



Case Number:	Appeal 7 of 2017
Date Delivered:	19 Sep 2017
Case Class:	Civil
Court:	Sports Disputes Tribunal
Case Action:	Decision
Judge:	John M Ohaga, FCI Arb
Citation:	Jonathan Mwaniki v Chemelil Sugar Company Limited [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Tribunal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Claim allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

APPEAL NO. 7 OF 2017

JONATHAN MWANIKI.....CLAIMANT

-VERSUS-

CHEMELIL SUGAR COMPANY LIMITED.....RESPONDENT

DECISION

Hearing: 29th August, 2017

Panel : John Ohaga - Chairman (SDT)
Elynah Shiveka - Vice-Chairperson
Gabriel Ouko - Member

Appearances: Messrs. Elvis Majani and Wambilianga instructed by Wambilianga, Majani & Associates Advocates for the Claimant

Mr. Ndung'u instructed by Ekin & Associates Advocates for the Respondent

The Parties

1. The Claimant is a male adult and is a footballer formerly employed to play for the Respondent in the Kenya Premier League.
2. The Respondent is a limited liability company ('**the Respondent**' or '**the Company**'); it owns and runs Chemelil Sugar Football Club ('**the Club**') which club participates in the Kenya Premier League and other authorized Leagues.

Procedural History

3. The Claim was commenced by the Claimant's Statement of Claim accompanied by a verifying affidavit sworn by the Claimant both dated 22nd March, 2017 and filed on the 7th March 2017.
4. The matter came up for a mention on 2nd May 2017 whereby the Respondent was allowed 7 days to file and serve the Statement of Response while the Claimant was given the liberty to reply if he so required. The hearing was then scheduled for 16th May 2017.
5. On 10th May 2017, however, the Respondent filed a Notice of Preliminary Objection challenging the jurisdiction of the Tribunal in entertaining the Claim. The Preliminary Objection was argued on 16th May 2017 and the ruling rendered on 30th May 2017. In the ruling, the Tribunal found that the preliminary objection had no merit and was therefore disallowed. Each party was to bear its own costs.
6. Thereafter, on 12th July 2017, the Respondent put in its Reply to the Statement of Claim.

7. The Respondent thereafter put in a Witness Statement of one Hillary Ouma dated 18th August 2017 and which was filed on the 21st August 2017. The witness was a member of the technical bench of the Club.

8. In sum, the said Hillary prayed that the Tribunal finds that the Claim is not warranted and that therefore it be dismissed with costs to the Respondents.

9. The Claimant also put in his Witness Statement dated 17th August and filed on 22nd August 2017. In the statement he emphasizes his claim and prays that the Tribunal allows the claim and awards him the amounts particularized in the claim.

10. The Claimant's Advocates thereafter filed their written submissions and bundle of authorities on 25th August 2017.

11. The matter came up for the main hearing on the 29th August when Counsel for both parties were heard by the Tribunal.

The Claimant's Case

12. In his written submissions, the Claimant claimed that: -

i. On the 1st July 2015, the Claimant and Company entered into a one and a half year employment contract, where the Claimant was primarily employed as a footballer for the Club in the Kenyan Premier League.

ii. On the 21st April 2016, the Claimant underwent surgery after falling ill, the cause of his illness being a urethra structure and periurethral abscess.

iii. On 25th May 2016, the Claimant was allowed to resume light training by the doctor, as he was still recovering from the surgery. He made diligent efforts to meet his contractual obligations, despite his health condition then.

iv. However, on the 20th June 2016, the Company, through the Head of Human Resource, terminated the Claimant's contract of employment and served him with a letter stating the same. No reasons as to why his contract was terminated were given.

v. The Claimant was not given any warning by the Company indicating that he had conducted himself in a manner to warrant any disciplinary action or termination of his contract. Moreover, the Respondent did not give him any notice of intention to terminate his employment contract, as required under Clause 14.4 of the said Contract.

13. The Claimant prayed that the Tribunal awards him the following: -

a. A declaration that the Respondent breached the Claimant's employment contract and in effect, unlawfully terminated the same;

b. An order directing the Respondent to pay to the Claimant a total sum of Kshs. 570,000.00 with interest, which is inclusive of one month's salary in lieu of notice, loss of income for the unexpired term of the contract, compensation or unfair termination and general damages; and

c. Costs of the claim with interest at court rates and any other relief the Tribunal found just to grant.

14. Counsel for the Claimant argued that there were two primary issues for determination; first, whether the unilateral termination of the employment contract by the Respondent was in breach and without just cause; and secondly whether the termination followed the lawful procedure prescribed by the law.

15. To this end, he had two limbs of argument; first on grounds of the provisions of the FIFA Regulations on the Status and Transfer of Players and secondly on the provisions of the Employment Law.

16. On the first limb of argument, Counsel argued that those Regulations are the sole rules governing the relationship between footballers and clubs. He invoked Article 13 which states that ***a contract between a player and a club can only be terminated on***

expiry of the term of the contract or by mutual agreement. Further, he underlined Article 16 to the effect that *a contract cannot be unilaterally terminated during the course of the season*.

17. He argued that the above provisions as highlighted have been breached by the Respondent when it unilaterally terminated the contract of the Claimant and more so before the end of the Kenyan Premier League season at the time.

18. In addition to the above, he submitted that Article 14 of the Regulations provides for instances where either party can terminate the contract in the course of the season with just cause. The Article continues to define the meaning of "*just cause*" in football as being established by the following merits: -

- a. The violation should persist for a long period of time;
- b. The player's uncooperative attitude towards the club and teammates would certainly justify sanctions against the player in accordance with the club's internal regulations;
- c. The sanctions should, however, (at least in the beginning) be a reprimand or a fine; and
- d. The club would only be justified to do so if the player's attitude continued, together with the player disappearing without a valid reason and without the express permission of the club.

19. He concluded that the FIFA DISPUTE RESOLUTION CHAMBERS (DRC) has duly adjudicated on many matters similar to the Claim herein. The FIFA DRC has never condoned the violation of Articles 13, 14 and 16 of the Regulations above.

20. On the second limb, he invoked Section 45(1) of the **Employment Act, No. 11 of 2007** which provides that no employer shall terminate the employment of an employee unfairly. This, he said, is also complemented by Section 47 which puts the burden of proving unfair termination or wrongful dismissal on the employee, while the burden of justifying the grounds of unfair termination or wrongful dismissal on the employer.

21. In this case, he submitted that the Respondent had failed to demonstrate both lack of capacity and misconduct without specific charges being made against the Claimant. He also argued that the Respondent had also failed to demonstrate that the Claimant failed to improve or rectify the situation, despite his ill health at the time. No specific measures, and/or warnings were directed to the Claimant to improve his performance.

22. He submitted that in taking to account the two tests set in the case of *Fred A. Odhiambo V. The Attorney General and Postal Corporation of Kenya (2013) eKLR*, the Respondent had not only failed the substantive test but also the procedural test. The Respondent had failed to show that the termination of the Claimant's contract was for a valid and just reason. Further, the Respondent had failed to demonstrate that the termination was undertaken in terms of a fair procedure.

23. With regard to breach, he invited the Tribunal to bear in mind that common law principles follow that loss based damages are owed by the breaching party to the party claiming. The amount of money to be paid in breach is usually to put the non-breaching party in the same situation they would have been in should the contract have been performed. This remedy is clearly highlighted at Section 49 of the Employment Act, 2007.

24. He concluded that it is a fiduciary duty in contracts that parties ought to perform their specific obligations and uphold each other's rights in order to facilitate not only a good working relationship, but also ensure that the purpose of the contract is met.

25. In this matter, the Claimant demonstrated utmost diligence in performing his contractual duties, until he suffered from an unfortunate illness. Despite undergoing surgery and his ill health, he made every effort to fulfill his duties to the Respondent. However, the Respondent, even with these facts, chose to unilaterally terminate his contract in the course of the season, without informing the Claimant of the reasons or affording him a proper hearing of the same.

26. In applying the quoted FIFA Regulations and the Employment Act, 2007, Counsel argued that it is clear that the Respondent did breach the contract with the Claimant by unilaterally terminating the contract without just cause and also failing to follow proper

procedure before terminating the contract, therefore making the action against the Claimant substantively and procedurally unlawful.

The Respondent's Case

27. The Respondent did not put in written submissions but in its place relied on its Reply to the Claimant's Claim, the bundle of documents as evidence, the witness statement of Hillary Ouma and the oral submissions of Mr. Ndung'u.

28. The Claimant's case is that the Claimant was first contracted by the Respondent as a football player on 2nd January 2013. The contract was available for renewal every year subject to the Respondent's discretion and on recommendation of the Club.

29. The Respondent averred that the Claimant had a good performance on his first year which ranged from 2nd January 2013 to 31st December 2013 taking a position in the first team. The second year was not good for him as he reported to be having urethral problems. He was sent to the Company Health Centre for checkup. On 25th January 2014, he was found to be having signs and symptoms pointing to urethral infection and partial urethral blockage (Urethral Stricture). He was treated for the infection successfully but the urethral blockage required further management.

30. He was referred to Doctor Raburu on 28th January 2014 for Laboratory and X-ray examination. On 30th January 2014, he was referred to Jalaram Hospital where he was admitted on 29th January 2014 and discharged on 9th February 2014. He was then given one-month rest after successful surgery and the Respondent's Medical Officer advised the Club to let him start light training on 11th March 2014.

31. The Claimant started light training under the instruction of the Technical Bench members' program. The program enabled the Technical Bench to:

- a. Monitor and assess his recovery.
- b. Do some counselling to the player to avoid loneliness.
- c. Involve him in team discussions during match analysis. (Theory & strategic team plan)
- d. Make him contribute to the spirit of the team to the best of his ability both on and off the field of play.

32. Thereafter, the Claimant underwent treatment at Jalaram Hospital. It was at Jalaram hospital that he was referred to Moi Teaching and Referral Hospital for review and investigations in terms of the discharge summary form dated 8th November 2014. After the Club had sight of this summary form, it became evident that the medical condition that the Claimant was suffering from started way back in 2009 which subsequently, developed lower urinary tract symptoms and had worsened over the past six months.

33. The Claimant reported back to the Respondent's medical officer who later advised the technical bench to give him 3 months rest. He resumed training in February 2015 after a year of inaction.

34. Critical to their case, the Respondent underlined the fact that the medical bills and expenses incurred by the Claimant were all settled by the Respondent.

35. Once again, the Claimant started light training as usual from the technical bench program. His performance dropped so much in 2015 owing to his deteriorating medical condition. The Club too did not perform well as it survived relegation by a whisker.

36. In December 2015, the Claimant had a reoccurrence of urethral infection and exacerbation of partial urethra blockage. The technical bench received the news after they had concluded the recruitment list for 2016. He was on the list of players who underperformed in the 2015 season. On the basis of sympathy having considered the hospital bill settled by the Respondent in the previous year which was over Kshs. 100,000, the Club decided to allow the Claimant to remain on its books so that he could be treated on the account of the Respondent.

37. The technical bench requested for two extra slots above the normal 25 players. One slot was that of the Claimant. The other was for a certain player who got injured while performing his Club duties and as such his case was in all fairness justified.

38. The Respondent's Medical Officer cautioned the technical bench that the Claimant's case was not a sports related injury but a sexually transmitted disease for which the Respondent is not obligated to provide medical cover or cater for the medical bills as it was a self-induced condition.

39. The technical bench persuaded the football management together with the Respondent's Medical Officer to allow the Respondent a chance to be treated on the account of the Respondent and assess if he could fully recover and be in a position to carry out his club duties effectively. They accepted on condition that after six months the two extra slots would be done away with because they had not been budgeted for.

40. The Claimant's condition continued to worsen. The Respondent's Medical Officer this time referred the Claimant to St Luke's Orthopaedic and Trauma Hospital. The Respondent undertook to pay medical bills to St Luke's Orthopaedic and Trauma Hospital through a letter dated 18th April 2016. The Claimant was to undergo a surgery at the Hospital.

41. From that time henceforth, there was no communication from the Claimant to the Respondent's Medical Officer regarding his health status and or progress of recovery. Equally, the Claimant did not report to duty as required. The technical bench contacted him through the physiotherapist. The first time he said he did not have fare to come back to the Club. The technical bench made arrangement for his salary to be sent to him through the club captain. Even then, he did not show up. When asked why he did not report, he said that a pipe (catheter) was inserted in his body to aid him pass urine and as such he was going through so much pain. He was asked to report to the Respondent's Medical Officer for examination but failed to do so.

42. The Respondent was paying the Claimant's salary in full despite not being active on the field. This was all courtesy of the technical bench and the executive committee's sympathy.

43. The technical bench sought the advice of the Respondent's Medical Officer regarding the Claimant's state of health and his observation was that due to the delicate nature of the operation and the fact that the Claimant had two recurrences of the infection and surgical intervention he was advised to avoid risky encounters that may lead to urethral infection which may lead to another recurrence of urethral blockage.

44. On 1st June 2016 the FIFA transfer window was open and the technical bench was to review each player's performance so that it could down size the team as it had promised the Club's management. The player who had been offered an extra slot passed the medical test and the technical bench assessed him and allowed him to play in the second leg.

45. The Club was under pressure paying the extra players and was also required to improve on the table ranks.

46. Owing to the persistent display of unprofessionalism and inability to competently fulfil the duties for which he was contracted, the Respondent argued, the technical bench was left with no choice other than to terminate the Claimant's employment under clause 3.3, 8.1, 8.4, 14.4.3.2, 14.4.3.3, 21.1 and 21.2 on standard Kenyan Premier League Contract of Employment for Footballers.

47. The Respondent informed the Tribunal that the Claimant was informed of the decision to terminate his contract by the Club Secretary. The matter was discussed between them and an agreement was reached. This was evidenced when he collected one-month salary in lieu of notice.

48. The Respondent reiterated that up and until the time of termination, the Claimant had been receiving his salaries and benefits as per his contract just like all the other players. The Respondent further underlined that at all times it complied with the KPL Contract of Employment of Footballers in its dealings with the Claimant.

49. In his oral submissions, to kick off his rejoinder, Mr. Ndungu for the Respondent sought to first demystify the aspect of poor performance as agued in the cases adduced by the Mr Majani for the Claimant. He argued that the argument cannot be raised since poor performance is subject to performance done in the first place. In this case, the Claimant had not played at all and as such the issue of poor performance cannot be raised.

50. Further, he submitted that as per the witness statement of Mr. Ouma, the treatment of the claimant is highlighted. He argued that the club kept paying him money even when he didn't play. He referred to appendix B and D. He argued that Appendix D did not indicate the reason for the termination of his employment to protect him from having his health status disclosed. He argued that the Appellant was dismissed also on grounds of absenteeism. He invoked Section 44 of the Employment Act which outlines absenteeism as one of the grounds for dismissal.

51. He invoked Clause 8.5 of the Kenya Premier League Contract which is Appendix A of the Claimant's documents which provided that it was the responsibility of the Claimant to seek medical attention to any ailment that may occur to him at the course of his contract.

52. He further invited the Tribunal to take judicial notice of the financial hardships that Kenyan clubs have. He therefore prayed that the Tribunal consider the financial constraints on the Respondent.

53. He also referred the Tribunal to clause 8.5 and clause 21 of the said contract. He therefore highlighted that absenteeism was a valid ground for the dismissal of the claimant from the employment and invited the Tribunal to find that the Respondent acted diligently.

54. In reply to the Respondent's submissions, Mr. Wambilinya for the Claimant said that their submission was an afterthought and was not canvassed in their pleadings.

55. On the issue on the Claimant having been rendered ill by the doctor and not going for medical reviews by the Respondent, he argued that it is a universal rule that you cannot terminate a person's employment on the basis of his health.

56. On the issue of poor performance, he submitted that the Claimant had very good performance in his first year. He therefore said that the Claimant could not be said to have had poor performance.

57. On the allegation that the Claimant did not go back for reviews, he argued that the Claimant were referred to several interviews by doctors severally and he attended.

58. Mr. Majani asked the tribunal to consider the fact that Claimant was dismissed on 20th June which was just 10 days to the close of the transfer window thus not giving him enough time to get another employer.

Discussion

59. We have considered the Counsels' oral and written arguments and we observe as follows:

The Law

60. Section 44 of the Employment Act No. 11 of 2007 on Summary dismissal

(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2)

(3) ...

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b)

61. Section 49 on the Remedies for wrongful dismissal and unfair termination

(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

62. Clause 3.3, 8.1, 8.4, 14.4.3.2, 14.4.3.3, 21.1 and 21.2 of the Kenyan Premier League Contract of Employment for Footballers provides as follows: -

3.3 In addition, the footballer will at all times act in accordance with the directions of the coach, technical and medical staff of the club, complying with their instructions and general contributing to the spirit of the team to the best of his ability both on and off the field of play.

8.1 Paid sick leave will be granted in accordance with the employment act (2007) Laws of Kenya from time to time and only in respect of illness or injury which is not caused by the footballer's misconduct and in accordance with the provisions set out hereunder.

8.4 The footballer shall not abuse his sick leave entitlement and any attempt to do so may result in disciplinary action being taken against him.

14.4.3.2 The failure to attend training or any club function.

14.4.3.3 The failure to arrive at the match whether league, cup, friendly or training

21.1 The footballer is found guilty of misconduct justifying dismissal.

21.2 The footballer is found to be incapable of competently fulfilling the job for which he has been employed.

63. FIFA Regulations on the Status and Transfer of Players at Article 13 on respect of contract. It provides that:

A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement.

64. Article 14 of the same Regulations on terminating a contract with just cause. It provides as follows:

A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.

65. Also, Article 16 on restriction on terminating a contract during the season. It provides as follows:

A contract cannot be unilaterally terminated during the course of a season.

Reasoning

66. We have considered all the arguments, facts and the law and find that there is one main issue for determination, which is:

Whether the termination followed the lawful procedure prescribed in the Employment Law.

67. In our opinion, we find that the procedure for terminating the employment was very clear both in the contract of employment entered into between the parties as well as in the Employment Act.

68. Section 41 of the Act gives the requirement of a notification and hearing before termination on grounds of misconduct. It requires that 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.

69. Further, it provides that notwithstanding any other provision of that part of the Act, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

70. There is no evidence from the Respondent that it gave a notification to the Claimant nor any hearing before the termination, purportedly on the grounds of misconduct, being absenteeism.

71. We note that in paragraph M and N of the Respondent's Response it submits that the matter of termination of the employment was discussed between the two and an agreement was reached. There is, however, no evidence adduced to the effect that the agreement was reached.

72. Having said this, we find that the procedure for terminating the employment was improper.

73. Nevertheless, we are alive to the fact that the Respondent bore a significant burden in meeting the Claimant's medical bill, to which the Claimant did not object or contradict. In terms of the evidence adduced, the Respondent bore Kshs. 428, 933.00.00

74. Bearing in mind that the Respondent improperly terminated the Claimant's employment contract, but nevertheless took it upon itself to bear the Claimant's medical bill on an ailment which is not necessarily automatically covered under the terms of the employment, the Tribunal shall award the Claimant damages equivalent to three (3) month's salary being Kshs. 90,000.00.

Conclusion

75. In view of the foregoing, the following orders commend themselves to the Tribunal:

- i. The Claimant is hereby awarded damages in the sum of Kshs. 90,000.00;
- ii. Each party shall bear its own cost.

76. The Tribunal thanks all the parties for their extremely helpful contribution and the cordial manner in which they conducted themselves.

DATED and Delivered at NAIROBI this 19th day of September, 2017.

Signed:

John M Ohaga, FCI Arb

Chairperson, Sports Disputes Tribunal

In the presence of:

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