



**REPUBLIC OF KENYA**

**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**APPEAL NO. 22 OF 2019**

**MWINYI KIBWANA SHAMI.....CLAIMANT**

**VERSUS**

**KCB FOOTBALL CLUB.....RESPONDENT**

**DECISION**

**Hearing:** 10<sup>th</sup> December, 2019

**Panel:**

1. Mrs. Elynah Sifuna – Panel Chairperson
2. Ms. Mary Kimani - Member
3. E Gichuru Kiplagat – Member

**Appearances**

1. The Claimant was represented by Kwaje Daniel Advocate.
2. The Respondent was represented by Ms. Akong'a, Advocate.

**The Parties**

1. The Claimant describes himself as a professional footballer.
2. The Respondent is a Kenyan Football Club formed in 1994 under the Umbrella of Kenya Commercial Bank (KCB) Sports Club.

**The Case**

3. The Claimant filed a statement of claim dated 03/10/2019 on 04/10/2019. The Claimant claims that he was employed by the Respondent as a player through a contract of agreement dated 01/11/2018 for a duration of 20 months lapsing on 30/06/2020 at a

monthly salary of Kshs.90,000.

4. The Claimant avers that he was a diligent and competent player who performed as required on and off the pitch which saw him play for the club from December,2018 until March,2019 where he scored a total of 5 goals. He added that he provided 11 assists which performance was pivotal in assisting the Respondent to be promoted from the National Super League to the Kenya Premier League.

5. The Claimant avers that sometimes in the month of March,2019 his personal relationship with the club's coach fell apart and his playing time was reduced. Subsequently, he was taken out on a loan to AFC Leopards Football Club for the remainder of the Kenya Premier League Season.

6. The Claimant stated that upon his return to the Respondent at the end of the season, without notice, his contract of employment with the Respondent was unilaterally terminated via a letter dated 22/07/2019 on the ground that his performance was unsatisfactory during the 2018/2019 season.

7. The Claimant claims that the termination was unfair, irregular and in complete contravention of Article 13 of FIFA Regulations on the Status and Transfer of Players, Sections 41,43 and 45 of the Employment Act.

8. The Claimant prays for judgment for:

a) Compensation for damages for wrongful dismissal and unfair termination equivalent to 11 months' salary adding up to Kshs.990,000/=

b) Costs of the suit be provided for.

c) Such other relief the honourable court may deem fit.

### **The Response**

9. The Respondent by a memorandum of response dated 26/11/2019 and filed on the same day denied the claims by the Claimant. The Respondent stated that the Claimant joined the Respondent in the year 2018 during the National Super League during which period his performance was average and the team got promoted to the Kenya Premier League

10. The Respondent noted that the Claimant's performance continued to deteriorate even after he was loaned to AFC Leopards as a stop gap measure to boost his career. However, the Respondent notes that even after the loan his performance remained unsatisfactory because he was mostly slow, sluggish and had poor defence.

11. Furthermore the Respondent noted that the Respondent held discussions with the Claimant and considered loaning him to another football club and the Respondent attempted a mutual separation agreement but the Claimant declined thus the Respondent made the decision to terminate his services.

12. In conclusion the Respondent stated that the Claimant's claim against the Respondent is frivolous, vexatious and devoid of merit.

### **Hearing**

13. The matter was heard on 10/12/2019 when both parties brought witnesses to testify. The Tribunal directed the parties to file written submissions by 21/01/2020.

14. On 21/01/2020 the Respondent confirmed filing its written submissions but the Claimant had not. The matter was fixed for further mention on 28/01/2020 to confirm compliance.

15. On 28/01/2020 both parties indicated that they had filed their written submissions. The Claimant filed his written submission dated 20/01/2020 on 21/01/2020. Similarly, the Respondent filed its written submissions dated 21/01/2020 on the same day. The Tribunal then retired to prepare a decision.

### **Discussion**

16. Having taken into account the parties' pleadings written and oral submissions, the Tribunal states as follows:

17. At the outset the Tribunal is faced with the question as to whether it has jurisdiction to determine this case.

18. The jurisdiction of this Tribunal stems from Section 58 of the Sports Act which provides as follows:

**“The Tribunal shall determine—**

**(a) appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including —**

**(i) appeals against disciplinary decisions;**

**(ii) appeals against not being selected for a Kenyan team or squad;**

**(b) other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and**

**(c) appeals from decisions of the Registrar under this Act.”**

19. Section 59 of the Sports Act states further that:

**“The Tribunal may, in determining disputes apply alternative dispute resolution methods for sports disputes and provide expertise and assistance regarding alternative dispute resolution to the parties to a dispute.”**

20. The current dispute stems from a contract dated 01/11/2018 entered between the Respondent and the Claimant. The Claimant is unhappy because the Respondent has terminated this contract allegedly without lawful cause.

21. The Claimant claims that the termination was unfair, irregular and in complete contravention of Article 13 of FIFA Regulations on the Status and Transfer of Players. The Claimant also relies on Sections 41,43 and 45 of the Employment Act. He proceeded to pray for:

a) Compensation for damages for wrongful dismissal and unfair termination equivalent to 11 months' salary adding up to Kshs.990,000/=.

b) Costs of the suit be provided for.

c) Such other relief the honourable court may deem fit

22. Clause 12 of the Contract between the parties provides for the Governing Law as follows:

This Agreement shall be governed by and construed in accordance with the laws of the Republic of Kenya without giving effect to

any choice of law or conflict of law provisions. **The Parties consent to the exclusive jurisdiction and venue in the Courts of the Republic of Kenya.**

23. Clause 14 of the Contract on the other hand provides for Dispute Resolution and designates amicable settlement in the first place and then arbitration before the FKF dispute resolution structures. It then goes on to provide as follows:

**Please note this will not in any way deny any of the parties in the dispute to follow the laid down justice machinery as provided in the Kenya constitution.**

24. Section 41(1) of the Employment Act states that:

**“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.”**

25. Section 43 of the Employment Act states that where the employer terminates a contract the employer is required to give reasons failure which such termination shall be deemed to be unfair.

26. Section 45 of the Employment Act states that termination of a contract shall only be unfair where there is no valid reason and where the procedure was not fair.

27. Article 162 (2) of the Constitution of Kenya states that:

**“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour...”**

28. Article 162 (3) of the Constitution of Kenya provides that:

**“Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”**

29. Pursuant to Article 162 of the Constitution, Parliament passed the Employment and Labour Relations Court Act. Section 12 sets out the jurisdiction of the court to include disputes relating to or arising out of employment between an employer and an employee.

30. Magistrates courts also have jurisdiction to hear and determine disputes relating to employment and labour under Section 9 of the Magistrates’ Courts Act subject to their pecuniary limits.

31. The question of jurisdiction was determined in the celebrated case of *Owners of the Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1* where the Court stated that:-

***“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

32. John Bacroft Saunders in a treatise headed **Words and Phrases Legally Defined-Volume 3: I-N** the Author states at page 113 the following on the issue of jurisdiction:-

***“By jurisdiction is meant the authority which the Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute, Charter or Commission under which the Court is constituted, and may be extended or restricted by the like means. If no restrictions or limits is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the nature of actions and matters of***

*which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exists. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess its decisions amounts to nothing. Jurisdiction must be acquired before Judgment is given.”*

33. The Court of Appeal in *Phoenix of E.A. Assurance Company Ltd –vs- S.M. Thiga t/a Newspaper Services Ltd (2019) eKLR*, observed that:-

*“It is a truism jurisdiction is everything and is what gives a Court or tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction" In common English parlance, jurisdiction denotes the authority or power to hear and determine the judicial disputes or to even take cognizance of the same. This definition clearly shows that before a Court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a Court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such Court will be amenable to being set aside ex debito justitiae.”*

34. In *Guaranty Trust Company of New York –vs- Hannay & Company (1915) 2KB 536 at 563*, Pickford LJ opted to reject the nuance between the word “jurisdiction” and the expression “the Court has no jurisdiction” to help achieve a meaning when His Lordship stated:-

*“The word “jurisdiction” and the expression “the Court has no jurisdiction” are used in two different senses which I think often leads to confusion. The first and in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, that is, that, although the Court has power to decide the questions it will not according to its settled practice do so except in a certain way and under certain circumstances.”*

35. Diplock LJ in *Garthwaite –vs- Garthwaite (1964) 2 All ER 233, 244*, where he observed as follows:-

*“In its narrow and strict sense, the “jurisdiction” of a validly constituted Court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or to any combination of these factors. In its wider sense, it embraces also the settled practice of the Court as to the way in which it will exercise its power to hear and determine issues which fall within its “jurisdiction” (in the strict sense) or as to circumstances in which it will grant a particular kind of relief which it has jurisdiction (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances.”*

36. From these decisions and looking at the circumstances and prayers sought by the Claimant here we find that the claim as framed by the Claimant as well as the provisions of the contract entered into by the parties, takes the matter out of the Tribunal’s jurisdiction because, whilst the dispute clearly arises out of a sports related contract, the manner in which the contract is framed and the way in which the Claimant’s pleading has been framed means that the fact it a sports dispute becomes secondary.

37. Indeed, to us the right forum to have the Claimant ’s claim addressed would be either the Employment and Labour Relations Court or the FKF Dispute Resolution structures in the first instance. .

38. This conclusion is distinguishable from other ‘employment type’ matters which have come before the Tribunal. In **Robert Williamson vs. FKF** for instance, the agreement between the parties specifically provided as follows:

#### **Resolution of Disputes**

*Football Kenya Federation and The Head Coach shall make effort to resolve amicably by direct informal negotiating any disagreement or dispute arising between them under or in connection with this agreement.*

*If, after thirty (30) days from the commencement of such informal negotiation Football Kenya Federation and The Head coach have been unable to resolve amicably a contract dispute, either party may require that the dispute be referred for resolution and arbitration at the Centre for Arbitration and Dispute Resolution in accordance with the Arbitration Act of the laws of Kenya and if no settlement is reached to FIFA. (emphasis ours)*

39. The Tribunal was therefore called upon to construe this agreement.

40. The next option offered is the FIFA Regulations for the Status and Transfer of Players. These provide for a Dispute Resolution Chamber at Article 24 which states as follows:

**1. The DRC shall adjudicate on any of the cases described under article 22 a), b), d) and e) with the exception of disputes concerning the issue of an ITC.**

**2. The DRC shall adjudicate in the presence of at least three members, including the chairman or the deputy chairman, unless the case is of a nature that may be settled by a DRC judge. The members of the DRC shall designate a DRC judge for the clubs and one for the players from among its members.**

**The DRC judge may adjudicate in the following cases:**

- i) all disputes up to a litigious value of CHF 100,000;**
- ii) disputes relating to the calculation of training compensation;**
- iii) disputes relating to the calculation of solidarity contributions.**

41. Article 24 makes reference to Article 22 which provides as follows:

**Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:**

**a) disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract;**

**b) employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement;**

**c) employment-related disputes between a club or an association and a coach of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists at national level;**

**d) disputes relating to training compensation (article 20) and the solidarity mechanism (article 21) between clubs belonging to different associations;**

**e) disputes relating to the solidarity mechanism (article 21) between clubs belonging to the same association provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations;**

**f) disputes between clubs belonging to different associations that do not fall within the cases provided for in a), d) and e).**

42. From the provisions of the FIFA Regulations for the Status and Transfer of Players, it is clear that FIFA is only competent to

hear disputes between a club and player of an international dimension. As the dispute between the parties are of a local dimension, FIFA will not have the jurisdiction to hear and determine the dispute.

43. The Tribunal is obliged to respect the forum elected by the parties in accordance with Section 58(b) of the Sports Act and it is clear from the Contract that the parties did not agree to come before the Tribunal.

#### **Conclusion**

44. It is therefore in consideration of this, as well as the parties' submissions that the Tribunal makes the following orders:

- a) The statement of claim dated 03/10/2019 is struck out;
- b) Each party shall bear its own costs.

**Dated at Nairobi this 16<sup>th</sup> day of June, 2020**

---

**Elynah Sifuna, Panel Chairperson**

---

**Mary N. Kimani, Member**

---

**Gichuru Kiplagat, Member**



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)