



**Musumbi v Astrazeneca Pharmaceuticals Limited (Employment and Labour Relations Cause E436 of 2022) [2025] KEELRC 2300 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2300 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E436 OF 2022**

**BOM MANANI, J**

**JULY 31, 2025**

**BETWEEN**

**MATHEW MUSUMBI ..... CLAIMANT**

**AND**

**ASTRAZENECA PHARMACEUTICALS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Claimant avers that the Respondent hired his services as its Country Manager as from 27<sup>th</sup> July 2020. He contends that the position required him to report to the Respondent's Country Director. He further avers that his monthly salary was agreed at Ksh. 823,000.00.
2. The Claimant avers that on 22<sup>nd</sup> October 2021, the Respondent's officers summoned him for a meeting to discuss what he was informed was his poor performance. He contends that this surprised him since he considered his performance as good.
3. The Claimant avers that so far as he is aware, he used to meet his work targets without fail. He further contends that prior to the summons of 22<sup>nd</sup> October 2021, the Respondent had not notified him of the alleged poor performance.
4. The Claimant contends that after the meeting of 22<sup>nd</sup> October 2021, the Respondent put him on a Performance Improvement Plan (PIP). He contends that the program was to run from 22<sup>nd</sup> October 2021 up to 31<sup>st</sup> December 2021.
5. The Claimant avers that notwithstanding the Respondent placing him on the PIP, it (the Respondent) did not provide him with resources to facilitate improvement of the alleged poor performance. He contends that despite this, he continued to exert himself to post the best results.



6. The Claimant avers that the ravages of the Covid 19 pandemic impacted negatively on the general performance of the Respondent. He avers that despite this, he was able to achieve 91% of the targets which had been set for him in 2021.
7. The Claimant avers that on 25<sup>th</sup> January 2022, the Respondent's officers summoned him for yet another meeting relating to his alleged poor performance. He contends that during the meeting, the Respondent's management informed him that his performance had further plummeted to 89%.
8. The Claimant contends that on 2<sup>nd</sup> February 2022, the Respondent terminated his contract of service. He contends that the Respondent's decision was illegal and violated his right to fair labour practice.
9. It is his case that the Respondent terminated the employment relation between them without valid reasons. He avers that although his published performance score showed that he attained 91% of the target which was set for him for 2021, the Respondent unilaterally adjusted this score to 89%.
10. The Claimant avers that the aforesaid decision contravened the requirements of fair procedure. He avers that the Respondent's action reeked of bias as it did not take into account his exemplary performance in the face of the difficult economic environment that had been occasioned by the Covid 19 pandemic.
11. The Claimant contends that the Respondent did not pay him his terminal dues after it illegally terminated his services. As such, he contends that the Respondent violated his right to fair labour practice. Consequently, he seeks the various reliefs that are enumerated in the Statement of Claim.
12. In response, the Respondent admits that the Claimant was its employee and further admits that it terminated his contract of service. However, it denies that the decision to terminate the contract was illegal.
13. The Respondent avers that it terminated the employment relation between them due to the Claimant's underperformance. It contends that the Claimant was not able to meet the agreed sales targets despite his experience.
14. The Respondent contends that it notified the Claimant about his poor performance and offered him assistance to improve. It avers that despite these efforts, the Claimant's performance did not improve. Hence the decision to sever the employment relation between the parties.
15. The Respondent contends that it held a meeting with the Claimant on 22<sup>nd</sup> October 2021 to discuss his performance when it was agreed that he be placed on a PIP. It contends that during the meeting, the Claimant and his line manager agreed on remedial measures to assist him improve his performance.
16. The Respondent contends that during the currency of the PIP, the Claimant and his line manager held regular bi-weekly review sessions to evaluate his productivity and discuss any shortcomings that were observed. Further, the Respondent avers that it organized for training sessions for the Claimant by external trainers. It contends that despite all these efforts, the Claimant's performance did not improve.
17. The Respondent avers that before it released the Claimant from employment, it wrote to him on 25<sup>th</sup> January 2022 inviting him for a performance hearing scheduled for 31<sup>st</sup> January 2022. It contends that it informed the Claimant of the poor performance charges against him beforehand. It further avers that it informed him of the right to be assisted by a fellow employee of his choice during the hearing.
18. The Respondent avers that the poor performance hearing was chaired by an independent facilitator. It contends that the hearing was conducted virtually because the participants were in different



jurisdictions. It avers that the Claimant attended the hearing and was accorded the opportunity to give an account of his performance and to put questions to the witnesses who were called for the employer.

19. The Respondent avers that after the hearing, the facilitator came to the conclusion that the Claimant had failed to discharge his duties as per the terms of the agreement between the parties. It contends that the facilitator established that despite the Claimant being aware of his targets, he had been unable to meet them even though the targets were fair and reasonable.
20. The Respondent contends that the facilitator concluded that the working relation between the parties had irredeemably broken down because of the Claimant's inability to deliver on his mandate. It further contends that the facilitator established that the working relation between the parties could no longer be sustained because of the Claimant's sustained unsubstantiated accusations against his line manager. As such, he made a recommendation that the contract between the two be closed.
21. The Respondent avers that it terminated the Claimant's employment based on the recommendation of the facilitator. It contends that it paid the Claimant his terminal dues to wit the following: one month's salary in lieu of notice to terminate his contract; salary for days worked in February 2022; leave encashment; expense allowance; and car allowance. As such, it avers that the Claimant's suit is unmerited and ought to be dismissed with costs.

### **Issues for Determination**

22. After evaluating the pleadings and evidence on record, the following issues emerge for determination:-
  - a. Whether the contract of service between the parties was legitimately terminated on account of poor performance on the part of the Claimant.
  - b. Whether the Claimant is entitled to the reliefs which he seeks through this case.

### **Analysis**

23. Section 41 of the *Employment Act* recognizes poor performance as a ground for termination of an employee's contract of service. However, in order for an employer to invoke it as a reason for termination of an employee's contract, he must provide cogent evidence pointing to consistent poor performance by the employee despite efforts to assist him to improve. The employer is also required to subject the employee to a performance hearing.
24. A charge of poor performance presupposes that the parties to a contract of service had agreed on achievable performance targets which the employee has failed to meet. In addition, the parties must have developed a performance appraisal mechanism against which the employee's performance has been measured and found to be unsatisfactory despite assistance by the employer (*Kamau v Kevian Kenya Limited* (Cause 467 of 2019) [2023] KEELRC 627 (KLR) (16 March 2023) (Judgment)).
25. According to the evidence on record, the Claimant and Respondent entered into an employment contract on 1<sup>st</sup> July 2020. Although the contract does not speak to the issue of performance, it mentions that the Claimant was bound by the Respondent's policies, procedures, rules and regulations which are applicable to the latter's employees. These include the Respondent's Policy & Procedure: Performance Management Manual which appears at page 95 of the Respondent's trial bundle.
26. According to the instrument, the Respondent's employees and their line managers are required to set performance targets annually. These targets should be clear and measurable in order to deliver business results. Further, performance objectives are required to be cascaded and aligned through the organization into function, team and individual objectives.



27. The policy provides for reward in recognition of good performance. It also provides for assistance in case of poor performance with the intent that the affected employee may improve his performance.
28. To ensure optimum performance, the policy requires employees to identify their development, training and support requirements. It further requires employees to request for coaching and feedback whenever necessary. The employees are expected to provide constant feedback regarding their performance to their line managers and to deliver on their objectives in accordance with the Respondent's values.
29. On the other hand, the line managers are required to propose and agree on performance objectives with the employees who report to them. In addition, they are required to review overall performance of the employees and provide them with feedback.
30. The line managers are expected to listen to feedback on own performance from the employees who report to them and address their concerns. In addition, they are required to provide reviews and rewards where appropriate.
31. The policy provides for continuous informal engagements between employees and their supervisors regarding their performance. These engagements should be in the form of coaching and feedback.
32. In addition, the policy provides that there should be two formal performance review sessions which should be documented. These are: the mid-year review and the end-year review.
33. The policy provides that in instances of poor performance by an employee, there should be positive interventions in the form of counselling sessions, feedback discussions, coaching and training meant to assist the employee to rectify the unsatisfactory performance. It further provides that where such intervention does not yield the desired results, the line manager may take disciplinary action against the employee which may result in the termination of his employment.
34. In the instant case, the parties are in agreement that as the Country Manager (Commercial Department) of the Respondent, the Claimant was charged with supervision of the Respondent's personnel who were tasked with sales of the latter's products. In this capacity, the Claimant's annual performance targets were hinged on the individual performance targets of the employees who were reporting to him. Indeed, the Respondent's witness spoke to this fact when she stated that as head of business in Kenya, the Claimant was required to set targets for the team that was working under him and to further see to it that it (the team) attained the set targets.
35. The Respondent's witness underscored the fact that attainment of the set targets was critical for the Respondent since it impacted on its profitability. As such, she contended that the Claimant was duty bound to ensure that his team was up to speed in meeting the set targets.
36. The controversy between the parties appears to centre on the Claimant's performance for the year 2021. Both parties do not contest the fact that the Claimant had been given targets for the year.
37. According to the evidence on record, when the Respondent conducted the Claimant's mid-year performance review, it became apparent that he was performing below the 100% performance goal which had been set. Indeed, during the Claimant's oral testimony, he confirmed that his performance was at 97% at the time.
38. Whilst the Claimant contends that a score of 97% was pretty good, the Respondent contends that it was not. According to the Respondent, the Claimant was expected to attain 100% of the set targets.



39. Concerned that this performance was below its expectations, the Respondent placed the Claimant on a performance improvement plan (PIP). The evidence on record shows that the Respondent implemented its aforesaid decision through its letter to the Claimant dated 22<sup>nd</sup> October 2021. Both parties agree that the letter was issued to the Claimant after a meeting was held between him and his line manager at which the issue of his performance was considered.
40. According to the aforesaid letter, the Respondent informed the Claimant regarding the reasons for its decision. It contended that the decision was prompted by the Claimant's failure to meet the financial targets for Kenya for 2021 in line with the submitted Medium Term Plan (MTP).
41. The Respondent informed the Claimant that he was required to hold bi-weekly meetings with his line manager to review the progress made in attaining the annual targets. He was further asked to communicate any assistance which he may require in the process.
42. The Claimant does not deny having received the above communication. As a matter of fact, he confirmed receipt of the letter during his oral testimony in court.
43. At the end of the PIP, the Claimant's performance did not hit the 100% mark which the Respondent expected. According to the Claimant, his performance dropped marginally to 92%. However and in his view, this was still good performance given that he was working under difficult economic conditions which had been occasioned by the negative impact of the Covid pandemic on businesses.
44. Contrary to the Claimant's assertion that his performance after the PIP period stood at 92%, the Respondent tabled data to demonstrate that it (the performance) in fact dropped to 89%. The Respondent contends that this score, measured against the expected target of 100%, qualified as poor performance.
45. From the record, it is not in contest that the Claimant did not attain the 100% target which had been agreed on. He has blamed the failure to reach the said target on, inter alia, the ravages of the Covid 19 pandemic. However, the Respondent denies that the pandemic had a negative impact on all businesses.
46. That the Claimant attained 89% against the expected 100% may not appear as poor performance for him. However, the reality remains that he did not meet the agreed threshold.
47. In the court's view, performance that falls below the agreed threshold between an employer and an employee provides a valid reason for the employer to consider releasing the employee from employment on grounds of poor performance. The court may entertain the thought that had it been in the employer's shoes, it would have considered the matter differently. However, this alone cannot justify interfering with the employer's decision to terminate the contract of service if it (the decision) falls within the band of decisions that a reasonable employer would have made based on the same set of facts (see *Kenya Revenue Authority v Reuwel Waithaka Gitabi & 2 others* [2019] eKLR).
48. Whilst one employer would have, quite reasonably, considered the Claimant's performance as acceptable, another employer would have, quite reasonably, considered it as unacceptable. Yet, either of the decisions would still have fallen in the band of what would constitute a rational reaction by a reasonable employer.
49. As such, I arrive at the conclusion that there was sufficient material to support the Respondent's contention that the Claimant failed to meet the agreed target after his PIP period came to a close thus justifying the decision to terminate his contract. Consequently, I find that the Respondent had a justifiable reason to sever the employment relation between the parties.



50. Did the Respondent adhere to the procedure developed through case-law whilst processing the Claimant's release from employment on account of poor performance? The answer to this question is in the affirmative.
51. The record shows that after the Claimant failed to meet the expected MTP, his line manager summoned him for a meeting to discuss his performance. The record further shows that the Claimant was then put on a PIP to assist him attain the set targets.
52. The letter dated 22<sup>nd</sup> October 2021 addressed to the Claimant shows that the Respondent asked him to communicate any assistance which he may require to meet his targets. During the Claimant's oral evidence in court, he said that he did not seek assistance from the Respondent even though he had been given the leeway to do so.
53. When the Claimant failed to meet the agreed target during the PIP period, the Respondent summoned him for a performance hearing at which the decision to terminate his contract was considered. The record shows that the hearing proceeded before an independent facilitator and the Claimant was given an opportunity to ventilate his case before a decision to terminate his contract for want of performance was arrived at.
54. The record further shows that the Respondent terminated the Claimant's contract of service based on the recommendations of the facilitator. Although the Claimant initially contended that he was not given a chance to challenge the decision on appeal, it is apparent from his cross examination that this right was granted to him.
55. Having regard to the foregoing, it is apparent that the Respondent complied with the procedural strictures that govern the release of an employee from employment on account of poor performance. It is so declared.
56. The upshot is that the court finds that Respondent's decision to terminate the Claimant's contract of service was informed by valid reasons and was executed in accordance with fair procedure. In the premises, it (the court) declines the Claimant's prayer that the decision be declared unlawful. For the same reason, the court declines the Claimant's prayer that the decision be declared to have contravened article 41 of the Constitution on his right to fair labour practices.
57. The Claimant has claimed for payment of: salary for the days he worked in February 2022; pay in lieu of notice to terminate his contract of service; and pay in lieu of accrued leave days. However, the Respondent tendered evidence to demonstrate that all these items were paid (see pages 152 to 157 of the Respondent's trial bundle dated 23<sup>rd</sup> May 2024). To be specific, the payment advises by Citi Bank at pages 156 and 157 of the Respondent's trial bundle indicate the status of the aforesaid payments to the Claimant as "processed".
58. The Claimant did not provide cogent evidence to controvert the Respondent's position on the above payments. The Respondent's case was that it remitted the impugned payments into the Claimant's account through electronic money transfer. If the Claimant's position is that he did not receive the funds, he should have exhibited a bank statement from his bankers to demonstrate that the money did not hit his account as claimed by the Respondent. However and as the record shows, he did not do so. Instead, he simply made a bare denial of having received the cash. This being the case, the court is convinced that the Respondent remitted the impugned funds to the Claimant's account. As such, the above claims by the Claimant are declined.



59. The evidence on record demonstrates that the Respondent legitimately terminated the Claimant's contract of service. As such, the Claimant's prayer for compensation for unfair termination of his contract of service is declined.
60. The Claimant has claimed service gratuity. However, according to the pay slip which he tendered in evidence for the month of January 2022, he was a contributor to the National Social Security Fund. As such and by virtue of section 35 (6) (d) of the Employment Act, he is not entitled to pursue this claim. Consequently, the claim for service pay is declined.

#### **Determination**

61. The upshot is that the court finds that the Respondent had valid reasons to consider terminating the Claimant's contract of service on account of poor performance. Further, it is apparent that the Respondent adhered to fair procedure in processing the Claimant's release from employment.
62. Consequently, the court finds that the Claimant's case is devoid of merit.
63. As such the suit is dismissed.
64. Each party to bear own costs.

**DATED, SIGNED AND DELIVERED ON THE 31<sup>ST</sup> JULY, 2025**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

#### **Order**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

