Aga Khan University Hospital v Gesore (Civil Appeal 133 of 2020) [2025] KECA 1214 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KECA 1214 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 133 OF 2020

J MOHAMMED, FA OCHIENG & AO MUCHELULE, JJA

JULY 4, 2025

BETWEEN

THE AGA KHAN UNIVERSITY HOSPITAL ..... APPELLANT

AND

DR EDNA KEMUNTO GESORE ..... RESPONDENT

(An Appeal from the Judgment of the Employment and Labour Relations Court at Nairobi, (M. Onyango, J.) dated 21st February 2020 in ELRC Petition No. 105 of 2019)

JUDGMENT

1. The appeal before us emanates from a petition in which the appellant herein was sued by the respondent after the appellant relinquished her clinical rights.

2. In 2006, the respondent successfully applied for a scholarship with the appellant for a post-graduate program to study anaesthesiology. During her training, the respondent was appointed as a resident in the department of anesthesia.

3. Upon completion of her training, the appellant offered the respondent a full-time faculty position in the department of anesthesia, effective 1st January 2010, on renewable one-year contracts.

4. Effective 2nd April 2012, the respondent was promoted to a Senior Instructor. She was further promoted to the position of Assistant Professor and full-time clinical practitioner on 16th January 2014.

5. In addition to being an employee of the appellant, the respondent was given clinical privileges on 21st May 2012 for a term of three years. These privileges gave the respondent rights to practice as a private medical practitioner and to admit her own patients to the hospital. The privileges were renewed on 9th May 2018.

6. On 1st April 2019, the respondent tendered her resignation notice to the appellant with effect from 30th June 2019. The resignation was accepted on 2nd May 2019.

7. On 10th June 2019, the University of Nairobi wrote to the appellant seeking permission for the respondent to continue treating its staff at the hospital in her private capacity. In response, the appellant wrote a letter dated 17th June 2019 to the respondent informing her that she would automatically relinquish her clinical privileges upon her resignation taking effect.

8. Aggrieved by the response, the respondent filed the petition, the subject of this appeal, seeking the following orders:

    a. A declaration that the conduct of the appellant violated the respondent's fundamental rights and freedom under Articles 27, 41, 47, and 50 of *the Constitution* as relates to dispute resolution.

    b. An order quashing the letter dated 17th June 2019 from the appellant to the extent that it purported to cancel the respondent's clinical privileges on 30th June 2019.

    c. Costs of the petition.

9. On the 24th June 2019, the respondent's application seeking an interim order to preserve her clinical privileges was granted.

10. When the application came up for inter-parties hearing on 8th July 2019, it was consolidated with the petition.

11. The respondent's case was that her appointment as a full-time faculty member was distinct from her admission rights and privileges. She contended that her employment contract did not mention admission rights. She stated that the renewal of privileges would expire in 2021. She pointed out that the privileges were conferred to her under the appellant's by-laws, 2010, as amended by by-laws, 2017.

12. The respondent submitted that the privileges existed even for practitioners who were not members of the faculty. She referred to Article 2.3.2 of the amended by-laws, which defined an active medical staff to exclude those already privileged. The respondent pointed out that she was already privileged under the 2010 by-laws, and was not caught up by the amendments in 2017.

13. The respondent was of the view that the termination of her privileges was discriminatory as other private practitioners who were not members of the faculty were exempted from the 2017 by-laws.

14. Opposing the petition, the appellant, through the affidavit of Dr. Majid Twahir, sworn on 4th July 2019, noted that it came as a surprise when the respondent abruptly resigned on 1st April 2019, without giving any reasons, as her appraisals had been positive throughout her employment.

15. He noted that the renewal of the respondent's privileges on 9th May 2018 was made in line with the 2017 by-laws, which were in force at the time of the said renewal. He pointed out that the Medical Staff Credentialing and Privileging Policy dated 15th March 2006 and revised on 15th March 2018, was explicit that the 2017 by-laws would apply.

16. He further stated that the respondent's privileges were lost as a result of her voluntary resignation, and that the letter dated 17th June 2019 did not in any way make any decision or take away the respondent's clinical privileges.

17. The appellant submitted that upon the respondent's resignation, she was no longer an employee, and as such, she could not invoke the jurisdiction of the court under *the Constitution* or Section 12 of the Employment and *Labour Relations Act*.

18. The appellant further submitted that the privileges conferred to the respondent were a direct result of her contract, which was very distinct from private practitioners who applied while they were not faculty members.

19. The appellant was of the view that the alleged discrimination against the respondent had not been established. It was of the view that such discrimination would arise if some individual or individuals were treated differently, from other members of the group, to which the individuals belonged. The appellant submitted that the respondent was attempting to use her alleged contractual rights to establish constitutional rights, however, not all violations of a contractual provisions were akin to violations of *the Constitution*.

20. The learned judge held that since the respondent claimed that the appellant's clinical privileges were conferred upon her by virtue of her employment, the ELRC had the jurisdiction to hear and determine the petition.

21. The learned judge further held that the respondent was already privileged at the time when the 3rd Edition by-laws came into operation, and was therefore, exempted under paragraph 2.3.2 of the by-laws.

22. The learned judge held that the respondent would also have had to resign from both active medical staff membership and full-time faculty membership. In this instance, the court held that the respondent had only resigned from full-time faculty membership; hence, Section 3.4 of the by-laws did not apply to her. The court held that the two positions were disjunctive.

23. The learned judge held that the letter dated 17th June 2019 was discriminatory against the respondent as it would be treating her differently from other active medical staff who were already privileged.

24. Consequently, the respondent's petition was allowed as prayed.

25. Being dissatisfied with the impugned judgment, the appellant lodged the present appeal, in which it raised 15 grounds of appeal. The grounds of appeal are summarized as follows:

    a. Jurisdiction: The appellant argued that the ELRC lacked jurisdiction as the dispute did not arise from an employment relationship, and also failed to disclose a valid constitutional issue. It contended that the petition was improperly treated as an unfair termination claim.

    b. Clinical privileges: The appellant maintained that the respondent's clinical privileges were tied to her employment and automatically lapsed upon her resignation. It argued that the trial court erred in finding otherwise and in misinterpreting the appellant's by- laws.

    c. Discrimination: The appellant challenged the finding of discrimination under Article 27 of *the Constitution*, arguing that the respondent did not meet the legal threshold for such a claim, including failure to prove differential treatment or lack of justification.

26. The appellant sought that the appeal be allowed; the ELRC judgment be reversed; and that the petition be dismissed with costs.

27. During the hearing of the appeal on 24th February 2025, the appellant was represented by learned counsel Mr. Amoko, while the respondent was represented by learned counsel Mr. Teddy Ochieng. Counsel relied on their respective written submissions, which they orally highlighted.

28. Mr. Amoko submitted that the ELRC lacked jurisdiction under Section 12 of the Employment and *Labour Relations Act*, as the matter in question, being the grant or cancellation of clinical privileges, did not arise out of an employment relationship. Counsel contended that clinical privileges were contractual arrangements distinct from employment, and hence did not fall within the purview of the ELRC.

29. It was the appellant's position that the respondent's clinical privileges were inextricably tied to her status as a full-time faculty member. Her resignation from the faculty, effective 30th June 2019, automatically led to the cessation of those privileges. The appellant maintained that there was no termination, but rather an automatic relinquishment, as communicated in the appellant's letter dated 17th June 2019.

30. The appellant emphasized that the request for continuation of privileges originated from the University of Nairobi, and not from the respondent. The appellant declined this request in adherence to its established by-laws, asserting that it was "constrained not to allow the request" and that privileges were not retained post-employment.

31. The appellant contended that the respondent's claims, particularly those under Articles 40, 47, and 50, were insufficiently pleaded and lacked particularity. The appellant further submitted that the ELRC erred in developing a new ground of discrimination under Article 27, which was neither pleaded nor canvassed.

32. The appellant pointed out that its by-laws clearly delineated two distinct classes of clinical staff: long-standing private practitioners with "grandfathered" privileges; and full-time faculty members whose privileges were contingent on employment. The appellant asserted that no discrimination occurred, as the respondent did not belong to the first category. The decision not to continue her privileges following her resignation was thus a lawful and reasonable administrative consequence, which was not differential or unlawful.

33. In its written submissions, the appellant strongly contested the jurisdiction of the ELRC. It argued that the dispute did not fall within the scope of Section 12 of the *Employment and Labour Relations Court Act*, as it did not genuinely involve a constitutional question.

34. The appellant submitted that the case was, at its core, an employment dispute concerning clinical privileges linked to employment, and not a valid constitutional complaint. The appellant asserted that the framing of the matter as a constitutional petition was misleading and that the learned Judge's assumption of jurisdiction amounted to a miscarriage of justice.

35. Regarding the nature of clinical privileges, the appellant submitted that these privileges were not independent but were intrinsically linked to the respondent's employment as a full-time faculty member. According to the 3rd Edition of the appellant's by-laws, only full-time faculty members may hold clinical privileges. The appellant emphasized that once the respondent resigned from her faculty position, she automatically ceased to hold these privileges under Section 3.4 of the by-laws.

36. The appellant contended that the learned Judge misinterpreted Clause 2.3.2, which applies to private practitioners, and wrongly applied it to the respondent, who was never categorized as such.

37. The appellant challenged the respondent's claim that her constitutional rights were violated, particularly under Article 27 of *the Constitution* (the right to equality and freedom from discrimination). It submitted that the petition did not clearly articulate any constitutional breach, and that the learned Judge wrongly went beyond the issues that were actually pleaded and supported by evidence.

38. Specifically, the appellant claimed that the learned judge failed to apply the correct legal test for constitutional discrimination, as outlined in precedents such as Mohammed Abduba Dida vs. Debate Media Limited & another [2018] eKLR. The appellant submitted that the respondent did not prove differential treatment, failed to identify valid comparators, and did not establish that any such treatment was unjustified or prejudicial.

39. Opposing the appeal, Mr. Teddy Ochieng submitted that clinical privileges were independent rights afforded to medical professionals, regardless of their employment status. Counsel was of the view that the respondent, having resigned from her faculty position, nonetheless remained an active medical staff member and was, in that capacity, entitled to continued privileges under the appellant's by-laws.

40. The respondent submitted that the Employment and Labour Relations Court (ELRC) is constitutionally empowered to interpret constitutional questions incidentally arising from employment disputes. Since the discrimination claim stemmed from her resignation, a matter rooted in employment, the ELRC was properly seized of jurisdiction.

41. The respondent submitted that the Employment and Labour Relations Court (ELRC) correctly found unlawful discrimination under Article 27. She was of the view that as two classes of doctors were identified: those engaged as private practitioners and those engaged as employees, upon her resignation, she should have automatically transitioned into the former category, yet she was denied that status.

42. The respondent contended that such treatment was inconsistent with Section 2.3.2 of the appellant's by-laws, which permits both classes to hold privileges. However, the respondent's counsel conceded that no comparative evidence was tendered to demonstrate differential treatment. The respondent argued instead that the discrimination arose from the misapplication of the by-laws, not from treatment vis-à-vis other doctors.

43. The respondent in her written submissions asserted that the ELRC was rightfully seized of the matter. Although she had resigned as a full-time faculty member, she maintained that the dispute did not stem solely from her employment contract but was properly framed as a constitutional petition concerning a violation of her rights, particularly the right against discrimination.

44. The respondent emphasized that Article 162(2) of *the Constitution* and Section 12 of the ELRC Act grant the court jurisdiction over employment and labour related matters, including those involving constitutional claims. She criticized the appellant for having previously moved the court to amend pleadings to reframe the case as a constitutional petition, which she argued, undermined its current objection to the court's jurisdiction.

45. On the issue of clinical privileges, the respondent contended that these rights were not automatically terminated by her resignation from her faculty position. She submitted that her clinical privileges were distinct from her employment as a faculty member and that her petition sought to clarify whether these privileges were tied to her job status. In her view, the trial court rightly found that the matter fell within its purview as the dispute involved employment relations broadly.

46. The respondent further disputed the appellant's reliance on specific by-laws (notably Sections 2.3.2 and 3.4 of the 3rd Edition) to justify the withdrawal of her clinical rights. According to the respondent, the appellant misinterpreted these provisions and incorrectly assumed that resignation from faculty also meant resignation from active medical staff membership.

47. The respondent also referred to the letter dated 17th June 2018 from the appellant, cancelling her clinical privileges as evidence of discriminatory treatment, arguing that she was unfairly singled out compared to other medical professionals who retained, or obtained privileges under the same by-laws.

48. The respondent strongly supported the trial court's finding that she was a victim of discrimination under Article 27 of *the Constitution*, which prohibits unjustified differential treatment. Specifically, she asserted that she was treated differently due to her status as an independent active medical staff member and that there was no reasonable justification for terminating her clinical privileges following her resignation from the faculty.

49. This is a first appeal. Rule 31(1)(a) of the Court of Appeal Rules provides that:

> "(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—
>
> a. to re-appraise the evidence and to draw inferences of fact;
>
> b. ..."

50. We must defer to the findings of fact made by the trial court, especially where they are based on the credibility of witnesses because the trial court had the added advantage of hearing and seeing the said witnesses testify. Nevertheless, we are entitled to interfere with those findings if they are based on no evidence or upon a misapprehension of the evidence or if the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. In the case of Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212 this Court espoused that mandate or duty as follows:

> "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

51. We have carefully considered the record, submissions by both parties, the authorities cited, and the law. The issues for determination are: whether the ELRC had jurisdiction to entertain the petition, given the nature of clinical privileges; whether the respondent's clinical privileges were intrinsically tied to her employment as a full-time faculty member and thus lapsed upon resignation; and whether the termination of the respondent's clinical privileges was discriminatory in violation of Article 27 of *the Constitution*.

52. The first and foundational question for determination is whether the ELRC had jurisdiction to hear and determine the respondent's petition, which challenged the appellant's decision to deny the continuation of her clinical privileges following her resignation from full-time employment.

53. The appellant argued that the dispute concerned the grant or cancellation of clinical privileges, which were contractual arrangements between a hospital and a doctor, not arising from an employment relationship. As such, the appellant contended that the matter fell outside the purview of Section 12 of the *Employment and Labour Relations Court Act*, and should instead have been filed in the ordinary civil courts or the High Court in its constitutional jurisdiction. The appellant also emphasized that the ELRC erred in assuming jurisdiction by treating the privileges as if they were inseparable from the respondent's employment.

54. The respondent, on the other hand, maintained that her clinical privileges, while related to her status as a doctor affiliated with the appellant institution, had always been intertwined with her employment as a faculty member. The challenge arose directly from her resignation, an *employment act*, and the subsequent consequential denial of her ability to continue practicing at the hospital, which she

contended was discriminatory and unlawful. The respondent further submitted that the ELRC is empowered to hear constitutional claims arising incidentally from employment relationships.

55. The jurisdiction of the ELRC is set out in Article 162(2)(a) of *the Constitution*, and further elaborated under Section 12 of the *Employment and Labour Relations Court Act*.

56. Article 162(2)(a) provides that:

> " (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
>
> a. employment and labour relations; and
>
> (b) ....."

57. Additionally, Section 12 provides that:

1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
    a. disputes relating to or arising out of employment between an employer and an employee;
    b. disputes between an employer and a trade union;
    c. disputes between an employers' organisation and a trade unions organisation;
    c. disputes between trade unions;
    d. disputes between employer organizations;
    f. disputes between an employers' organisation and a trade union;
    g. disputes between a trade union and a member thereof;
    f. disputes between an employer's organisation or a federation and a member thereof;
    g. disputes concerning the registration and election of trade union officials; and
    h. disputes relating to the registration and enforcement of collective agreements.
2. An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

58. The Supreme Court in United States International University (USIU) vs. Attorney General [2012] eKLR, held that:

> " 44. In the final analysis, I would adopt the position of the Constitutional Court of South Africa in Gcaba v Minister of Safety and Security (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret *the*

constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of *the Constitution* within a matter before it.

45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret *the Constitution* and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011."

59. Further, in Judicial Service Commission vs. Gladys Boss Shollei [2014] eKLR, this Court reiterated that:

> " In my view to hold that the Industrial Court has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from an employment relationship would defeat the intention and spirit of *the Constitution* in establishing special courts to deal with employment and labour disputes. Indeed such a stance would not only be inimical to justice, but would expressly contravene Article 20 of *the Constitution* that provides that the Bill of Rights "applies to all law and binds all state organs and persons", and enjoins a court to promote the spirit, purport and objects of the Bill of rights and adopt an interpretation that most favours the enforcement of a right or fundamental freedom."

60. Moreover, in Kenya Airways Ltd vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR, this Court noted that jurisdiction is not ousted merely because the dispute involves contractual elements. What matters is whether the core of the dispute arises from the employment relationship.

61. In the present case, it is not in dispute that the respondent was, at the material time, a full-time faculty member employed by the appellant. Her clinical privileges flowed directly from that employment relationship. The record reveals that her resignation from employment on 30th June 2019 triggered the contested decision by the appellant, communicated through the letter of 17th June 2019, which denied her continued clinical privileges at the hospital.

62. The appellant's own submissions acknowledged that the category of privileges held by the respondent was available only to "active members of staff", and that the respondent belonged to the second category of such staff, i.e., full-time faculty. The respondent's loss of privileges, therefore, stemmed directly and causally from the termination of her employment. This chain of events establishes a sufficient nexus between the privileges dispute and the employment relationship.

63. Additionally, the respondent alleged violations of constitutional rights, including the right to equality and freedom from discrimination under Article 27, and fair administrative action under Article 47. As established in the USIU case and the Shollei case, the ELRC is empowered to determine constitutional questions arising incidentally to employment disputes, provided the claims are properly pleaded and arise from the employer–employee relationship.

64. In our view, the ELRC did not err in assuming jurisdiction. The dispute, while involving the interpretation of the appellant's by- laws, was rooted in an employment context and its aftermath. The core question of whether clinical privileges should have continued post-resignation was not

a freestanding private contractual issue but one arising from the cessation of the employment relationship. Accordingly, the ELRC was properly vested with jurisdiction to hear and determine the matter.

65. The appellant argued that the respondent's clinical privileges were inherently tied to her employment and thus expired upon resignation. It relied on Clause 3.4 of the 3rd Edition of its by- laws, which provides that clinical privileges are conferred on full- time faculty members and that such privileges lapse upon cessation of such employment.

66. The respondent, however, relied on Clause 2.3.2, contending that she fell within the exception created therein for previously privileged practitioners.

67. We are persuaded by the appellant's interpretation. Clause 3.4 expressly links clinical privileges to faculty status. The respondent's privileges were renewed in 2018 while she was still a full-time faculty member, and the process followed the 2017 by-laws.

68. Therefore, the respondent cannot be seen to claim that the renewal of her clinical privileges in May 2018 was tied to the 2010 by-laws, given that the law does not operate retrospectively. At the time of the renewal, the 2017 by-laws had been effected. It defies logic how the 2010 by-laws could have been enforced in the 2018 renewal, when the 2017 by-laws were already in force.

69. The appellant submitted that the other doctors who had clinical privileges while not faculty members had applied for the said privileges in their capacity as private practitioners, directly to the appellant. The respondent did not apply for the said privileges because they were part of her employment contract.

70. In the circumstances, the learned judge erred in holding that the respondent retained privileges in perpetuity simply because she was privileged before the 2017 by-laws came into force. The court misapprehended Clause 2.3.2 of the by-laws, which pertains to private practitioners. The respondent was never solely a private practitioner under that specific provision. The appellant distinguished between the two distinct categories of medical staff enjoying clinical privileges: full-time faculty and private practitioners, with different terms for retaining such privileges. The respondent's claim that her clinical privileges were "distinct and separate from her employment" was not supported by the governing by-laws for full-time faculty members. The respondent, upon her resignation, ceased to be a faculty member, and therefore the clause did not apply to her.

71. As was stated by this Court in National Bank of Kenya vs. Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR:

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000*) (unreported): "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

72. At the time of renewal of her clinical privileges in 2018, the respondent was aware that the 2017 by-laws had been implemented and that they were in force, and applicable to the said renewal.

73. In Attorney General vs. Kabuito Contractors Limited [2023] KECA 230 (KLR), this Court held that:

> "Any contractual dispute invariably requires an interpretation of the contract concerned to determine the obligations of the parties involved. Accordingly, to resolve the contested issue of the existence or otherwise of the alleged "oral extension of the contract," an inevitable starting point is the written contract between the parties dated March 14, 1997. Implicitly, it is vital to establish whether the written contract which is alleged to have been "extended orally" provided for variation(s) or extension(s). We say so because we take judicial notice of the fact that in most jurisdictions non-variation clauses are commonplace in commercial and construction contracts. Non-variation clauses are common place because parties to such contracts may exercise their contractual freedom in an effort to constrain such liberty in the future. Such provisions are important because they place emphasis on the absolute contractual freedom of parties to amend their contracts or they sacrifice absolute contractual freedom for the sake of certainty and formality."

74. It is trite that contractual rights and obligations must be interpreted within the framework of the documents that created them. In this case, the by-laws and institutional policies clearly tied clinical privileges to full-time employment.

75. The learned Judge found that the respondent was discriminated against in contravention of Article 27 of *the Constitution*. With respect, we disagree.

76. In Trusted Society of Human Rights Alliance vs. Attorney General & 2 Others [2012] eKLR, this Court held that:

> "... the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged..."
>
> "...The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."

77. In Mohammed Abduba Dida vs. Debate Media Limited & Another (supra), this Court stated that a party alleging discrimination must establish: differential treatment; absence of justification; and prejudice.

78. The respondent did not identify any other person who was similarly situated and retained clinical privileges after resigning from faculty. The respondent failed to demonstrate that she was treated differently compared to similarly situated individuals, that such treatment was unjustified, or that she suffered prejudice. Her attempt to equate herself with non-faculty practitioners was misplaced, as those individuals never held employment-based privileges to begin with.

79. Mere unequal outcomes do not automatically amount to discrimination. In Package Insurance Brokers Limited vs. Gichuru [2019] KECA 477 (KLR), this Court emphasized the need for evidence of unjustified and targeted differential treatment as follows:

> "The respondent was not given differential treatment from other sick employees, and being the only one who was sick, he cannot be heard to say he was discriminated against. In our

view, there was no discrimination. If anything, it would appear that the appellant supported the respondent in the course of his treatment."

80. The fact that the University of Nairobi sought clarification through its letter to the appellant meant that it was also apprehensive that, by her resignation, the respondent would lose her privileges at the hospital. If this fact was clear, the university would not have gone through the trouble to seek such a clarification.

81. We find that the respondent's assertion that the appellant's actions constituted "differential treatment" that was discriminatory, does not hold water in the absence of a proper comparable of the same circumstances, (full-time faculty member resigning), who was treated differently.

82. It follows, therefore, that the termination of privileges was an automatic consequence of resignation under the governing by-laws. No evidence was led to show that the appellant targeted the respondent unfairly or applied the by-laws selectively.

83. In light of the foregoing, we find that the ELRC was properly seized of jurisdiction under Article 162(2)(a) of *the Constitution* and Section 12(1)(a) and (3)(viii) of the *Employment and Labour Relations Court Act*; the respondent's clinical privileges were lawfully relinquished in accordance with the appellant's by-laws; and the learned Judge erred in finding that the respondent was discriminated against.

84. Accordingly, we make the following orders:

    a. The appeal is meritorious and is hereby allowed.

    b. The judgment and orders of the Employment and Labour Relations Court delivered on 21st February 2020 are set aside in their entirety.

    c. The respondent's petition is hereby dismissed with costs to the appellant in both this Court and the court below.

    Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2025.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR