REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1940 OF 2014

MARGARET WAIRIMU GACHERU…....….....….....CLAIMANT

-VERSUS-

BETA HEALTHCARE INTERNATIONAL LIMITED……. RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 8th January, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 31.10.2014 through T.M Kuria & Company Advocates. The claimant changed her advocates to P.M. Karanja as per the notice of change of advocates filed on 17.10.2019. The claimant prayed for judgment against the respondent for:

a) The respondent reinstates the claimant to her former position without any loss of benefits and in alternative:

b) Severance pay for the period employed.

c) Compensation for a maximum of 12 months for wrongful dismissal.

d) Unpaid salaries and leave allowance.

e) Costs of the suit.

f) Interest on a, b, c, and d.

g) Any other relief as the Court may deem just.

The respondent filed the response to the memorandum of claim on 26.11.2014 through Wairagu & Wairagu Advocates. The respondent subsequently changed advocates to Titus Makahanu and Associates Advocates. The respondent prayed that the cause be dismissed with costs.

There is no dispute that the parties were in a contract of service. The respondent employed the claimant to the position of Secretary or Typist as per the letter of employment dated 12.07.2002.

There is no dispute that the respondent dismissed the claimant from employment by the letter dated 25.04.2014 on account of using the company assets in the wrong way namely, using the email services provided by the respondent to malign people or colleagues and their families using derogatory remarks, foul language and character assassination.

It is not in dispute that the respondent's email and instant messaging policy as revised on 02.05.2010 was in place at all material times. The policy was to the following effect:

a) The email or electronic messaging systems are the respondent's property. All messages stored in company provided electronic messaging systems or composed, sent or received by any employee or non-employee are the property of the company. Electronic messages are not the property of any employee.

b) The company reserves the right to intercept, monitor, review or disclose any and all messages composed, sent or received.

c) The company reserves the right to alter, modify, reroute or block the delivery of messages as appropriate.

d) The unique email addresses or instant messaging identifiers assigned to an employee are the property of the Company. Employees may use these identifiers only while employed by the company.

The claimant testified that she wrote emails on the respondent's provided platform disparaging the respondent's employee one Margaret Mathenge. The disparaging and offensive emails were addressed by the claimant to her workmate one Elius Ng'ang'a. The matter was subject of criminal case No. 3698 of 2014 at Makadara in which the claimant and the said Elius Ng'ang'a were accused of using abusive language contrary to section 95(1) (a) of the Penal Code. The accused persons were acquitted under section 215 of the Criminal Procedure Code as per the judgment delivered on 14.06.2019.

The respondent's grievance committee held a meeting on 25.04.2014 when the claimant was given the printed chat of the offensive emails in issue. She confirmed she had written the offensive emails and that she did not deny the same and stated thus, "**I regret the whole issue it's a terrible mistake on my end.**" The claimant admitted before the Committee of her wrong doing and requested for a second chance. The claimant wrote a letter of apology on 25.04.2014 addressed to the said Margaret John-Mathenge who had been adversely and disparagingly been directly or indirectly mentioned or referred to in the offensive emails. By the letter dated 25.04.2014 the claimant stated that she had read the letter of dismissal, accepted her misconduct, regretted the same and requested to be given a chance to resign instead of the dismissal the respondent had already imposed against her. A certificate of service was issued dated 12.05.2014.

The Court has considered the memorandum of claim. The claimant's case is that her employment was unlawfully terminated upon unjustifiable cause and upon trumped charges. Further the Grievance Committee met the same day she was notified to attend so that the proceedings were a mere formality to dismiss her from employment. The respondent's case is that the claimant clearly breached and admitted breaching the email and instant messaging policy and the reasons for dismissal were valid.

The claimant testified that she voluntarily wrote to apologise to Margret Mathenge and it was the said Margaret that she had discussed in her offensive emails.

The Court has considered the claimant's concerns that she was given a short notice to attend the disciplinary hearing and that she was not aware of the email and instant messaging policy. However she admitted to have committed the gross misconduct of writing the offensive emails. To that extent the Court finds that she fully contributed to her termination and she is not entitled to reinstatement or compensation as prayed for. She stated that she thought the communication was private but the Court returns that the respondent as the owner of the email system and platform was entitled to access the chats and retrieve them accordingly. The claimant's witness no. 2 (CW2) and who was the deputy to the Head of Human Resource - Margaret Mathenge also respondent witness No.2 (RW2) was one Peter Omache Nyakoi. His evidence was that he handled the claimant's case because RW2 was the complainant. He confirmed he summoned the claimant at noon on 25.04.2014. The claimant was then on leave and she arrived at 3.00pm and the Committee heard her case and he was the secretary to the Grievance Committee. The claimant admitted the allegations and apologised. The Committee recommended disciplinary action. The meeting ended a few minutes to 5.00pm and CW2 signed the letter of summary dismissal which was authored by RW2. The Court has considered that evidence and the overriding finding is that the claimant admitted the gross misconduct and even if she was given more time prior to appearing before the Grievants Committee, nothing would have changed in that regard. The Court finds that the respondent had a valid reason to dismiss the claimant as envisaged in sections 43 and 45 of the Employment Act, 2007.

The Court further finds that the fact that the claimant admitted the misconduct as was alleged and proceeded to apologise shows that she knew about the respondent's policy on use of the email facilities. Thus there is no reason to doubt the respondent's evidence that the claimant knew about the policy.

The court has considered the undisputed failure to serve formal notice or show cause notice and the short period the claimant was given prior to appearing before the Grievance Committee hearing and returns that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for:

a) The dismissal of the suit.

b) Each party to bear own costs of the suit.

Signed, dated and **delivered** in Court at **Nairobi** this **Wednesday, 8th January, 2020.**

BYRAM ONGAYA

JUDGE