



**REPUBLIC OF KENYA**

**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**APPEAL SDT NO. 13 OF 2020**

**AL AMIN ABDALLAH.....APPELLANT**

**-VERSUS-**

**LILIAN DORCAS NANDUDU KAZUNGU.....RESPONDENT**

**FKF ELECTORAL BOARD..... INTERESTED PARTY**

**DECISION**

**HEARING:** 11<sup>th</sup> November, 2020 (VIRTUAL HEARING)

<b>PANEL:</b>	1. Mrs. Njeri Onyango	Panel Chair
	2. Mr. Edmond Gichuru	Member
	3. Mr. Peter Ochieng	Member

**APPEARANCES**

1. Mr. Ezekiel Munyua together with Mr. J. Oketch (instructed by the firm of Rachier & Amolo Advocates) for the Applicant/Appellant.

2. Mr. Ochieng Odipo (instructed by the firm of RBZ Advocates LLP) for the Respondent.

3. Mr. Charles Njenga (instructed by the firm of Muchoki Kangata Njenga & Company Advocates) for The Interested Party

**ABBREVIATIONS AND DEFINITIONS**

The following abbreviation used herein have the indicated

CAF – Confederation of African Football.

FIFA - International Federation of Association Football

FKF – Football Kenya Federation

S.D.T- Sports Dispute Tribunal

All the definitions and interpretations shall be construed as defined and interpreted in the constitutive document both local and international.

### **THE PARTIES**

1. The Appellant AL-AMIN A. ABDALLAH, is a male adult resident of the Republic of Kenya who describes himself as the chairperson elect of FKF Mombasa County (hereinafter referred to as the appellant)
2. The Respondent LILIAN DORCAS NANDUDU KAZUNGU is a female adult residing in the Republic of Kenya and was an aspirant for the position of Chairperson in the FKF Mombasa County elections held on 19<sup>th</sup> September, 2020. (hereinafter referred to as the Respondent)
3. The Interested Party, THE ELECTORAL BOARD is an independent board appointed and recognized by FKF and vested with the mandate to carry out National and County elections of FKF (Under FKF Electoral Code 2019) (Hereinafter referred to as The Board)

### **JURISDICTION**

4. The Sports Dispute Tribunal (hereinafter referred to as SDT) is established under Section 55 of The Sports Act No. 25 of 2013. It's jurisdiction to hear sports matters is set out at Section 58 of the said Act. The same shall be dealt with substantially hereunder.

### **BRIEF BACKGROUND**

5. The brief facts not contested by the Parties is that on 19<sup>th</sup> September, 2020, the Appellant and the Respondent were contestants for the position of Chairperson of FKF Mombasa County. Those elections were supervised by the Interested Party who had the mandate to conduct and oversee the said elections both at County and National Level.
6. It is also common ground that the elections and any disputes arising therefrom would be dealt with in accordance with the FKF Constitution 2017 and the FKF Electoral Code 2019.
7. Upon completion of voting on 19<sup>th</sup> September, 2020 at Shanzu Teachers College, the Returning Officer Mombasa county Mr. Christopher Mbugua Nduati, declared as spoilt and rejected 2 votes and after vote counting, declared the Appellant herein as the duly elected Chairperson with 17 votes against the Respondent's 16 votes.
8. The Respondent being aggrieved by the decision of the Returning Office lodged her complaint with The Electoral Board as provide for under the FKF Electoral Code. The Electoral Board upheld the decision of the Returning Office in rejecting the two (2) votes, which the Respondent argued were in her favour and thus, on 26<sup>th</sup> September, 2020 dismissed her Complaint.
9. Dissatisfied with the decision of The Electoral Board, the Respondent filed an Appeal with the FKF Appeals Committee (hereinafter referred to as the Appeals Committee)
10. The Appeals Committee is established under Article 64(1) of the FKF Constitution 2017, and is vested with the powers and jurisdiction to receive and hear Appeals against decisions and determinations of all other committees of FFK by dint of Article 67 of The FKF Constitution.
11. The Appeals Committee rendered its determination on 6<sup>th</sup> October 2020, in a fairly lengthy decision and in allowing the Respondent's Appeal issued the following orders;

**i. The Appellant's petition is upheld**

**ii. The votes be recounted with the inclusion of the two rejected votes in favour of the Appellant.**

**iii. A Declaration is made by the Independent Electoral Board upon a determination of the outcome following the recount as ordered hereby.**

**iv. Each Party shall bear its own costs.**

12. The appellant herein is aggrieved by the decision of The Appeals Committee and has filed the present Appeal together with a Notice of Motion dated 13<sup>th</sup> October, 2020. The motion sought orders as follows;

**i. This application be certified urgent and be heard ex-parte in the first instance**

**ii. Pending hearing and determination of this application interparties, this Honorable Court be pleased to issue an order of stay of execution of ruling of the Football Kenya Federation Appeals Committee at Nairobi Dated 7<sup>th</sup> October 2020 in Appeal No. 2 of 2020**

**iii. The Honorable Court be pleased to stay execution of the Ruling pending the hearing and determination of the intended appeal.**

**iv. The costs of this application be provided for.**

13. The Appellant's Memorandum of Appeal challenges the determination of the Appeals Committee and has set out 12 grounds of appeal as follows;

**i. THAT** the Honorable Committee Members erred in law and fact by finding that the rejected votes were valid as against Section 6 (2) B (iii) of the FKF Election Rules 2019/2020.

**ii. THAT** the Honorable Committee Members erred in law by upholding the Appellant/ Respondent's petition yet they had found and held in the same ruling that the delay complaint did not prejudice the Appellant/Respondent or any other aspirant.

**iii. THAT** the Honorable Committee Members erred in law and fact in finding that the Appellant/Respondent had made a case warranting setting aside of the electoral board decision yet they held in the same ruling that the Appellant/Respondent had not proved her complaint in relation to lighting and the conduct of the alleged voter No. 5.

**iv. THAT** the Honorable Committee Members erred in law and fact in finding that civic education was not conducted yet they held in the same ruling that a bulk of voters were able to exercise their right in line with the voting procedure.

**v. THAT** the Honorable Committee Members erred in law and fact in ordering that the electoral board do conduct a recount yet they had held in the same ruling that FKF Mombasa County Chairperson elections were not characterized by procedural irregularities that could undermine the entire elections.

**vi. THAT** the Honorable Committee Members erred in law and fact in holding that the intention of the voters could be deduced, being to vote for in favour of the Appellant /Respondent yet the voting process was by secret ballot and the affected ballot papers were marked in a manner that the sign covered the space for both aspirants and the intention of the voter could therefore not be identified.

**vii. THAT** the Honorable Committee Members erred in law and fact in completely disregarding the FKF election rules on what amounts to a rejected vote.

**viii. THAT** the Honorable Committee Members erred in law and fact in ordering that the rejected votes be included in the recount yet they had observed and held in the same ruling that it was difficult to discern the intention of the two voters from the manner in which the ballot papers were marked.

**ix. THAT** the Honorable Committee Members erred in law and fact in relying on a case law whose circumstances were not similar to the case before them and in total disregard of the FKF elections rules, the FKF electoral Code and the FKF Constitution.

**x. THAT** the Honorable Committee Members erred in law and fact in finding that the Appellant demonstrated that there exists some evidence which casts doubt on the sensitization of voters.

**xi. THAT** the Honorable Committee Members erred in law and fact in totally disregarding the 1<sup>st</sup> Respondent/Appellant's pleading and arguments.

**xii. THAT** the Honorable Committee Members erred in law and fact in completely disregarding the evidence adduced by the officials of The Electoral Board in charge of conducting, preparing and supervising the FKF election.

14. On 15<sup>th</sup> October 2020, the appellant's application was placed before SC. J Ohaga, the Chairperson of SDT for directions. The following directions were issued;

**a. That the matter is duly certified as urgent.**

**b. The Appellant shall ensure service of Memorandum of Appeal by close of business Monday 19<sup>th</sup> October ,2020.**

**c. The matter shall be mentioned on Wednesday 21<sup>st</sup> October 2020 at 2:30pm via zoom meetings or such medium as The Tribunal shall determine.**

15. The appellant by the 13<sup>th</sup> of October had filed the following documents

a. Memorandum of Appeal

b. Certificate of Urgency

c. Notice of Motion

d. Supporting Affidavit to which was annexed the decision of The Appeals Committee.

16. As directed in the SDT Orders of 15<sup>th</sup> October,2020, this matter came up for mention for further direction on 21<sup>st</sup> October 2020 (via Microsoft teams). All the parties were duly represented. The SDT issued the following directions:

**a. The Tribunal does away with the Application for Stay and goes straight into the appeal for interests of expediency**

**b. Advocate for the Respondent to serve the Replying Affidavit on the advocate for the Appellant and advocate for the Interested Party.**

**c. Advocate for the Interested Party to file a response to the substantive appeal.**

**d. All counsels to exchange brief written submissions to be filed simultaneously seven days after response by the interested party and**

**e. The Panel constituted to hear this matter shall be:**

**i. Njeri Onyango**

**ii. Gichuru Kiplagat; and**

**iii. Peter Ochieng.**

**f. The matter shall come for highlighting of submissions on Wednesday 4<sup>th</sup> of November 2020 at 2:30 p.m. Via Microsoft teams or such other medium as The Tribunal shall determine.**

17. Pursuant to those orders, the Respondent on 28<sup>th</sup> October 2020 filed a 21 paragraph Replying Affidavit sworn on 19<sup>th</sup> October, 2020. To this she annexed various documents in support of the averments set out in the affidavit.

18. The matter came up before the appointed hearing Panel on 4<sup>th</sup> November 2020 when it was due for highlighting of Parties' Submissions. The parties were all represented by Counsel on record. At this stage only Appellant's Counsel had filed and served their Written Submissions. This led to an application for adjournment by the Respondent and the Interested Party. The Panel made the following orders;

**a. Application for adjournment by the respondent and the interested party is hereby allowed**

**b. The Respondent and Interested Party to file and serve Written Submissions on or before close of business on 9<sup>th</sup> November, 2020**

**c. The matter shall be heard on 10<sup>th</sup> November 2020 at 2:30 p.m. virtually for highlighting submissions.**

**d. The Appellant to provide The Tribunal with a soft copy of the FKF Constitution that is sought to be relied on as per the Written Submissions.**

19. In compliance with the above directions, the Respondent filed and served written submissions on 09/11/2020. The Interested Party also on the same day (9/11/20) filed its Written Submissions.

20. The matter was heard on 10/11/20 (virtual hearing) when respective parties addressed the Panel by way of highlighting their submissions. The Panel reserved The Decision to be delivered on 25<sup>th</sup> November, 2020

## **ISSUES**

21. Arising from the parties' documents filed with The Tribunal, the Written Submissions and the highlighting of submissions, the issues that present themselves for determination are:

i. Whether or not the SDT has jurisdiction to hear and determine the appeal filed herein"

ii. If the answer to (i) above is in the affirmative, whether or not the Appeals Committee has jurisdiction to reverse the decision of the Electoral Board"

iii. Whether or not the Appellant has exhausted available internal disputes resolution mechanisms"

iv. Whether or not there has been undue delay in filing this Appeal"

v. Whether or not the Appellant can raise new issues not raised before the Electoral Board and Appeals Committee"

vi. Which party will bear the costs of the appeal"

## **JURISDICTION OF THE SDT**

22. The challenge to the jurisdiction of the SDT as we perceive it, is two pronged.

a. The substantive jurisdiction on whether or not, the Constitution and rules of FKF as read together with the provisions of S.58 of the Sports Act allow for the present Appeal; and

b. The procedural jurisdiction on whether or not internal dispute resolution mechanisms have been exhausted before the filing of this Appeal.

23. The jurisdiction of the SDT is derived from Section 58 of the Sports Act No. 25 of 2013 (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.**

24. It has been argued by the Interested Party, that in order for The Tribunal to be seized of this Appeal under the provisions of Section 58(a), the rules of FKF and its Elections Code, have to specifically provide, that an appeal can be made to the SDT on an election issue arising from the FKF Appeals Committee. The Interested Party's position is that the SDT has no jurisdiction to entertain this appeal as the FKF Constitution and the Electoral Code specifically bar any appeals on electoral disputes beyond the decision of the FKF Appeals Committee

25. The Interested Party has laid reliance on Article 69 of the FKF Constitution, 2017 which provides that;

### **Article 69: Disputes Resolutions**

**1. Disputes in the Association or disputes affecting Leagues, members of Leagues, Clubs, and members of Clubs, Players, Officials and other Association Officials shall not be submitted to Ordinary Courts, unless the FIFA regulations, this Constitution or binding legal provisions specifically provide for or stipulate recourse to Ordinary Courts**

**2. The entities mentioned in par. 1 above shall give priority to arbitration as a means of dispute resolution. 3. The disputes as specified in art. 1 shall be taken to an independent Arbitration Tribunal recognized by FKF or CAF or to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.**

**4. Decisions made by the FKF standing committees and the judicial bodies are final and FKF members are prohibited from taking such matters to ordinary courts. Any member found in violation of the same shall be subjected to disciplinary measures as stipulated in the disciplinary Code of FKF and FIFA**

**5. If any of the parties is dissatisfied by decisions and rulings made by any of the Standing Committees and judicial committees, such a party is at liberty to lodge an appeal with the Appeals Committee whose decision shall be final unless**

stipulated elsewhere in this Constitution.

**6. The first body for Electoral disputes shall be the Independent Electoral Board. Any member unsatisfied with decisions of the Electoral board may Appeal to the FKF Appeals Committee.**

26. It is argued by the Interested Party that the impugned elections were conducted under the FKF Electoral Code and the road map published by the Electoral Board on 11<sup>th</sup> August, 2020. That Clause 6 of the elections guidelines and regulations did provide that;

**“The FKF electoral board will provide for time in the electoral calendar to hear the grievances and appeals of candidates and voters. Those still aggrieved by the decision of the Electoral Board will have the opportunity to further appeal to the FKF appeals board as provided for in Section 7 of the Electoral Code....”**

27. Section 7 of the FKF Electoral Code on its part provides that ;

**a. Appeals against decisions of the Electoral Board may be lodged only with the FKF Appeals Committee.**

**b. Decisions of the FKF Appeals Committee SHALL BE FINAL AND BINDING.**

28. The Interested Party therefore submitted that the current dispute arising from an electoral process has;

i. Been placed before the Electoral Board for review and decision rendered.

ii. The Electoral Board decision was appealed to and reviewed by the FKF Appeals Committee and a decision rendered on 6/11/2020.

iii. The decision of The Appeals Board is final and binding this being an elections related dispute.

29. The Appellant does not agree with the challenge on the jurisdiction of the SDT and contends that the SDT has jurisdiction. Whereas the Appellant is alive to the provisions of Article 69 of the FKF Constitution and Section 7 of the FKF Electoral Code cited above, the Appellant does not agree that in the instant case the Appeals Committee decision is final and binding. The Appellant states that the decision must be challenged and jurisdiction lies at the SDT as;

i. The Appeals Committee acted without jurisdiction. Its decision is thus an illegal decision.

ii. The Appeals Committee entertained an appeal that was out of time.

iii. The decision of the Appeals Committee itself was delivered out of time in terms of the timelines set out in the Electoral Code

30. The Appellant also places reliance on the provisions of Article 70 (1) of the FKF Constitution which allows for disputes to be placed before a recognized Independent Tribunal once all internal dispute resolution channels have been exhausted. Article 70 (1) provides;

#### **Article 70 Jurisdiction**

1. Recourse may only be made to an Arbitration Tribunal in accordance with art. 68 once all internal channels of FKF have been exhausted.

31. The Appellant thus argues that S.7(1) of the Electoral Code is only final in terms of the internal decision making mechanism, whereafter a party still aggrieved can seek recourse to The Tribunal envisaged and allowed by Article 70(1) FKF Constitution. It is proposed that the appellant has only demonstrated that he has exhausted the available internal dispute resolution mechanisms in that;

- i. Elections were held on 19/9/20.
- ii. Results were announced.
- iii. A challenge was mounted with the Electoral Board.
- iv. The Electoral Board decided.
- v. The challenge was filed with the Appeals Committee.
- vi. A decision of the Appeals Committee was rendered as the final internal dispute resolution mechanism.

32. The appellant further argues that the SDT is an independent Tribunal recognized by the FKF, CAF and FIFA statutes. The Appellant placed reliance on the Decision of **JARED NYAUMA AND OTHERS VS FKF** where the court held that the SDT has jurisdiction to handle a dispute relating to Federation elections.

33. On her part, the Respondent did not raise issue with the substantive jurisdiction of the SDT but rather questioned the procedural jurisdiction of the SDT on the basis that the appellant being dissatisfied with the decision of the Appeals Committee had not exhausted all the internal dispute resolution mechanisms before approaching the SDT.

34. The Respondent's position is based on the claim that the Appellant before filing the current Appeal had commenced a review process before the Appeals Committee and had even obtained stay orders, which had at the Appellant's request been variously extended ostensibly to allow for time for the Appellant to pay the Review fee Kshs. 100,000/=. That the Appellant has thereafter not pursued that process nor withdrawn the same and as such it remains pending resolution before the Appeals Committee.

35. This Panel is obliged to consider the competing arguments on the issue of jurisdiction first before embarking on any other issues in the matter. As it is often stated, jurisdiction is everything.

36. The basic facts as to what has led to the current appeal are clearly not in much contest, the issue therefore lies in this Panel's interpretation of the SDT's Appellate Jurisdiction as set out at Section 58 (a) of the Sports Act vis-a vis the provisions of Article 69 of the FKF Constitution and Section 7 of the FKF Electoral Code.

37. The Panel is of the view that the appellate jurisdiction of the SDT, must be construed to be contained and limited to the specific ambit of Section 58(a) being matters where the "*rules (of the Federation) specifically allow for appeals to be made to the tribunal*"

38. To construe the SDT jurisdiction, the Appellant has relied on the decision of **JARED NAYUMA ONDIEKI**. It is noted that the claim by the Claimants **Jared and others** in SDT Case No. 21 and 24 2019 related to the validity of the nominations / appointments of members of the FKF Electoral Board and the FKF Electoral Code. The claimants therein contested the composition of the Electoral Board as they said several members hold appropriate qualifications did not qualify or could not be neutral arbiters and also Challenged the Validity of the Electoral Code for what was termed as a failure to obtain stakeholder participation in its formulation. It was not a matter arising from a dispute in the election exercise or the outcome of the electoral process.

39. In the instant matter, the dispute in issue arises from a disputed electoral result and the decisions of the FKF mandated electoral dispute resolution organs and thus the same has to be viewed in terms of the available electoral dispute resolution regulations found within the FKF Constitution and the FKF Electoral Code. Neither the Electoral Board's composition nor the Electoral Code provisions are in issue.

40. The question that begs to be resolved is whether or not the specific challenge on the outcome of the Electoral process can properly be entertained at an Appellate level or not

41. The Panel has reviewed both Article 69 and Section 7 of the FKF Electoral Code. The Panel is satisfied that within the



provisions thereof together with the contents of Clause 6 of the Electoral Board road map issued on 11/8/20(cited above) both candidates and voters were well aware of the available grievance resolution mechanism. That is, that they had a chance to raise challenges on decisions of any Election Officials to the Electoral Board and a further appeal to the FKF Appeals Committee. The appeal before this Panel has gone through that process.

42. Section 58 (a) of the Sports Act gives jurisdiction to the SDT to determine matters of appeal against decisions of National Sports Federations, whose rules specifically allow for appeals to be made to the SDT: In the instant case, the specific rules as cited above are the FKF Constitution and the Electoral Code which specifically provide;

i. Article 69(6); The first body for Electoral disputes shall be the Independent Electoral Board. Any member unsatisfied with decisions of the Electoral board may Appeal to the FKF Appeals Committee.

ii. Section 7 (1) (b); Decisions by the FKF Appeals Committee shall be final and binding.

“According to Black’s Law Dictionary ‘**Bind**’ means **to obligate; to bring or place under definite duties or legal obligations, particularly by a bond or covenant; to affect one in a constraining or compulsory manner with a contract or judgment**, and ‘**Final**’ means *Definitive; terminating; completed; last*”

43. Having considered the limitation on the jurisdiction to hear Appeals from decisions of Sports Organizations as set out at S. 58(a) of The Sports Act and the relevant provisions of the FKF Rules relating to electoral disputes, this Panel is of the considered view that the Appeal before it is of such nature which the rules of FKF specifically do not allow an appeal to the SDT against the decision of the FKF Appeals Committee. Parties herein have also not brought themselves within the provisions of Section 58 (b) of the Sports Act.

44. Consequently, this Panel finds and holds that the SDT has no jurisdiction to entertain, hear or rule on the present appeal. Borrowing from the words of NYARANGI J. in the celebrated case of **OWNERS OF THE MOTOR VESSEL “LILLIAN S” V CALTEX OIL (KENYA) LTD [1989] KLR**

“...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...”

45. Having held as above, it is this Panel’s view that this Panel cannot make or take any further step in this matter or determine any other issues placed before it. This Panel therefore downs its tools.

46. In view of the determination above and the importance of this matter to the parties, this Panel orders that each party shall bear its own costs.

**Dated at Nairobi this 25<sup>th</sup> day of November, 2020**

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**Njeri Onyango; MCI Arb, panel Chairperson**

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**Mr. E Gichuru Kiplagat**  
**Member**

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**Mr Peter Ochieng**  
**Member**

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