



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**  
**AT NAIROBI**  
**CAUSE NUMBER 1693 OF 2012**  
**BETWEEN**  
**FRANCIS ONG'ELE OPALLA.....CLAIMANT**  
**VERSUS**  
**LIGHT ACADEMY SCHOOLS.....RESPONDENT**

*Rika J*

*Court Assistant: Edward Kidemi*

*Mr. Wasuna Advocate instructed by Wasuna & Company Advocates for the Claimant*

*Mr. Ahmed instructed by Amin & Company Advocates for the Respondent*

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**ISSUE IN DISPUTE: UNLAWFUL TERMINATION**

**AWARD**

**[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]**

1. The Claimant filed his Statement of Claim on the 20<sup>th</sup> February 2012. The Respondent filed its Statement of Response on the 31<sup>st</sup> January 2014. The Claimant testified on the 24<sup>th</sup> February 2014, and the 9<sup>th</sup> April 2014 when he closed his case. The Respondent testified through Ms. Elizabeth Nyambura Komu, a Teacher at the School and one-time Dean of Staff. Her evidence was recorded on the 9<sup>th</sup> April 2014, when the hearing came to a close. The matter was last mentioned before Wasilwa J, on the 28<sup>th</sup> July 2015, who directed the file is transmitted to the Trial Judge in Mombasa for the writing of the Award.

2. The Claimant's evidence is that he was appointed by the Respondent School Principal as a Science Teacher. Appointment was contained in an e-mail communication from the Principal Murat Oguz, dated 12<sup>th</sup> April 2010. The Claimant was required to report to the School with effect from 19<sup>th</sup> April 2010. His other terms were shown in the e-mail to comprise basic salary of Kshs. 35,000 per month; Kshs. 20,000 in monthly house rent allowance; Kshs. 2,200 in monthly commuter allowance; family medical insurance cover of up to Kshs. 300,000; and pension contribution at 5% of the Claimant's basic salary.

3. He reported as advised. He was required to serve under probation for the first 3 months. Probation ended in July 2010. He continued to work after probation. There were no issues raised on his continued service. He received the Employment Handbook from the Respondent after probation.

4. The Handbook stated:-

- The first 3 months of employment would be probationary. Confirmation in employment was subject to satisfactory evaluation at the end of probation.
- The initial contract would be for 1 year, with an option to renew for another 2 years.

5. The Claimant expected his first year would lapse on the 19<sup>th</sup> July 2011. After July 2011, he continued working, and believed he was now on the 2 year contract, contemplated in the Handbook. He did not receive any notice of termination immediately after July 2011. He was told by the Principal his terms were as stated in the Handbook. He expected the 2 year extension, would end in July 2013.

6. He however was made to sign another contract, back-dated 1<sup>st</sup> July 2011, which indicated his engagement commenced on 1<sup>st</sup> July 2011, and would end on the 15<sup>th</sup> December 2011. This contract stated that the School would offer the Teacher a new contract for the ensuing year on or before December 2011, unless the Teacher was given a notice of the School's intention not to re-employ.

7. The Claimant explained he signed this new contract because he believed it would not affect the terms given in the Handbook. He testified the new contract captured the essence of his previous terms, and was drawn to serve the internal housekeeping of the School. This new contract was for 6 months. The Handbook did not provide for 6 months. There was no revised Handbook. The Principal had always referred the Claimant to the Handbook whenever the Claimant asked for a written contract. The terms in the Handbook were incorporated in the new contract. If there were amendments in the Handbook, the Respondent would have issued the Claimant a new Handbook. The School unduly influenced the Claimant into signing the new contract. The Claimant did not have any disciplinary issues. He had received commendation from the Respondent.

8. On 30<sup>th</sup> November 2011, the Claimant received a notice from the Respondent, advising the Claimant that his contract would not be renewed upon expiry, on the 31<sup>st</sup> December 2011.

9. The Claimant approached the Court seeking the following Orders against the Respondent:-

- A declaration that the purported termination of employment is invalid and void *ab initio*.
- Salaries for the remaining period in the contract, up to 21<sup>st</sup> July 2013, at the rate of Kshs. 66,280 per month, totaling Kshs. 1,259,329.
- Annual Leave pay at Kshs. 123,722.
- Costs, Interest and any other suitable reliefs.

10. Cross -examined, the Claimant testified he was employed in April 2010. Initially he was on 1 year contract, then a 2 year contract. It was specified in the Handbook which he signed on 3<sup>rd</sup> January 2011. The Principal always made the Claimant know the terms and conditions of service were contained in the Handbook. The Respondent would have to give the reasons for non-renewal. 1 year had not lapsed when the Claimant signed the Handbook, from the date his probation ended. He did not receive any communication saying his contract was over. The terms in the contract signed on 1<sup>st</sup> July 2011 were binding, but inconsistent with the Handbook. This Handbook could be amended. The new contract did not amount to an amendment of the Handbook. In case of inconsistency, the Handbook would prevail. The Claimant stated he would have to go back to his records to confirm his annual leave balance. He was able to secure fresh employment elsewhere, 1 year after he left the Respondent. He prays the Court to allow

the Claim.

11. The Respondent filed its Statement of Response on 31<sup>st</sup> January 2014. Its position is that the Claimant was employed by the Respondent as a Teacher, in a fixed-term contract, commencing 1<sup>st</sup> July 2011, ending 15<sup>th</sup> December 2011. The Claimant signed the contract freely. There was no pressure of any form exerted on him by the Employer to sign. The contract was not automatically renewed. The Teachers' Handbook was intended to serve as a guide; it was not a contract document. The Respondent did not notify the Claimant that his contract would be terminated; it only notified him the contract would not be renewed. The Respondent exercised its discretion in not renewing the Claimant's contract. There was no obligation to hear the Claimant before informing him his contract would not be renewed.

12. Elizabeth Nyambura Komu restated this position in her evidence before the Court. Questioned by the Claimant's Advocate, she stated the Teachers signed the Handbook at the beginning of the year 2011. She did not recall if Teachers signed the Handbook in July 2011. Before this date, Teachers had always signed contracts. The Claimant had signed a Handbook before he signed his contract. He must have negotiated and agreed on his terms and conditions of employment with the School Headmaster. The contents of the Handbook were incorporated in the individual contract of employment. The Respondent urges the Court to dismiss the Claim.

The Court Finds:

13. The Claimant was employed by the Respondent School, as a Science Teacher, effective 19<sup>th</sup> April 2010. His letter of employment issued through an e-mail communication from the Headmaster Light Academy, Mr. Murat Oguz, on the 12<sup>th</sup> April 2010. It is marked Claimant's exhibit 1, and the terms and conditions of employment are clearly spelt out [see paragraph 2 of this Decision].

14. The e-mail communication does not state the duration of the contract. It required the Claimant to serve the first 3 months under probation, but gave no expiry date, if and after there was confirmation.

15. The probation of 3 months lapsed sometime in July 2010. There was no letter issued the Claimant, advising he had now been confirmed. There was nothing at the end of the probation, changing the contract into a fixed term contract. The Claimant continued to teach science. He was advised, and the Court finds nothing to show he was untruthful on this, that his contract was subject to the Teachers' Handbook.

16. On 3<sup>rd</sup> January 2011, he was availed and signed a copy of the Teachers' Handbook. Although signed after the contract of April 2010, the Handbook mainly confirmed the terms and conditions given in the contract on basic salary, house allowance, commuter allowance and seniority allowance. This appears to support the position of the Claimant, that he had always been told, his terms and conditions of employment were to be found, beyond the e-mail of April 2010, in the Teachers' Handbook. He did not see this Handbook, until 3<sup>rd</sup> January 2011.

17. The Handbook again confirmed the requirement for the Teachers to go through a probationary period of 3 months. It also stated the initial contract would be for 1 year, with the option to renew for a further 2 years. By the 3<sup>rd</sup> January 2011, the Claimant had completed his 3 month probation, and presumably serving as a confirmed Employee.

18. The Respondent issued the Claimant another contract, signed on 1<sup>st</sup> July 2011. This contract clarified that *' the terms and conditions and other provisions of the Academy's Teachers' Handbook are incorporated herein. The Teacher agrees to abide by all the policies and procedures contained in this Handbook. The Academy reserves the right to modify, revise, supplement or rescind any or all of its policies, procedures and rules including the policies set forth in the Handbook at any time, with or without notice. If any changes are made, a new written policy will be issued and will prevail.'*

19. The Handbook endorsed existing terms and conditions of employment under which the Claimant

served from 2010 as seen above. It expressly applied to the Claimant's contract.

20. The contract signed on 1<sup>st</sup> July 2011, gives the expiry date as 15<sup>th</sup> December 2011. It was for 6 months. It is the contract through which the Claimant was compelled by the Respondent to leave employment on the 31<sup>st</sup> December 2011. His last salary was Kshs. 66,280 all-inclusive. He was issued a letter titled 'Work Contract,' stating there would be no renewal after 31<sup>st</sup> December 2011. It was not made clear to the Court by the Respondent, if the expiry date was 15<sup>th</sup> December 2011 or 31<sup>st</sup> December 2011.

21. The Respondent was not able to justify the validity of this 6 months' contract. The Claimant had already served for 1 year by April 2011. Under the Handbook, which was incorporated in the individual contract, he had completed probation, and worked for over 1 year. Probation is not served twice, as concluded in the Industrial Court at Nairobi Causes between **Gumba v. KEMSA [2014] e-KLR**; and **Caroline Nyambura Thiga v. Oxfam [2013] e-KLR**. In both cases the Court found that probation is not for old Employees.

22. Once the Claimant finished his first year in July 2011, the employment contract, which included the Handbook, stated there would be an option to renew the contract for a further period of 2 years. The renewal for 6 months, cannot be justified under the first contract of April 2010 which was in fact silent on the term of the contract; or the Handbook which provided for 2 years after the first. It was therefore reasonable for the Claimant to expect he would continue serving up to July 2013.

23. The Respondent's submission that the Handbook was merely a guide is without merit. It was incorporated as part of the Claimant's contract. In **Gumba v. KEMSA; Industrial Court at Nairobi Cause Number 746 [N] of 2009, between Kenya Union of Journalists v. the Standard Group; and Industrial Court at Mombasa Miscellaneous Civil Application Number 24 of 2014 R v. KPA and Moses Echwa [ex-parte applicant] [2015] e-KLR**, the Court held that Human Resource and Procedure Manuals are quotidian in nature. They do not become automatically incorporated in the contract of employment. To become binding, they must be expressly adopted as terms and conditions of the contract of employment. They must be received and signed by the Employee.

24. The Handbook in question was received and signed by the Claimant. It was in place at the time he was employed, and he was told by the Headmaster it comprised his terms and conditions of employment. The terms in the Handbook, except the definite term contract, reflected what was contained in the initial letter of employment. The definite term was in fact disadvantageous to the Claimant, the initial contract having been open ended. The Claimant however testified he was advised of the presence of a Handbook, which was eventually given to him and signed on 3<sup>rd</sup> January 2011. The Respondent on its part ignored both the initial open-ended contract and the Handbook, offering the Claimant a 6 months' contract without justification.

25. Ultimately the Court is persuaded the Claimant was entitled to work for 2 years after completion of his first year. He was not to be placed on a 6 months' contract. This was in complete departure from the Handbook and the contract of April 2010.

26. The 6 month's contract was invalid. Termination in December 2011 was invalid. Section 9 [2] of the Employment Act 2007 requires the Employer to draw up the contract stating the particulars of employment. It must be shown the Employee has consented to the contract, in the mode stipulated under Section 9[3]. In cases where the terms are ambiguous, the interpretation which favours the Employee is to be given by the Court. Section 10 [1] emphasizes the need for written particulars of the contract, and allows for such particulars to be given in installments not later than 2 months after the beginning of the contract. Under Section 10 [5] the contract may be revised, but only in consultation with the Employee, and notice of the changes shall be notified to the Employee in writing.

27. The Respondent did not advise the Claimant of any changes to the contract of April 2010 in writing. The Handbook which in effect altered the open-ended contract into a fixed term contract was made

available more than 2 months after the Claimant was employed. The Handbook was never changed. The contract of 1<sup>st</sup> July 2011 fundamentally changed what was in the initial contract and the Handbook. There was no evidence the Claimant was consulted before the changes were made. There was no written notice of the changes. The last contract through which the Claimant left, was not clear if it was meant to be a renewal envisaged under the Handbook; whether it was a probationary contract; or a completely new 6 month contract. It had no foundation in the primary document, the Handbook.

28. The Claimant explained that he signed the contract of July 2011, because he was made to understand by the Respondent, that it would not have effect on the terms and conditions offered by the Handbook. The Court accepts this explanation. In the ***Industrial Court at Nairobi, Cause between Margaret A. Ochieng v. The National Water Conservation and Pipeline Organization [2014]*** which cited ***United Nations Appeals Tribunal [UNAT] Case 2010 -125 between Frenchon v. The Secretary- General United Nations***, it was held that generally, fixed term contacts have no expectancy of renewal. The refusal to renew can be challenged on limited grounds. These include actions of the Employer giving rise to legitimate expectation on the part of the Employee that there would be renewal; and two, where non-renewal is based on improper motives, or countervailing circumstances. In the case of the Claimant he was initially employed on a contract which was open-ended. The Handbook clarified to the Claimant he would serve for 1 year, which would be renewed for 2 years. He had completed the first year when the Employer imposed on him a 6 months' contract. The 2 year renewal was a legitimate expectation, on the part of the Claimant.

29. The Claimant is therefore entitled to compensation for the unexpired period ending July 2013. The Court has held in the past that such compensation need not be pegged on the anticipated salaries for the unexpired period, in this case the 19 months from January 2012 to July 2013. One cannot assuredly say the Claimant would have completed those 19 months, and the law requires he moves on after the premature termination, and mitigate his losses. The Claimant was able to find an alternative job, 1 year after he left the Respondent. Fair remuneration presupposes that the Employee has rendered his labour. It is not intended that the Employee receives salaries for the entire period he thinks he could or should have completed in service; what the law intends, is that there is a fair go all round in compensating the Claimant's economic injury. The Claimant for whatever reason, ceased to teach science at Light Academy, in December 2011. He did not teach for 19 months after this date. ***The Court grants the Claimant 10 months' gross salary at Kshs. 662,800 as damages for unlawful termination.***

30. The Claimant did not show that he was owed 56 days of annual leave as at the time he left employment. Cross-examined, he testified he would have to relook into his employment records, to find out what his actual leave balance was. ***The claim for annual leave pay is rejected.***

31. There shall be no order on the costs and interest. In sum, IT IS ORDERED:-

***a. It is declared the change in terms and conditions of employment of the Claimant's contract, through the letter signed by the Claimant on 1<sup>st</sup> July 2011; and the non-renewal by the Respondent, of the contract on 31<sup>st</sup> December 2011, were unlawful.***

***b. The Respondent shall pay to the Claimant 10 months' gross salary at Kshs. 662,800 in damages for breach of the employment contract.***

***c. No order on the costs and interest.***

Dated and signed at Mombasa this 22<sup>nd</sup> day of September, 2015

James Rika

Judge

Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of October, 2015

Helen Wasilwa

Judge