



**REPUBLIC OF KENYA**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**AT NAIROBI**

**CASE NO. E013 OF 2021**

**COLLINS WAKHUNGU.....CLAIMANT**

**-versus-**

**SOFAPAKA FOOTBALL CLUB**

**(Sued through its MANAGEMENT COMMITTEE,**

**CHAIRMAN (Mr. Elly Kalekwa ),**

**GENERAL MANAGER TO/CEO (Mr. Jimmy Carter Ambajo),**

**TEAM MANAGER (Mr. Hillary Echesa).....RESPONDENT**

**AND**

**FOOTBALL KENYA FEDERATION.....INTERESTED PARTY**

**DECISION**

**Panel**

**1 NJERI ONYANGO – PANEL CHAIR**

**2 MR. GABRIEL OUKO - MEMBER**

**3 MS. MARY KIMANI - MEMBER**

**Representation**

1 Mr. Munge instructed by the firm of Kwew Advocates LLP for the Claimant

2 Mr. Ochieng instructed by the firm of Sila Munyao & Co Advocates for the Respondents

3 Mr. Muhuyu instructed by the firm of Litoro & Omwebu for the Interested Party

## **DEFINITIONS**

**1 FIFA – International Federation of Association Football**

**2 FKF- Federation of Kenyan Football**

**3 SDT- Sports Disputes Tribunal**

## **THE PARTIES**

1 The Claimant is described as an adult of sound mind of P.O Box 50199-00100 residing at Nairobi County. He is a professional football player.

2 The Respondent is a Football Club established in Kenya which participates in the FKF Premier League, the top tier Club competition in Kenya.

3 The Interested Party is the National Sport Organization responsible for managing and running the sport of football in the country. It is responsible for ensuring adherence to football regulations and rules and to set up such organs and committees to assist in the management of the sport

## **BACKGROUND**

4 Collins Wakhungu (hereinafter “the Claimant”) filed an Application by way of a Notice of Motion under a Certificate of Urgency on 3<sup>rd</sup> August, 2021. He also filed the following;

- a) Statement of Claim
- b) Verifying Affidavit
- c) Supporting Affidavit
- d) Claimant’s List of Witnesses
- e) Witness Statement by himself with annexures

5 The Claimant’s position is that the employer /employee relationship between him and the Respondent had totally collapsed. He had issued a notice to terminate the same and sought various orders, details of which shall be set below

6 The matter was placed before the chairperson of the Sports Disputes Tribunal who on 23<sup>rd</sup> September, 2021 made the following orders:

***“UPON READING the Certificate of Urgency of Samuel Munge, Advocate, together with the Notice of Motion dated 20<sup>th</sup> September, 2021 presented before this Honourable Tribunal by Counsel for the Claimant/Applicant AND upon reading the Affidavit of Collins Wakhungu sworn on the same date together with the annexures thereto***

***AND UPON hearing Counsel for the Claimant/Applicant on 23<sup>rd</sup> September 2021 at 4.00pm when the said Application came for hearing***

## **IT IS HEREBY ORDERED**

***1 THAT the matter be and is hereby certified as urgent;***

**2 THAT an order be and is hereby issued directing the Respondent to issue the Claimant with a Release Letter as a free agent pending the hearing and determination of this suit;**

**3 THAT an order be and is hereby issued directing the Interested Party to issue the Claimant with a Release Letter as a free agent and where necessary also issue International Transfer Certificate (ITC), pending the hearing and determination of this suit;**

**4 THAT the matter shall be mentioned on 28<sup>th</sup> September 2021 at 2.30pm for directions on the hearing of the main suit;**

**5 THAT the costs of this Application to abide the outcome of the suit.**

7 The pleadings filed and the Application dated 20<sup>th</sup> September, 2021, Statement of Claim dated 20<sup>th</sup> September, 2021 and a Hearing Notice dated 21<sup>st</sup> September, 2021 were eventually served up the Respondents on 22<sup>nd</sup> September, 2021 as per the Affidavit of Service of Ambrose Onyancha sworn on 23<sup>rd</sup> September, 2021.

8 When the matter was mentioned virtually via Microsoft Teams before the Tribunal on 28<sup>th</sup> September, 2021, the Claimant was represented by his Counsel on record Mr. Munge. Mr. Ochieng represented the 1<sup>st</sup> Respondent while the Interested Party was represented by Mr. Muhuyu. The Tribunal made the following orders.

**“UPON HEARING of this case by the Tribunal on 28<sup>th</sup> September, 2021, the Tribunal hereby directs, and orders as follows:**

**1 The 1<sup>st</sup> Respondent to issue an immediate release of the player.**

**2 Respondents have seven days to file responses to the claim, whether by preliminary objection or by substantive responses;**

**3 Parties to Email responses to the Tribunal, in the event any party is not able to access the E-portal;**

**4 The matter is set for hearing on 7<sup>th</sup> October 2021 at 2.30pm via Microsoft Teams or such other medium as Tribunal shall determine for the purpose of securing a date.**

9 The Respondent appointed its Counsel on record and a Notice of Appointment of an Advocate was filed by the firm of M/S Sila Munyao & Company Advocates dated 28<sup>th</sup> September, 2021.

10 On 6<sup>th</sup> October, 2021, the Claimant pursuant to leave granted by the Tribunal filed his replying Affidavit in respect of the Notice of Motion and Supporting Affidavit filed by the Respondent as above outlined.

11 On the 7<sup>th</sup> of October, parties were again represented by Counsel where the matter again came up for mention. This time Mr. Munyendo was holding brief for Mr. Muhuyu for the Interested Party. The panel was informed that Mr. Muhuyu had been bereaved and was still out of the office as at that date. Therefore Mr. Muhuyu had not complied with the timelines issued in the directions of 28th September, 2021. In regard to filing the Interested Parties response or Affidavit and written submissions.

12 . The Claimant indicated that they had received the release letter but not in the terms acceptable. The Tribunal thus issued the following orders

**“UPON HEARING the case on 7<sup>th</sup> October, 2021 the Tribunal hereby directs and orders as follows:**

**1 Adjournment is granted to 19<sup>th</sup> October 2021 at 2.30pm;**

**2 Leave is granted to Mr. Ochieng to file a further Affidavit within 7 days;**

**3 Corresponding leave is granted to the Claimants to file such response as may be necessary within 5 days from the date of service;**

*4 Mr. Munyendo granted leave to file any application within 5 days. Corresponding leave to the other parties to file their responses within 5 days of service;*

*5 All parties to ensure that their skeleton submissions are filed and served on or before 18<sup>th</sup> October 2021;*

*6 Further directions to be issued on the 19<sup>th</sup> October 2021.*

13 The matter was by consent of the parties stood over to 19<sup>th</sup> October 2021. Leave was granted to Mr. Muhuyu for the Interested Party to file any Application for document he may wish together with written submissions. Corresponding leave was granted to the Claimant to file any necessary response to such Application as maybe filed.

14 On 7<sup>th</sup> of October, the Respondent through his Advocates on record filed a Notice of Motion Application under Certificate of Urgency dated 1<sup>st</sup> October, 2021. There are Four (4) prayers in the Application:

*“Ex-parte*

*1 THAT this application be certified as urgent and be heard on priority basis*

*2 THAT there be an order for stay for the proceedings herein pending the hearing and determination of this application inter-parties*

*Inter-parties*

*3 THAT there be an order of permanent stay of proceedings herein*

*4 THAT the cost of this application provided for”*

**WHICH APPLICATION** is grounded upon the following **FOUNDATIONS**:-

*a THAT the parties herein have not agreed to refer to this Honourable Tribunal the subject dispute as provided under Section 58(b) of the Sports Act and as per the Arbitration Agreement subject hereof and ought to be allowed to do so in the first instance*

*b THAT the Respondent has not delivered any pleadings or taken any other steps in these proceedings.*

*c THAT there is no sufficient reason as to why the subject dispute should not be referred in accordance with the Arbitration Agreement*

*d THAT the Respondent is ready and willing to do all things necessary to the proper conduct of the Arbitration as agreed.*

*e THAT this Honourable Tribunal has a discretion to grant the orders sought herein*

15 The Respondent’s objections on the jurisdiction of the tribunal was deliberated upon by the panel. A ruling on the same was issued on 9<sup>th</sup> November 2021. The panel held that the Tribunal had requisite jurisdiction to hear and determine the claim as filed. The panel then issued the following directions:

*“UPON HEARING of this case by the tribunal on 9<sup>th</sup> November, 2021, the Tribunal hereby directs and orders as follows:*

*1 The Respondents are hereby granted seven (7) days to file and serve their response to the Claimant’s claim;*

*2 The Claimant is hereby granted leave to file a response to the Respondent’s response within seven (7) days of service;*

***3 The matter will be mentioned on 30<sup>th</sup> November, 2021 at 2.30pm via Microsoft Teams or such other medium as Tribunal shall determine to confirm compliance and for further directions.***

16 On 30<sup>th</sup> November, 2021, when this matter came up for mention to confirm compliance, all the parties were represented by Counsel. Mr. Munge for the Claimant informed the panel that he had not yet been served with the Respondent's response to the claim. He asked for directions on the hearing.

17 On his part, Mr. Muhuyu for the Interested Party took the position that the Interested Party would not be participating in the proceedings as they relate to the employment contract between the Claimant and the Respondent.

18 Mr. Munyendo holding brief for Mr. Ken Ochieng for the Respondent informed the panel that Mr. Ochieng had been involved in an accident that resulted in an injury to his back. As such he was prescribed to remain in bed rest for at least three weeks beginning the week prior to the date of the mention. This compromised his ability to file the Respondent's response to the Claimant's claim. Mr. Munyendo therefore sought further time to allow Mr. Ochieng to file a response to the claim.

19 The Tribunal took note of the parties submissions but did observe that the accident involving Mr. Ochieng took place sometime after the period for filing the Respondent's response as per the Order issued on 9<sup>th</sup> November, 2021 has expired. The panel therefore issued the following directions:

***UPON HEARING of this case by the tribunal on 30<sup>th</sup> November, 2021, the Tribunal hereby directs, and orders as follows:***

***1 Mr. Ochieng has time to delegate the representation of the matter and so the matter will be listed for hearing on 14<sup>th</sup> December 2021 at 2.30pm. via Microsoft Teams or such other medium as the Tribunal shall determine in view of the exceptional circumstances in which Mr. Ochieng finds himself, and notwithstanding the timelines indicated in the ruling of the Tribunal dated 9<sup>th</sup> November, 2021;***

***2 The Respondent is hereby granted seven (7) days from the date of the directions herein to file a response to the Claimant's claim if any;***

***3 The Claimant is granted leave to file a response to the Respondent's response within seven (7) days of service."***

20 This matter therefore came up for hearing on 14<sup>th</sup> December, 2021 at 2.30pm. By that date the Respondent had not filed its response to the claim. There was no representation by Counsel for the Respondent either, despite the date having been given in the presence of Mr. Munyendo on 30<sup>th</sup> November, 2021. Mr. Muhuyu on his part reconfirmed that the Interested Party would not be participating in the hearing. The panel then determined that the matter would proceed for hearing.

21 The hearing proceeded virtually via Microsoft Teams. Mr. Collins Wahungu, the Applicant was sworn in and testified. He confirmed that he was the Claimant and that he had filed the Statement of Claim, the supporting documents as listed in the list of documents and the Witness Statement. He fully wished to adopt and rely on the Witness Statement and the documents produced. He thus prayed for judgment in his favour as set out in the Statement of Claim.

22 Mr. Munge upon closing the Claimant's case requested for time to file his written submissions which was granted. Submissions were to be filed within seven days.

### **CLAIMANT'S CASE**

23 By the Statement of Claim filed on 20<sup>th</sup> September, 2021 the Claimant stated that on 2<sup>nd</sup> January, 2020, the Claimant and the Respondent entered into a contract of employment for a period of 2 years (hereinafter "the contract"). The Claimant under the contract would provide service as a professional football player at a **monthly salary of Kshs 55,000 inclusive payable at the end of each month effective from 2<sup>nd</sup> January, 2020.** (Emphasis added)

24 The Claimant claimed that he commenced his contract and performed his part of the bargain but to the contrary, the Respondent breached the terms of the contract by failing to pay the Claimant his due monthly salary for a period of seven months. Thereafter the

Respondent in toto breach the Respondent did not pay the Claimant's salary for December 2020, and for the period starting January 2021 to July 2021 save for some half salary payment made in the month of January and March 2021.

25 The Claimant's position is that the intermittent or total failure of paying the salary put him in an awkward position as he only came to the city of Nairobi from Western Kenya when he signed to play for the Respondent. As a consequence he was unable to meet his rental payments, purchase food or even meet fare to the training ground. As a result he was kicked out of his rental premises and had been reduced to seeking accommodation from a good Samaritan yet he continued to provide his services to the Respondent.

26 For the reasons sought above and in order to meet his basic necessities, about June 2021 the Claimant was invited to play and did agree to take part in a tournament known as Olunga Cup and he played for a team called Red Bull which won the tournament. The said team is not in the FKF Premier League. He concedes that he received some money from that tournament which money he spent on purchase of food for himself as well as bus fare to the Respondent's training ground.

27 As a consequence of the participation in the above tournament, the Respondent served the Claimant with a letter dated 22<sup>nd</sup> June, 2021 giving him notice to show cause why disciplinary action should not be taken against him for breach of his contract. The letter is set out as follows

22<sup>nd</sup> June, 2021

Collins Wakhungu

Sofapaka FCPlayer

**NAIROBI**

Dear Collins

**RE: SHOW CAUSE LETTER**

*The above subject matter refers.*

*It has come to our attention that you breached your contract and further risked the health of your team-mates by playing in the Olunga Cup Tournament with players that may not have been vaccinated.*

*As guided by the contract Article 1.6 and the 1.7 on performance and also 5.2, 5.4 and 5.5 on conduct, states clearly on how you should conduct yourself as a professional.*

*You participated in a tournament that was duly sponsored by a competitor of our main shirt sponsor and further took a photo after the team you were representing won which clearly you were advertising for them knowingly very well the season is still on and also you failed to request for permission to attend for this tournament from the Technical bench.*

*Due to your actions, we have taken this matter seriously and you hereby asked to show cause why action should not be taken against you for breaching the club regulations, failure to which the club will have no option but to terminate your contract with immediate effect*

*You have 72 hours to respond before action is taken.*

28 The Claimant says that he was unable to respond to the letter above as he states that the time was too short. The Respondent in the absence of a response served the Claimant with a further letter dated 30<sup>th</sup> June, 2021 imposing a fine on him of Kshs 45,000/= and directing him to train with the youth team for 45 days. The said letter is set out as follows

30th June, 2021

Collins Wakhungu

Sofapaka FC

**NAIROBI**

**RE: SHOW CAUSE LETTER**

*The above subject matter refers.*

*In reference to our letter dated 22<sup>nd</sup> June, 2021 in which you were informed categorically on how you breached certain Articles on your contract and given 72 hours to respond before an action can be taken.*

*We can authoritatively state to date that you have not yet responded to our letter meaning you had no excuse whatsoever to act in the manner you did on the weekend of 20<sup>th</sup> June, 2021.*

*Failure to respond to our letter, the Management has resolved to first fine you Kshs 45,000/= for that act and further order you to be training with the youth team for another 21 days as they deliberate further on what action would seem fit to be taken against you.*

*Further, you are again being warned to adhere to club rules and guidelines that are clearly stated in your contract whenever such attempts arise.*

*Stand ne guided and act accordingly*

*Yours Sincerely*

**JIMMY CARTER AMBAJO**  
**GENERAL MANAGER /CEO**

29 In compliance with the letter of 30<sup>th</sup> June the Claimant proceeded to train with the Youth Team and completed the 21 days as ordered. He therefore made effort to resume training on the morning of 5<sup>th</sup> August, 2021 but upon arrival on the training ground he was denied entry as his name had an asterisk against it among other players who had similar asterisk against their names in a list placed at the entrance of the training ground.

30 In a bid to get an explanation, the Claimant called the Respondent's Team Manager but his called was not picked by the said Team Manager Mr. Jimmy Carter Ambajo. He therefore sent a text to the Respondent's Team Manager via Whatsapp pleading to be facilitated with funds to cover for his fare to return to his home county to avoid suffering in Nairobi where he had no place to live or food as he had exhausted his welcome at the good Samaritan's residence for a short period. The text message is set out as follows:

*"Niajee tm sina adi pa kuenda unaeza nisaidia plz nifike tu ata home, nitoke tu sai niende plz, nakuomba tu."*

31 In response to the above text plea, the Claimant instead got a termination of contract dated 5<sup>th</sup> August, 2021 which was sent to him via his phone on WhatsApp. The said letter is as follows

*"Collins Wakhungu*

*Sofapaka FC Player*

NAIROBI

Dear Wakhungu

**RE: TERMINATION LETTER**

The above subject matter refers.

In reference to our letter dated 27th July, 2021 in which you were asked to show cause why action should not be taken against you for breaching your contract on matters that were well stipulated.

The Management has resolved to terminate your contract with immediate effect since after several warnings, you have continued to maintain such vices in which its now becoming intolerable.

We acknowledge that you are being owed salary arrears which you will be informed when it will be made available to you.

We appreciate your services that you offered us and therefore wish the best of luck in your next chapter of life.

Thank you for your continued support and cooperation.

Yours Sincerely

JIMMY CARTER AMBAJO

32 The Claimant's outstanding salary was not paid together with the termination. He therefore on the 12<sup>th</sup> August, 2021 through his Advocates on record issued a Demand Letter to the Respondent which letter is in the following terms:

The Secretary General,

Football Kenya Federation (FKF)

Fifa Goal project at Kasarani Stadium

P.O. Box 49911 – 00100

NAIROBI

Dear Sir/Madam,

**RE: UNLAWFUL TERMINATION, ILLEGAL, SUSPENSION AND OVERDUE AND UNPAID SALARY FOR SEVEN (7) MONTHS IN RELATION TO MR. COLLINS WAKHUNGU BY SOFAPAKA FOOTBALL CLUB**

We refer to the above subject matter in which we have been retained by Mr. Collins Wakhungu (herein referred to as "Our Client") with instructions to address you as herein under:

By virtue of a contract entered on 2<sup>nd</sup> January, 2020 between Our Client and Sofapaka Football Club (herein after referred to as "the club"), the club secured the services of our Client as a professional football player from Nzoia Sugar Football Club, where he was the top scorer, **for a period of two (2) years until 2<sup>nd</sup> January, 2022**. Amongst the salient terms of the contract was the provision that our Client would provide his services to the club as a professional football player and in return the club would pay him **a monthly salary of Kenya Shillings Fifty-Five Thousand ( Kshs 55,000/=) and which salary included fare to the training ground.**

*(A copy of the contract entered on 2<sup>nd</sup> January, 2020 between Collins Wakhungu and Sofapaka Football Club enclosed herein for ease of reference).*

*In compliance with the terms of the contract Our Client continued to provide his services to the club. The club on the other hand only paid salary to our Client until the end of November, 2020. In the following year 2021, the club only paid our Client partly in January and partly in March. Thus, the salary for January, February, March, April, May, June and July 2021 remain unpaid.*

*As a result of the unpaid salary for several months Our Client, having come to Nairobi for the first time from Bungoma following the securing of his services by the club, suffered a lot as he was unable to pay rent, buy himself food and afford fare to the training ground. Due to the outstanding rent for several months Our Client was kicked out of his premises and had to put up with a good Samaritan. Furthermore, Our Client's woes of not having food and fare to the training ground continued due to unpaid salary. Our Client endured all these and continued to offer his services to the club.*

*On or about June 2021 Our Client in a bid to secure food and obtain fare to the training ground participated in Bull won the said tournament. The little money he was given in the said tournament as a token of appreciation provided Our Client with a reprieve as he could buy himself food for a few days and also afford fare to the training ground of the club.*

*Following Our Client's participation in the Olunga Cup Tournament the club by virtue of a letter dated 22<sup>nd</sup> June, 2021 gave a notice to Our Client to show cause within 72 hours why action should not be taken against him on the allegations of breach of contract for participating in the said tournament. Our Client was able to respond to the said letter by the club as the time given was very short. Consequently, by virtue of a letter dated 30<sup>th</sup> June, 2021 the club imposed the following sanctions against our Client:*

*a) Fined him Kshs 45,000/=*

*b) Directed him to train with the youth team for 21 days ( A directive which Our Client complied fully)*

*(Copies of the letters dated 22<sup>nd</sup> June, 2021 and 30<sup>th</sup> June, 2021 enclosed herein for ease of reference)*

*Upon completion of the 21 days training with the youth team Our Client resumed training with the senior Team. However, on the morning of Thursday, 5<sup>th</sup> August 2021 upon arriving at the training ground he was denied entry as his name from the list of players placed there had an asterisk. In a bid to understand what was happening Our Client contacted the Club's Team Manager who did not pick his call. Our Client therefore sent a text to the Club's Manager via Whatsapp requesting for assistance to enable him go home as it was evident that he was going to continue suffering in Nairobi with no food and a place to reside, having only been hosted by a good Samaritan for a short period of time. Instead of the Club's Team Manager responding to Our Client's text message he sent him a termination letter dated 5<sup>th</sup> August, 2021 making allegations of several warnings and referring to a letter dated 27<sup>th</sup> July, 2021 which are unknown to our Client as they have never been brought to his attention or served upon him apart from the letters dated 22<sup>nd</sup> June 2021 and 30<sup>th</sup> June 2021.*

*(A copy of the WhatsApp message and a copy of the termination letter dated 5<sup>th</sup> August, 2021 enclosed herein for ease of reference)*

*Consequently, by virtue of Article 56 (4) of the constitution of Football Kenya Federation (FKF) (2017), Chapter Six paragraph 6.1.7 of the Rules and Regulations governing Kenyan Football (2019) and Article 12bis, 13 and 17 of the Fifa Regulations of the Status and Transfer of Players January 2021 edition we urge you to intervene IMMEDIATELY and take appropriate action against the club and its concerned and relevant officials for:*

*a) Unlawfully terminating our Client's contract*

*b) Breaching the very contract by not paying our Client salary for over seven (7) months and*

*c) Imposing sanctions against Our Client without according him a fair hearing in total contravention of the Fifa Regulations on the Status and Transfer of Players.*

*We look forward to your prompt and immediate intervention failure to which we shall have to other alternative than to seek redress at the next relevant fora.*

*Yours Faithfully*

**KWEW ADVOCATES LLP,**

**SAMUEL KIONGERA**

33 There was no response to the above letter from the Respondents neither was payment received, the Claimant therefore filed the present claim in which the Claimant has set out a Claim for wrongful and unlawful termination of his contract. He has also claimed that unlawful sanctions were set out against him whose particulars are set hereunder:

**“PARTICULARS OF ILLEGAL SANCTIONS**

- a) Fining the Claimant a sum of Kshs. 45,000/=;*
- b) Suspending and directing the Claimant to train with the youth team for 21 days (A directive the Claimant adhered to fully to his own humiliation).”*

34 The Claimant therefore prayed for Orders as follows:-

- a) A declaration be made that the Respondent has breached the contract by failing to discharge its financial obligations;*
- b) A declaration be made that the Respondent’s termination of the Claimant’s employment was unfair and unlawful;*
- c) A declaration that the sanctions imposed upon the Claimant were and are illegal, being in breach of the rules of natural justice;*
- d) An order be made directing the Respondent to pay the Claimant;*
- i One month’s salary in lieu of notice being Kshs. 55,000/=*
- ii Unpaid salary, December 2020, January (half), February, March (half) to July 2021, being Kshs 385,000/=*
- iii Loss of income on the unexpired contractual period from August 2021 to December 2021, being Kshs 275,000/=*
- iv Compensation for unfair termination of employment equivalent to 12 months salary, being Kshs 660,000/=*
- e) An order compelling the Respondent to issue a certificate of service and release letter to the Claimant within a period of seven (7) days from the date of delivery of the Judgment. In the alternative and in the event the Respondent fails/declines to issue the same, the same be issued by the Chief Executive Officer (CEO) of the Interested Party including the International Transfer Certificate (ITC) where necessary and needed;*
- f) Costs of this suit;*
- g) Interest (d) & (f) at court rates from the date of delivery of the Judgment until payment in full;*
- h) Any other order that this Honourable Tribunal may deem fit to grant in the circumstances.*

**CLAIMANT’S SUBMISSIONS**

35 The Claimant filed his written submission dated 21<sup>st</sup> December, 2021 with the Tribunal. In his first issue for determination the Claimant submitted that the Respondent breached the contract between it and the Claimant. According to the Claimant, the Respondent breached the contract as it failed to discharge its financial obligations towards the Claimant contrary to the terms contained in the contract. The Respondent would habitually make partial payment of the monthly salary of Kshs 55,000 contrary to clause 3.1 of the contract.

36 The Claimant claims that through his Advocate on record he wrote a letter addressed to the Interested Party and was copied to the Respondent. The letter was served to the Respondent via email as the Respondent's offices had been closed. The Respondent however has not responded to the said letter necessitating the Claimant to file his claim at the Tribunal.

37 The Claimant submits that he is entitled to be paid Kshs 385,000 as damages because if the afore-stated breach had not occurred, the Claimant would have been paid the seven months' salary. The Claimant relied on the case of: *South Nyanza Sugar Company Ltd v Donald Ochieng Mideny1 20181 eKLR* at paragraph 11 the High Court reiterated the purpose of damages for breach of contract as it had stated in the case of *Consolata Anyango Auma v South Nyanza Sugar Company Limited MGR HCCA 53 of 2015 120151eKLR* that:

*"...As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum..."*

38 The Claimant further relied on the following provision of *Article 17(1) of FIFA Regulations on the Status and Transfer of Players January 2021 edition*:

*"In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods. The club shall be able to register new players, either nationally or internationally, only as of the next registration period following the complete serving of the relevant sporting sanction. In particular, it may not make use of the exception and the provisional measures stipulated in article 6 paragraph 1 of these regulations in order to register players at an earlier stage."*

39 Secondly, the Claimant in his submissions stated that the Tribunal should direct that the Respondent's termination of the Claimant's employment was unfair and unlawful. The Claimant submits that in compliance with the terms of his contract he continued to offer his services as a professional football player to the Respondent but on the contrary the Respondent only complied with the terms up to November 2020 when the Claimant's salary was fully paid. In toto breach, the Respondent did not pay the Claimant's salary for December, 2020 and for January 2021 (only paid half of it), February, March (only paid half of it), April, May, June and July.

40 As a result of unpaid salary the Claimant suffered a lot as he was unable to pay rent, buy food for himself and afford fare to the training ground. Due to the outstanding rent for several months, the Claimant was kicked out of his premises and had to put up with a good Samaritan.

41 In a bid to secure food and obtain fare to the training ground the Claimant took part in the Olunga cup Tournament and the team he played for in the said tournament called Red Bull won the tournament. As a token of appreciation he was given a little money. Following the Claimant's participation in the Olunga cup Tournament the Respondent gave the Claimant a notice to show cause by a letter dated 22<sup>nd</sup> June, 2021.

42 The Claimant was unable to respond to Respondent's letter dated 22<sup>nd</sup> June, 2021 as the time given to him was very short. The Respondent further imposed a sanction of Kshs 45,000 and also directed the Claimant to train with the youth team for 21 days through a letter dated 30<sup>th</sup> June, 2021. Upon completion of 21 days the Claimant returned to the first team where he was served with a Termination letter dated 5<sup>th</sup> August, 2021 via WhatsApp.

43 The Claimant therefore submitted that the Tribunal should make a declaration that the Respondent's termination of the

Claimant's employment was unfair and unlawful and that he is entitled to be paid compensation for wrongful dismissal and unfair termination, salary of twelve months being Kshs 660,000.

44 The Claimant in his submissions requested for the Tribunal to declare that the sanctions imposed upon him were illegal as he was given a notice to show cause vide a letter dated 22<sup>nd</sup> June, 2021. The Claimant was unable to respond as the Notice was too short and therefore in contravention of Article 47 (1) & (2) and Article 50 (1) & (2) of the Constitution of Kenya.

45 The Claimant further submits that the Respondent should be directed to pay him one month's salary in lieu of notice being Kshs 55,000 and loss of income on the unexpired contractual period, from August 2021 to December 2021 being Kshs 275,000. The Claimant further states that prior to the termination the Claimant had not been given three (3) written warnings as provided under Clause 4.2 of the contract. As per clause 4.3 of the contract, three (3) months' notice is required before a contract is terminated. The Claimant therefore claims that he is entitled to payment of three (3) months' salary being in lieu of notice being Kshs 165,000.

46 The Claimant therefore prayed for the following orders as already set out above.

### **ANALYSIS AND DECISION**

47 The panel has considered the documents filed by the Claimant and his evidence. The panel notes that the Respondent did not file any response to the claim. The issues that arise from the pleadings as filed are:-

In respect to the contract between the parties:

- a Whether or not the Respondent breached the terms of the contract;
- b Whether or not the Respondent termination of the contract was unfair and unlawful;
- c What are the appropriate orders to grant in the circumstances.

48 It is noted that the Claimant had prayed for an order to compel the Respondent to issue a release letter to him. This prayer was also contained in the Notice of Motion Application filed with the substantive claim. This prayer was dispensed with at the Interlocutory stage by the orders of the Tribunal of 7<sup>th</sup> September and 14<sup>th</sup> September and the Claimant's Counsel did confirm that an appropriate release letter had been issued to the Claimant by the Respondent on 13<sup>th</sup> October, 2021. That prayer is therefore spent.

#### **A) Whether or not the Respondent breached the terms of the contract**

49 The panel has reviewed the contract between the Claimant and the Respondent. The terms thereof in regard to the Claimant's remuneration for rendering his professional football services to the Respondent are clear. The player was to play **exclusively for the Respondent at a consideration by way of remuneration and allowances of Kshs 55,000 (inclusive) "payable at the end of every month."** (Emphasis added)

50 The Claimant stated that he commenced playing for the Respondent on 2<sup>nd</sup> January, 2020 (contract was signed on 2<sup>nd</sup> January, 2020) and that up to the time of filing this claim and at the hearing date he had not been paid salary for December 2020, half salary for January and March 2021, and full salary for the months April, May, June and July 2021. In the absence of a statement from the Respondent to controvert that statement, that position remains unrebutted.

51 The Claimant at paragraphs 4,5 and 6 of his statement stated as follows:-

***4. In compliance with the terms of the contract I continued to offer my services as a professional football player to the Respondent.***

***5. On the contrary the Respondent only complied with the terms of the contract up to November 2020 when my last full salary was paid. Thereafter in toto breach of the contract the Respondent has not paid my salary for December 2020, this year, 2021,***

*for January (only paid half of it) February, March(only paid part of it), April, May, June and July*

**6. As a result of unpaid salary for several months having come to Nairobi for the first time from Bungoma following the securing of my services by the Respondent, I suffered a lot as I was unable to pay rent, buy food for myself and afford fare to the training ground.**

52 The panel has seen a letter dated 12<sup>th</sup> August, 2021 addressed to the Secretary General of the Interested Party and copied to the Respondent which is cited at paragraph 32 above. That letter contains the full grievances as per the Claimant's Claim in this suit. There is no response to it. The panel is therefore satisfied that demand before action was made.

53 To determine whether or not there was a breach of the contract and by which party such breach was occasioned, the panel can only rely on the Applicant's evidence at the hearing and the documents in support. This far, the uncontroverted evidence is that as at the beginning of June, 2021 the Claimant was owed at least 6 months' salary. Clearly, as at that date the Respondent had grossly and substantially breached Clause 3.1 of the contract. The panel therefore has no hesitation in finding that the Respondent was in breach of the terms of the contract.

54 The Claimant states that he agreed to play in the Olunga Cup Tournament for Red Bull Team for reason of desperation in order to get some money to cater for his basic needs by reason of the breach to pay his salary by the Respondent. The panel has no doubt in his mind that the Claimant was placed in a financial embarrassment and desperation. However, sad as this situation clearly is, the same is unfortunately in breach of Clause 1.6 of the contract and the exclusivity of the contract between the parties as per Clause 1.3 of the contract. It is the panel's view the Claimant could and should have sought to terminate his contract for the substantial breach of the contract by the Respondent.

**B) Whether or not the termination was unfair and unlawful**

55 In regard to the termination of the player's contract, the Claimant has stated that the termination was unlawful. In order to make that determination the panel has reviewed the series of actions following the Claimant's participation in the Olunga Cup Tournament. The same shall be viewed against the provisions contained in the "" of the contract between the parties.

56 Upon finding out the fact of the Claimant's participation in the Olunga Cup, The Respondent issued the Claimant with a letter dated 22<sup>nd</sup> June, 2021. This letter gave him 72 hours to respond. The letter specifically cited the breach of articles 1.6, 1.7, 5.2 and 5.4 of the contract. It also cited the risk of exposure of the other team members, on account of the Claimant playing with and against Un-inoculated players in the Olunga Cup Tournament. The other ground is that the sponsor of the Olunga Cup Tournament is a competitor of the main shirt sponsors of the Respondent which would therefore put the Respondent in an awkward position. The Claimant had apparently been photographed wearing a shirt of the competing sponsor, which had been widely published.

57 In the said date of 22<sup>nd</sup> June Notice was given to the Claimant to respond within 72 hours. It would appear that the Claimant did not respond. The Claimant says that the time to respond, 72 hours, was too short. The panel however notes if that was the case the Claimant never sought for more time to enable him to respond. Further, the Claimant could have explained the reason for his participation (the dire need for upkeep occasioned by non-payment of salary) in that tournament as they have done in this Claim. Consequently, it is apparent that the Claimant failed to respond to that letter and the breach of Contract on his part, despite the opportunity granted to do so.

58 The Respondent in view of the failure by the Claimant to respond to the letter of 22<sup>nd</sup> June, 2021 issued a letter dated 30<sup>th</sup> June, 2021 where a determination on the conduct appears to have been made:

- a) By fining the Respondent Kshs 45,000/=;
- b) Relegating him to train with the junior team for 21 days.

59 The wording of that letter in the penultimate paragraph would appear to suggest that that matter had been put to rest. It is therefore not surprising that the Claimant upon completion of the 21 days with the Junior Team made an attempt to go back to training with the Respondent's first team on 5<sup>th</sup> August, 2021 where after he learnt that his services had been terminated on the same day.

60 The panel has not seen a letter dated 27<sup>th</sup> July, 2021 but has seen one dated 30<sup>th</sup> July, 2021 which is a show cause letter. The letter of 5<sup>th</sup> August, 2021 cited at paragraph 31 makes two important pronouncements: -

a) At paragraph 2 the Claimant is informed of the termination of his contract with immediate effect on the purported ground that after several warnings the Claimant has continued to maintain “such vices” which had become intolerable;

b) The Respondent acknowledges that the Claimant is owed salary arrears, the amount not stated and which he would be informed when it would be made available.

61 The panel notes from this letter that the Respondent appears to accuse the Claimant of various breaches of his contract apparently committed after the letters of 22<sup>nd</sup> June and 30<sup>th</sup> June 2021. It is also noted that there is a claim that various warnings had been issued to the Claimant. Apart from the two letters mentioned, the panel has not seen any other warnings regarding his conduct or breach of contract as appears to be alleged here. In the absence of a Response to this claim from the Respondent, the panel can only work with what is before it.

62 An important matter that comes from this letter however, is the admission of outstanding salary arrears owed to the Claimant. This confirms the assertion by the Claimant that he was owed several months' salary arrears. On this, the panel can only rely on the un rebutted statement of the Claimant in regard to the quantum of arrears.

63 From the letter of 5<sup>th</sup> August, the panel takes note that the termination of the contract was with immediate effect. There clearly does not appear to have been any process set up to determine the nature of the misconduct by the Claimant and the particulars of the misconduct are not set out in the letter. It also seems to go back on the position apparently taken in the penultimate paragraph in the letter dated 30<sup>th</sup> June, 2021 which had appeared to have taken action on the Claimant by imposing financial sanction and relegating him to train with the Youth Team.

64 It is not clear therefore, whether there are further actions committed by the Claimant after the letter of 30<sup>th</sup> June, 2021 and if so what those misdeeds or acts of breach of contract would be that would lead to the right to resort to immediate termination of the contract between the parties.

65 Under clause 4 of the contract, termination of the contract was provided for as follows:

*“4.1. The Club shall have the full mandate to negotiate and process the transfer of the player to and from the club and that the player shall be entitled to 5% commission accruing from the transfer paid in respect of a transfer to another team (club)*

*4.2 The Club shall have the right to terminate the contract by giving 3<sup>rd</sup> verbal written warning or short notice depending on the gravity of misconduct of the player.*

*4.3 The player shall have the right to terminate a contract to join another club by giving three month notice and fulfillment some conditions of release determinate to SOFAPAKA F.C*

*Such a player defaulting this section to play for another Premier or Super League team when his contract is in force will not have his transfer forms or release letter sanctioned by SOFAPAK F.C within a period of one year.*

66 In view of the foregoing, the panel finds and holds that the letter of 5<sup>th</sup> August was issued un-procedurally. That whereas the Claimant had by playing in the Olunga Cup Tournament acted in breach of the terms of his contract (Clause 1.3) therefore making it possible for the Respondent to terminate the contract, The Respondent did not take that step at that time, but elected to impose other sanctions, and therefore for any other or further alleged breaches, it was necessary to follow the process set out under Clause 4 of the contract and ought to have given either appropriate warnings under Clause 4.2 and where necessary due disciplinary process before termination of the contract.

## **DETERMINATION**

67 Having reviewed this matter above, the Panel finds un rebutted evidence that the Claimant was owed salary arrears for 7 months

for the period beginning December 2020 to June 2021 at the rate of Kshs 55,000/=.

68 The panel also finds that the Claimant remained in the service of the Respondent for the period of July up to 5<sup>th</sup> August 2021 when he was served with the Notice of Termination.

69 The panel has also established that the decision to terminate the Claimant based on the reasons given in the letter of 5<sup>th</sup> August was taken unprocedurally without granting the Claimant a fair hearing. Equally the decisions to:

- a) Fine the Claimant of sum of Kshs 45,000 and;
- b) relegating him to play with the youth team were taken without granting the Claimant an opportunity to be heard;

were unprocedural and unlawful.

70 Whereas the step taken by the Claimant to play in the Olunga Cup Tournament was based on his desperate position in view of the outstanding salary arrears, that decision was ill advised and in breach of the contract between the parties for which the Respondent could terminate the contract being a substantial breach.

71 On the other hand, the letter of 5<sup>th</sup> August appears to be on parallel with the contents of the letter of 30<sup>th</sup> June, 2021. The steps taken are therefore unprocedural and unlawful, but for that unprocedural action the contract would have run to its end on 2<sup>nd</sup> January, 2022. The panel would therefore be inclined to agree with the Claimant and would award salary for

- a) One month salary in lieu of Notice and;
- b) Salary for the unexpired period for the contract from 5<sup>th</sup> August, 2021 to January, 2022.

72 The Claimant states that that letter of 12<sup>th</sup> August, 2021 was not responded to nor was his then overdue salary paid. The panel is satisfied from the documents availed that the letter was duly remitted to the Interested Party and the Respondent.

73 There has been no rebuttal to the fact of issuance of the letter of 12<sup>th</sup> August nor the issues of non-payment of salary claimed by the Claimant in it and in the present claim.

74 The Claimant has asked for general damages for breach of contract. The panel has found that the Claimant, despite the reasons given, had himself acted in breach of the contract. Further, the panel has above awarded the Claimant damages for unexpired period of the contract and therefore, would not be inclined to allow for damages as claimed under this head.

## **ORDERS**

75 Having found as above, the orders that commend themselves to the Tribunal and which the Tribunal hereby proceeds to issue are as follows: -

- i) One month's salary in lieu of Notice Kshs 55,000/=
- ii) Unpaid salary December 2020 to 5<sup>th</sup> August, 2021 Kshs 449,166/=
- iii) Loss of income for the unexpired period of income from 6<sup>th</sup> August, 2021 to 2<sup>nd</sup> January, 2022 Kshs 269,500/=
- iv) The Claimant shall have the cost of the suit to be agreed or taxed
- v) The Respondent shall be granted 30 days from the date of this decisions within which to pay the sums awarded at (i), (ii) and (iii) above. In default of payment of the said sum within that period the total sum due thereunder shall attract interest at 12% per annum with effect from the expiry of the 30 days period.

**DATED AT NAIROBI THIS 25TH DAY OF JANUARY, 2022**

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**MRS. NJERI ONYANGO-PANEL CHAIR**

.....

**MS. MARY KIMANI-MEMBER**

.....

**MR. GABRIEL OUKO-MEMBER**



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