was given a show cause letter and was invited to a disciplinary meeting and after the decision to terminate was made each of them was allowed to prefer an appeal which was considered and a decision reached. The Respondent submitted that it attended conciliation meetings and the report was rejected in part. The Respondent submitted that it followed fair procedure in terminating the services of the Claimants. The Respondent submitted that he who alleges must prove and relied on the case of **David Getare Nyangau v Houseman General Contractors Ltd [2013] eKLR**. The Respondent also relied on the case of **Banking Insurance & Finance Union v Post Bank Ltd [2013] eKLR** and **Moses Chavangi v Barclays Bank Ltd Cause No. 694 of 2010**.

5. The Court has considered the pleadings of parties, documents, the law and submissions of parties in coming to this decision. The Claimant unfortunately did not attach the copies of decisions it relied on.

6. The recognition agreements however old are subject to the dictates of the law. If parties agree that the decision of a labour officer is final, such agreement cannot oust the jurisdiction of the Court to consider whether the decision reached was just and fair. Section 73(1) of the Labour Relations Act 2007 makes provision as follows:-

73.(1) If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.

7. The burden of proving that unfair termination took place rests on the employee while the burden of justifying the dismissal shall lie on the employer. Section 47(5) of the Employment Act provides as follows:-

> 47. (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

8. An employer is permitted to dismiss an employee for good cause. Section 44(4)(g) of the Employment act provides as follows:-

> 44(4)(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

9. In determining whether an employer was justified in terminating the services of an employee, this Court is bound to consider the procedure adopted in the process of dismissal and the handling of the appeal that ensues. The Employment Act Section 45(5) makes provision as follows:-

> 45(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-
>
> (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; ?
>
> (b) the conduct and capability of the employee up to the date of termination; ?
>
> (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural

requirements set out in section 41 ?

10. The procedural fairness under Section 41 cannot be emphasized enough. Section 41 makes provision as follows:-

> 41 (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

11. The Claimant had a burden of proving that the dismissal was unfair. The process leading up to the dismissal was one which does accord to Section 41. The Respondent gave each of the grievants an opportunity to be heard. Representatives of the Claimant were invited as were the grievants. The fact that they were given the opportunity demonstrates that the Respondent complied with the law. Under Section 44(4)(g) there was basis for termination where there is proof that the employee engaged in dishonest conduct. As I held in the case of **Moses Chavangi v Barclays Bank** *"I would be remiss if did not reiterate that trust and confidence in some jobs is more critical than academic papers. If there was cause to terminate, as there was in this case, I will not stand in the way of the dismissal. I uphold it."*

12. The first and second grievant were given an opportunity to explain, their explanations were found wanting and dismissals ensued. In the case of the second grievant he was given a soft landing. He ought to be grateful he was only given a termination. For the third grievant his summary dismissal was reduced to normal termination and his dues accordingly paid. The upshot of the foregoing is that the Claimant failed to prove its case on a balance of probability and the suit is for dismissal. Costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 5th day of May 2015

Nzioki wa Makau

JUDGE