



**Inginda v Cosmos Pharmaceutical Limited (Cause E191 of 2023)
[2025] KEELRC 2317 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2317 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E191 OF 2023**

**SC RUTTO, J
JULY 31, 2025**

BETWEEN

FRASER BULIMU INGINDA CLAIMANT

AND

COSMOS PHARMACEUTICAL LIMITED RESPONDENT

JUDGMENT

1. The Claimant avers that he was employed by the Respondent with effect from 1st February 2020 as a Sales Manager for the General Health Division and was tasked to turn around the performance of the General Health team, which had declined in 2019. According to the Claimant, he worked diligently and devotedly, and in the year 2020, General Health sales grew by 34%.
2. The Claimant further avers that he successfully guided the General Health team to fully achieve the 2021 target and over 100% for the whole team for the overall target set by the Respondent.
3. It is the Claimant's case that on 31st October 2022, the Director of the Respondent summoned him through a phone call and told him that he had made up his mind that the Claimant was no longer deemed fit to be in employment at the Respondent company. To this end, the Claimant avers that the Respondent, without any lawful basis, discriminated against him by subjecting him to an unjustifiable and punitive dismissal from employment.
4. The Claimant's claim against the Respondent is for the sum of Kshs 5,254,400.00 being maximum compensation for wrongful termination, service pay for 2 years 9 months, bonus for 9 months and unpaid leave. The Claimant further prays for an order of reinstatement without any loss of benefits, general damages for discrimination and harassment, exemplary damages and damages for violation of his constitutional right to fair labour practices. He has further prayed for the costs of the suit plus interest.



5. Opposing the Claim, the Respondent avers that there had been meetings involving the Claimant and his Supervisor-Head of Business Development, during which the supervisor had expressed his concerns regarding the Claimant's underperformance. According to the Respondent, these concerns centred around the Claimant's inability to meet established targets, deficiencies in supervising staff and failure to adhere to prescribed work plans and weekly report submissions.
6. The Respondent further avers that the Claimant being lawfully terminated, voluntarily signed a discharge certificate on 2nd December 2022 stating that he did not have any further or other claims against the Respondent. Consequently, the Respondent has asked the Court to dismiss the claim with costs.
7. In a Response dated 13th October 2023, filed in answer to the Respondent's Response, the Claimant denied the averments contained in the Response and reiterated the contents of his Memorandum of Claim.
8. During the hearing, which proceeded on 8th May 2024 and 28th April 2025, both parties called oral evidence.

Claimant's Case

9. The Claimant testified in support of his case and at the outset, sought to adopt his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed alongside the Memorandum of Claim as his exhibits before Court.
10. It was the Claimant's evidence that when he was employed by the Respondent, he was tasked to turn around the performance of the General Health team, which had declined in 2019. The Claimant averred that he was to be travelling the whole country and was to work with all the team members for at least one week in order to train them on marketing, product knowledge, presentation skills, sales amongst others. His role was also to check planners, reports and clear expenses, manage team budget, of field and marketing activities, set budgets for the year, and do strategy for the sales team, which he achieved.
11. The Claimant averred that in the year 2020, sales grew by 34% vs degrowth the previous year and due to the good performance, team members were taken to the South Coast for a sales conference and team building, plus a retreat as an appreciation. According to the Claimant, it was the first time the Respondent ever did that to the team members.
12. The Claimant further averred that a target for 2021 was achieved 100% as for General Health and over 100% for the whole team. In early March 2020, the General Manager passed on and his duties were divided amongst the two Sales Managers and the Marketing Manager.
13. That in a meeting, the Director, Business Development promised that if the targets were achieved, he would revise salaries upwards instead of hiring another manager. The Claimant stated that as a team, they had attained over 100% sales and again, they retreated to Diani Mombasa for a team building and sales conference. In March 2021, his salary was increased to Kshs. 322,000/-. That all along in 2020 and 2021, bonuses were being paid monthly due to the great achievement.
14. That in 2022, they had a budget of Kshs. 2,080,000,000/- overall sales for the year, with General Health to achieve Kshs. 612,000/- and Ksh.1,468,000,000/-. According to the Claimant, the company was struggling with out-of-stock products from January to October.
15. He further averred that the company's focus was also on Specialty Health in marketing support and launch of new products, with a bias on General Health as a non-focus area.



16. Throughout the years he worked as the Sales Manager together with the other managers, they had a monthly meeting at the beginning of every month to give a status report, feedback and challenges.
17. He is aware that in October (sic), the manager in charge of Specialty Health got an offer to work somewhere else, and they had a discussion in which he implied he would go and bargain for a better deal before thinking of resigning. He had a discussion with the Director in which he learnt that he had bargained to manage the two teams while he would get a counter-offer.
18. It was the Claimant's testimony that on 31st October, 2022, the Director summoned him to a meeting via a phone call and, out of the blue, told him he had made up his mind that they part ways. He claimed that his division was not performing well.
19. The Claimant contended that throughout his years of work in the organization, he had never had an oral or written communication about his performance and if anything, he was being paid bonuses due to his exemplary performance.
20. The Claimant averred that the Director told him that he could not fit into the former General Manager's shoes, nor his colleague's in charge of marketing. This rang a bell about the discussion they had had with the Manager Specialty Health.
21. The Claimant further stated that the following day, they had the usual monthly meeting, and no issue of performance about the teams came out.
22. That on 3rd November 2022, while in the field, he was once again summoned by the Director. In the meeting was the Head of Human Resources and Administration, Mr. Imanyara. He said he had made up his mind that the Claimant should resign, or he would teach him a lesson by summary dismissal. The Claimant refused to resign because he had no performance or disciplinary issues, and so he politely asked the company to initiate the process.
23. The Claimant averred that the letter of termination gave malicious and unfounded grounds upon which he was terminated.
24. According to him, no complaint (verbal or in writing) has ever been brought to his attention since he started working for the Respondent. He termed the allegations made in his termination letter untrue.
25. He further averred that in 2020, medical representatives underwent a performance improvement plan as directed and most of them improved. Only 4 left through resignation, having found other opportunities. This indicates that he was able to manage his juniors effectively.
26. It was the Claimant's testimony that the Head of Business Development, Mr. Alakh Patel, had a clear intention of terminating his contract, which was permanent and pensionable. His legitimate expectation was to work until retirement age.
27. The Claimant further averred that the pharmaceutical industry is close-knit, and any word such as his termination spreads very fast. This has dented his career of over 20 years in the industry, with opportunities for employment reduced with the current job situation in the country.
28. That throughout his employment, he received his bonus and with the stock situation having started improving, he expected to get his full bonus in arrears by the end of 2022, which was capped at a maximum of Kshs 40,000/- per month.



Respondent's Case

29. The Respondent called oral evidence through Mr. Raphael Imanyara and Mr. Alakh Patel, who testified as RW1 and RW2, respectively. Mr. Imanyara, who was the first to go, identified himself as the Head of Human Resources and Administration in the Respondent company. He started by adopting his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the Respondent to constitute his evidence in chief.
30. It was RW1's evidence that the Claimant's areas of underperformance, as discussed with his supervisor, included: failure to provide the members of his team with the essential support required to effectively execute their duties and succeed in their roles; failure to actively participate in crucial pharmacy meetings; failure to attend scheduled meetings as requested or required, including the meeting at Aga Khan Hospital, thereby leading to the Respondent's missing out on important updates and opportunities for collaboration; failure to consistently submit weekly reports in a timely manner, hindering the organization's ability to monitor and evaluate progress; lack of effective supervision of his team which led to a critical incident where one team member engaged in fraud and gross abuse of the company's policies procedures and regulations; and lack of the Claimant's overall leadership of his team resulting in the team's underperformance.
31. RW1 further averred that despite discussions and meetings with his immediate supervisor, the Claimant's underperformance persisted, including his inability to meet set targets, supervise staff effectively, and submit work plans and weekly reports.
32. Consequently, he summoned the Claimant to his office, where together with Mr. Alakh Patel (the Head of Business Development), they apprised the Claimant of the shortcomings in his performance.
33. According to RW1, the Claimant was given an opportunity to answer to the facts made against him. The Claimant defended his performance and pointed to some of his achievements in the role. However, his supervisor disputed this and showed him reports indicating he was not meeting the set targets.
34. The Claimant claimed that he was being targeted and mentioned the names of his colleagues who he alleged were behind the smear campaign because they wanted to be promoted to his position. One of the people he blamed was Vincent Marigi.
35. RW1 averred that the Claimant became brazenly arrogant and disrespectful of the Manager and dared him to sack him. He (RW1) informed the Claimant that the gross misconduct he was engaging in could result in dismissal or termination. Due to the tense situation, the meeting could not go on because the Claimant was not responding positively to the advice from the supervisor.
36. RW1 averred that on 2nd November 2022, the Claimant was served with a termination notice, which clearly outlined the reasons for the termination of his employment. Subsequently, between 4th November 2022 and 30th November 2022, the Claimant proceeded to complete his clearance with the Respondent.
37. Mr. Alakh Patel, who testified as RW2, identified himself as the Head of Business Development in the Respondent company. Similarly, he adopted his witness statement to constitute his evidence in chief.
38. RW2 averred that during the Claimant's employment, he was his direct supervisor and they held meetings during which he had expressed his concerns regarding his underperformance.
39. RW2 further averred that despite the said discussions and meetings with the Claimant, his underperformance persisted, including his inability to meet set targets, supervise staff effectively, and



submit work plans and weekly reports. It also came to his attention that the Claimant was approving fictitious medical camps that never occurred.

40. RW2 testified that he forwarded the matter to the Human Resources office and subsequently, the Claimant was summoned by the Human Resources Department, and together with RW1, they briefed the Claimant on the issues related to his performance.
41. According to RW2, the Claimant was given an opportunity to answer to the facts made against him and he defended his performance and pointed to some of his achievements in the role. However, he (RW2) disputed this and showed him reports indicating he was not meeting the set targets.
42. RW2 added that the Claimant became brazenly arrogant and disrespectful and dared him (RW2) to sack him. Due to the tense situation, the meeting could not go on because the Claimant was not responding positively to his (RW2) advice.
43. On 2nd November 2022, the Claimant was served with a termination notice, which clearly outlined the reasons for the termination of his employment, and between 4th November 2022 and 30th November 2022, the Claimant proceeded to complete his clearance with the Respondent.
44. The Claimant's final dues were calculated, and upon receipt of the same, he voluntarily signed a discharge certificate dated 2nd December 2022. However, the Claimant proceeded to alter the discharge certificate by inscribing the phrase "without prejudice" on it. Nonetheless, he proceeded to accept and receive his final dues in accordance with the document.
45. In RW2's view, the Claimant is not entitled to the reliefs sought in the Statement of Claim or any other relief.

Submissions

46. The Claimant submitted that the Respondent failed to subject him to a Performance Improvement Plan, which action went against Clause 6.2.3 of its Human Resource Policy Manual. In this regard, the Claimant has submitted that the allegation of poor performance could not be valid or proven against him.
47. It was further submitted that the Respondent failed to comply with the legal requirements of Section 41(2) of the *Employment Act* as the Claimant was not accorded a fair hearing or any hearing at all before his termination was effected.
48. In the same vein, it was submitted that the Claimant was never issued with a Notice to Show Cause prior to his termination from employment. In support of the Claimant's arguments, reliance was placed on a number of cases, including *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* ELRC Cause No. 171 of 2015, *Jacqueline Gitonga v Care International Kenya* ELRC Cause No. E119 of 2021 and *George Kagotho Gachuiru v County Government of Kiambu* ELRC Cause No. E028 of 2023.
49. On its part, the Respondent submitted that Section 45 of the *Employment Act* only applies where termination is unilateral and without just cause. That in the instant case, the Claimant's termination was consensual, as confirmed by the clear and unambiguous wording of the discharge certificate. To buttress this position, the Respondent placed reliance on the case of *Thomas De La Rue (K) Ltd v. David Opondo Omutelema* [2013] eKLR.
50. It was further submitted by the Respondent that the discharge certificate was voluntarily signed by the Claimant, given that in his Memorandum of Claim, he failed to plead that he had been coerced or that he had signed the discharge certificate under duress or undue influence.



51. Referencing the case of *KSC International Limited (Under Receivership) & 4 others v Bank of Africa (Kenya) Limited & 7 others* (Civil Case 446 of 2015) [2023] KEHC 24298 (KLR), the Respondent further submitted that the Claimant’s endorsement of the words “without prejudice” on the discharge certificate is immaterial to its binding nature, particularly in the instant case where a compromise/agreement was reached between the parties.
52. The Respondent further argued that the Claimant is estopped from pursuing this claim due to his conduct in signing the discharge certificate and accepting the payment of Kshs. 289,927.90. To this end, reliance was placed on Section 120 of the *Evidence Act* and the case of *Bunyi v Saab Kenya Limited* [2023] KEELRC 3238 (KLR).

Analysis and Determination

53. Flowing from the pleadings, the evidence on record as well as the rival submissions, it is clear that the Court is being called to determine the following issues: -
 - i. Whether by executing the discharge certificate, the Claimant absolved the Respondent from further liability and action arising from the termination of employment;
 - ii. Depending on (i) whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant;
 - iii. Depending on (i) whether the Claimant was afforded procedural fairness prior to termination;
 - iv. Is the Claimant entitled to the reliefs sought?

Import of the discharge certificate

54. The Respondent has contended that the Claimant voluntarily signed a discharge certificate on 2nd December 2022 stating that he did not have any further claim against the Respondent, hence he is not entitled to the reliefs sought in the Statement of Claim.
55. Thus, the question that begs for an answer is whether the discharge certificate had the effect of discharging the Respondent from any further liability relating to the Claimant’s employment and thereby precluding the Claimant from instituting a claim as he has done through the instant suit.
56. It is notable that upon executing the discharge certificate, the Claimant remarked, “without prejudice”.
57. According to the *Black’s Law Dictionary* (10th Edition, p. 1837), the term “without prejudice” means “without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party”.
58. Applying the definition of the term “without prejudice” to the case herein, it can very well be said that despite executing the discharge certificate, the Claimant reserved his right to bring a claim to enforce his rights with respect to the matter in issue being termination of his employment by the Respondent.
59. Put differently, the Claimant did not waive his right to institute legal proceedings against the Respondent relating to his termination from employment. As such, the Respondent was not absolved from liability relating to the termination of the Claimant’s employment.
60. That said, I now turn to consider whether there was a justifiable reason for the termination of the Claimant’s employment.



Justifiable reason?

61. It is discernible from the record that the Claimant was terminated from employment on grounds related to his performance. It was specifically alleged that the Claimant's reports had reported that he had failed to give them the necessary support they needed to perform their duties successfully. That further, the Claimant did not participate in pharmacy campaigns and did not attend scheduled meetings, including at the Aga Khan Hospital. The Claimant was further alleged to have failed to submit weekly reports as expected, even after several reminders. It was further alleged that the Claimant had failed to supervise his reports to the point where one of them was engaged in fraud and gross abuse of company policies, procedures and regulations, yet he (Claimant) was not aware of it. That, finally, the team the Claimant was leading was underperforming.
62. The Claimant has disputed the allegations spelled out in the letter of termination and has contended that throughout his employment with the Respondent, he never had issues related to his performance.
63. It was the Claimant's testimony that when he was employed by the Respondent, he was tasked to turn around the performance of the team, which had declined in 2019 and in the year 2020, the sales grew by 34% from the previous year. According to the Claimant, this was a 106% achievement. The Claimant further averred that in 2021, his team achieved 100% targets.
64. In terms of Section 43(1) of the *Employment Act*, the Respondent being the employer, was required to prove the reasons for termination of employment and failure to do so, such termination would be deemed to be unfair. Connected to this, the Respondent was enjoined under Section 45 (2) (a) and (b) to prove that the reasons for the termination of employment were fair, valid and related to the Claimant's performance.
65. In view of the reasons advanced for the Claimant's termination from employment, it was expected that the Respondent would lead evidence to confirm its assertions that the Claimant's performance was not at par with the required standards. Regrettably, this was not the case.
66. I must say that despite the Respondent's assertion in the Claimant's letter of termination that his performance had been assessed, there was no evidence to confirm as much. Indeed, there was no evidence that the Claimant's performance had been evaluated against set targets vis-à-vis his achievement over a specific period of time.
67. In light of these gaps, I am led to question how the Respondent was in a position to determine that the Claimant's performance was not up to its standards, without any evidence of assessment against his set targets.
68. It is also evident from the foregoing that the Respondent did not adhere to its own Performance Management Policy, which was exhibited in Court. From the said Policy, it is clear that there is an elaborate process of performance appraisal leading up to the placement of an employee on a Performance Improvement Plan and finally, termination in instances where an employee fails to meet the set targets. Evidently, the Claimant herein was not subjected to the process contemplated under the Respondent's Performance Management Policy.
69. It is also worth noting that the Respondent did not discount the Claimant's evidence that throughout 2022, the company was struggling with out-of-stock in respective products from January to October. In support of his assertion, the Claimant exhibited emails dated 5th October 2022 and 31st October 2022 emanating from one Susan Okoma, the Respondent's Regional Marketing Manager, in which she acknowledged that the overall market was slow and on a decline. To this end, she singled out specific



products and further observed that most of the 20 companies were on a decline value-wise wise except the Respondent company and a few others.

70. Therefore, if indeed the Claimant's team was underperforming as alleged by the Respondent, it failed to indicate how the overall market growth, as depicted by its Regional Marketing Manager, had impacted the Claimant's performance.
71. In light of the foregoing, I am led to conclude that the decision by the Respondent that the Claimant had not performed as per the required standards was not arrived at based on an objective assessment.
72. Further to the above, the Respondent did not adduce evidence to support its assertions that the Claimant had failed to submit weekly reports despite several reminders. Indeed, no such reminder was exhibited in court. Further, there was no evidence that the Claimant had failed to give his reports the necessary support they needed to perform their duties successfully.
73. Needless to say, the allegations levelled against the Claimant were not supported by any evidence.
74. All things considered, the Court finds that the Respondent has failed to discharge its evidential burden by proving that it had a justified reason to terminate the Claimant's employment based on the allegations set out in the letter of termination. To this end, the Claimant's termination from employment was not for a justifiable reason.

Procedural fairness?

75. Pursuant to Section 45 (2) (c) of the [Employment Act](#), an employer is required to prove that in the termination of an employee from employment, it complied with the provisions of fair process. The specific requirements of a fair hearing are provided for under Section 41(1) of the [Act](#) in the following manner: -
 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. Underlined for emphasis
76. In the instant case, there is no evidence that the Respondent complied with the requirements under Section 41 (1) of the [Employment Act](#). Here is why. First, there is no evidence that the Claimant was put on notice that the Respondent was considering terminating his employment based on any specified allegations.
77. Second, there is no evidence that prior to the meeting held on 1st November 2022, between the Claimant, RW1, and RW2, the Claimant was given sufficient notice that his performance would be discussed at the said meeting. Tied to this, there is no evidence that the Claimant had a fair chance and opportunity to sufficiently prepare for the meeting, including obtaining necessary evidence. Further, to the foregoing, it is not clear whether the Claimant was informed of his right to be accompanied to the meeting by a fellow employee of his own choice.
78. In the foregoing premises, I am led to conclude that in terminating the Claimant from employment, the Respondent did not act in compliance with the requirements of a fair hearing as stipulated under Section 41 of the [Employment Act](#). Accordingly, the Claimant's termination from employment was procedurally unfair.



Reliefs?

79. Having found that the Respondent has not proved that there was a justifiable reason to terminate the Claimant's employment and in so doing failed to adhere to the requirements of procedural fairness, the Court awards the Claimant compensatory damages equivalent to six (6) months of his gross salary. In issuing this award, the Court has considered the length of the employment relationship as well as the circumstances attendant to the Claimant's termination from employment.
80. The claim for unpaid leave succeeds as the Respondent failed to produce the Claimant's leave records, despite its obligations under Section 74(1) (f) of the *Employment Act*. As such, it did not discount the Claimant's claim that he had accrued leave that was not paid.
81. The claim for service pay is declined as it is evident from the Claimant's pay slip that he was contributing to the National Social Security Fund. Therefore, he falls within the exclusions under Section 35(6) of the *Employment Act*.
82. The claim for bonus pay is also declined as there is no evidence that the Claimant had qualified for the same. Besides, bonus pay is not guaranteed, and the employer has the discretion whether or not to pay the same, and if so, the rate at which the bonus is paid.

Orders

83. In the final analysis, the Court enters Judgment in favour of the Claimant against the Respondent in the following manner: -
 - a. A declaration that the termination of the Claimant from employment was unfair and unlawful.
 - b. The Claimant is awarded the sum of Kshs 1,932,000.00 being compensatory damages equivalent to six (6) months of his last gross salary.
 - c. The Claimant is awarded the sum of Kshs 64,400.00 being payment for accrued leave days for a period of six (6) days.
 - d. The total award is Kshs 1,996,400.00.
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
 - f. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Okondo instructed by Ms. Guserwa

For the Respondent Mr. Owino instructed by Mr. Wandati

Court Assistant Millicent Kibet

ORDER



In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

