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Court:	Sports Disputes Tribunal
Case Action:	Decision
Judge:	John M Ohaga FCIArb
Citation:	Gor Mahia Football Club v Kenya Premier League Limited [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
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Case Outcome:	Appeal ordered
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
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**REPUBLIC OF KENYA**

**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**APPEAL NO. 35 OF 2016**

**GOR MAHIA FOOTBALL CLUB.....APPELLANT**

**VERSUS**

**THE KENYA PREMIER LEAGUE LIMITED.....RESPONDENT**

**DECISION**

**Hearing:** 2<sup>nd</sup> August, 2016

**Panel:** John M Ohaga, FCI Arb - Chairman

E Gichuru Kiplagat - Member

Mary N Kimani - Member

**Appearances:** Mr. Francis Wasuna instructed by Wasuna & Co. Advocates for the Appellant

Ms. Akonga and Mr. Makori instructed by Macharia-Mwangi & Njeru for the Respondent

**The Parties**

1. The Appellant is Gor Mahia Football Club (**'the Club'**) which is a football club participating in the Kenyan Premier League and is based in Nairobi, Kenya. It describes itself as one of Kenya and East Africa's most supported football clubs and as Kenya's most successful club having won the national league 15 times, Cecafa Cup 3 times and the Africa Cup once.[\[1\]](#)

2. The Respondent is the Kenya Premier League Limited (**'KPL'**) is a private company incorporated in October 2003 under the Companies Act, Chapter 486 of the Laws of Kenya (now repealed). The KPL is affiliated to the Football Kenya Limited (FKL), which is also a KPL shareholder and voting member of the KPL Board of Directors. Non-voting members include the Kenya Football Coaches Association (KEFOCA) and Kenya Football Referees Association (KEFORA). The KPL is fully owned and managed by the sixteen Premier League clubs and is the entity charged with the responsibility of running the Kenyan premier league.[\[2\]](#)

**Brief Background**

3. The Club appeals the decision of the Independent Disciplinary Appeals Committee (**'IDAC'**) of the Football Kenya Federation dated 15<sup>th</sup> July, 2016: **Gor Mahia FC -vs- The Kenya Premier League Limited**.

4. The facts set out below are a summary of the main relevant facts as extracted by the Tribunal from the decision of the Independent Disciplinary and Complaints Committee (**'IDCC'**) dated 26<sup>th</sup> May, 2016.

5. On 25<sup>th</sup> April, 2016 the KPL charged the Club with the offence of failing to control its members and supporters on the 16<sup>th</sup> April, 2016 during a league match between the Club and Tusker FC which resulted in disruptions of the match and assault of one of the 2<sup>nd</sup> assistant referees, contrary to Rule 3.4(a) of the Rules of Kenyan Football. It also charged Mr. Boniface Oluoch, the goalkeeper of

the Club with the offence of assaulting the 2<sup>nd</sup> assistant referee contrary to Rule 6.1 of the Rules of Kenyan Football.

6. At paragraphs 28 and 29 of its decision, the IDCC made the following findings:

*'The IDCC is satisfied that the charge against Gor Mahia FC has been proved. Gor Mahia FC failed to control its members and supporters, contrary to Rule 3.4 (a) of the Rules of Kenyan Football.'*

*'The IDCC is satisfied that the charge against Mr Boniface Oluoch has been proved. In any case, Mr Oluoch admitted that he assaulted the 2<sup>nd</sup> assistant referee.'*

7. The holding of the IDCC was thus expressed at paragraph 33 as follows:

*'a. Gor Mahia FC failed to control its fans and supporters on the 16<sup>th</sup> April, 2016 during a league match, thereby causing disruptions of KPL Match Number 65 and the assault of the 2<sup>nd</sup> assistant referee following the conclusion of the said match, contrary to Rule 3.4(a) of the Rules of Kenyan Football.*

*b. Mr Boniface Oluoch assaulted the 2<sup>nd</sup> assistant referee, contrary to Rule 6.1 of the Rules of Kenyan Football.'*

8. The IDCC then proceeded to make the following orders:

*a. The KPL shall, with immediate effect, deduct three points from Gor Mahia FC's tally of points, which Gor Mahia FC has attained in the KPL League Tournament of 2016.*

*b. Mr. Boniface Oluoch is hereby banned from playing for Gor Mahia FC for one match, namely the next match organized by the KPL involving Gor Mahia FC with effect from the date of this decision, and from attending that match in the area immediately surrounding the field of play.*

*c. Gor Mahia FC shall meet the costs of the IDCC sitting and any witness expenses of the 12<sup>th</sup> May, 2016, exclusive of any legal fees, which shall be paid within 14 days of the date hereof, and in default be deducted from Gor Mahia FC's KPL grant.*

9. Aggrieved by the decision of the IDCC the Club lodged its appeal with IDAC via Memorandum of Appeal dated 27<sup>th</sup> May, 2016. IDAC rendered its decision on 15<sup>th</sup> June, 2016 wherein it dismissed the Appeal.

10. The Club remained aggrieved with the decision of IDAC and lodged an appeal with the Tribunal on 29<sup>th</sup> June, 2016. It cited eleven (11) grounds of appeal in its Memorandum of Appeal. It invited the Tribunal to find that the appeal had merit and to make the following orders:

*i. The decision of the Committee be set aside and be replaced with one allowing the Appellant's appeal from the decision of the Independent Disciplinary and Complaints Committee of 26<sup>th</sup> May, 2016;*

*ii. The orders of IDCC be set aside and be replaced with an order dismissing the complaints of the Kenya Premier League.*

*iii. The Tribunal be pleased to make such further orders as shall meet the justice of the case.*

### **The Club's Case**

11. The Club filed a Memorandum of Appeal to which it annexed the decisions of the IDCC and IDAC of 26<sup>th</sup> May and 15<sup>th</sup> June, 2016 respectively. Counsel for the Club, Mr. Wasuna also made extensive oral submissions before the Tribunal.

12. As a preliminary issue, Mr. Wasuna pointed out the decision of IDAC was not reasoned and as no reasoned decision had been provided as contemplated by Article 116 of the FIFA Disciplinary Code, 2011 Edition (the 'FDC') he would argue the Appeal on the premise that IDAC fully agreed with the decision and reasoning of IDCC.

13. Mr. Wasuna pointed out that Article 116 thereof permits a disciplinary committee to render a decision without giving reasons for the decision but that once a party had indicated an intention to challenge the decision, then the disciplinary committee was required to make available a reasoned decision. He stated that the reasons for IDAC's decision were never sent to the Club as required under the said Article.

14. He submitted that under Article 67 of the FDC both the home and the visiting clubs are responsible for the conduct of their spectators but the home club is responsible for all spectators, whether from the home or visiting club; that Article 67 is incorporated in Kenya through the Rules of Kenyan Football approved in January 1998. He then made reference to Article 146 of FDC which stipulates that the application of Article 67 can be modified and this has been done through Rule 3.4 (a) of the Rules of Kenyan Football.

15. With respect to Rule 3.4(c) of the Rules of Kenyan Football ('RKF') he submitted that the security of the playing field which includes securing players and other people on the technical bench is solely the responsibility of the home club. It was his view that the responsibility of clubs for their spectators only relates to what happens on the terraces but that the home club has a further duty to ensure that what happens on the terraces does not spill over into the playing field. He added that this further responsibility is demonstrated by the duty placed on the home club to hire security for the match.

16. While making reference to para. 11 of the IDCC Ruling, Mr. Wasuna submitted that there was no invasion of the playing field by the Club's supporters until the final whistle was blown. He acknowledged that to the extent that there was throwing of items onto the playing field and Rule 3.5 (b) & (c) of RKF were applicable. He submitted that it was the responsibility of the home club to deal with such spectators by posting stewards and police men to observe the spectators. He added that the predictability and mode of reaching the playing field ought to have been known to the home club.

17. Mr. Wasuna questioned whether IDCC had taken evidence from KPL to prove that Tusker FC as the home club had taken all reasonable measures to control security for the match. It was his view that the burden of proof of the offences against the Club rested on KPL and requested the Tribunal to interrogate the evidence used to find the Club liable. It was his view, that the standard of proof should be beyond reasonable doubt as what the Club had been charged with was essentially a criminal offence because it carried penal consequences.

18. He argued that the burden of proof on the home club to demonstrate that it had provided adequate security had not been discharged. Therefore, at worst, both clubs, being Tusker FC and Gor Mahia FC ought to have been charged by KPL so that their respective liabilities could be apportioned.

19. It was Mr. Wasuna's argument that as the Club did not attend the Pre-Event Meeting, it could not have accepted responsibility for any security related matters; he argued that issues of security cannot be discussed at a Pre-Match Meeting which occurs just about two (2) hours before kick-off and therefore there was no basis for the finding by IDCC that the Club had accepted responsibility for manning any gates. In any event, this would have been contrary to Rule 3.5 of the RKF. He therefore urged the Tribunal to treat the evidence of Mr. GMT Ottieno and the Match Commissioner as inconsequential.

20. With respect to Blackie, the intruder he argued that it was the responsibility of the home club to control him as IDCC has observed that the intruder had evaded the police and gained access to the playing field. He submitted that had the police wanted to arrest the intruder they would have done so.

21. With respect to the penalty imposed, Mr. Wasuna submitted that the IDCC erred in its interpretation of Rule 7.3(c)(vii) of RKF as the rule provides for the disciplinary committee to impose '*any other conditions set by the committee*' and the docking of points could not be construed to be additional condition.

22. He pointed out that while the docking of points is indeed provided for under Article 65(3)(h) of the Constitution of FKF, this had not been relied upon by the IDCC.

23. With respect of the penalty imposed by IDCC on the Club's goalkeeper, Mr. Boniface Oluoch, Mr. Wasuna acknowledged that the appeal may be academic to the extent that the penalty had already been served. Nonetheless, he maintained on a plain reading of Article 77 of the FDC, the IDCC had erred in imposing the penalty as the offence was could not have been missed by the match officials who nonetheless did not see fit to sanction it and therefore IDCC had no jurisdiction to make a determination on the matter.

He pointed out that it was wrong for the referee not to punish the goalkeeper during the match and then purport to testify at the hearing before the IDCC. He therefore invited the Tribunal to reverse the finding of IDCC.

### **The Response**

24. Counsel for the KPL elected to file written submissions on 15<sup>th</sup> July, 2016 in opposition to the Memorandum of Appeal in which the Tribunal was urged to affirm the decision of the IDCC as upheld by IDAC.

25. Mr Makori who made brief oral arguments on behalf of the KPL submitted, with respect to the preliminary issue, that IDAC properly exercised its powers under Article 116 of the FDC because it was the obligation of the parties to request for reasons for the decision. That the Club not having requested for the reasons for the decision within the ten (10) days provided for, the decision became final and binding.

26. With respect to the security arrangements, he submitted that it was a two-pronged issue where both the home and visiting club have responsibilities to discharge. He submitted that under Rule 3.4 (a) the Club had a duty to ensure that its members behaved in a fair and sporting manner. He pointed out that Counsel for the Club had admitted that supporters of the Club had thrown projectiles on to the field of play which led to the match being held up for about ten (10) minutes. Therefore, the finding of IDCC as upheld by the IDAC with respect to the violation of Rule 3.4(a) of RKF was proper.

27. With respect to the distinction of infringements sought to be made by Mr Wasuna regarding on-field and off -field infringements, he submitted that both the Pre-Match and the Pre-Event Meetings were held and security issues discussed. He asserted that it was logical that the Pre-Match meeting would confirm whether the security aspects of the Pre-Event Meeting had been undertaken and would further advise on whether additional security measures were necessary in view of new developments or information.

28. Mr. Makori insisted that the Club had been assigned certain security responsibilities and pointed out that this was logical because the Club had a large following it had been agreed that they would man the gates close to where their supporters were seated. He argued that the arrangement to have the Club make security arrangements is valid as the agreement was arrived at without coercion or undue influence. Further, he stated that the arrangements to be made by the home club could include co-opting the visiting club to handle the issue of security.

29. With respect to the deduction of the three (3) points, he made reference to Rule 7.3 (c)(vii) of RKF and submitted that it envisions the deduction of points. He submitted that the IDCC had further relied on Rule 30 of the FIFA DC which allows for the docking of points.

30. He then made reference to the definition of the term 'Rules' in the RKF and submitted that even if it was the finding of the Tribunal that the IDCC did not have the power under Rule 7.3(c)(vii), it would still have those powers under the FDC.

31. Mr. Makori argued that it was common knowledge that the Club's fans have caused immense chaos in the past and therefore it was necessary that a heavier sanction should be imposed as fines have been imposed on the Appellant over time with no positive result. He added that a further fine would have merely been a slap on the wrist and it was important for the IDCC to send a clear message to the football fraternity and to the Club in particular.

32. With respect to the issue of the sanction imposed against Mr. Boniface Oluoch, he argued that it was clear from para. 21 of the IDCC decision and that he had been convicted on his own plea of guilt. He asserted that the charge was valid and speculated that due to the circumstances obtaining at the particular point in the game when the offence was committed, it would have further aggravated the situation had the match officials sanctioned Mr. Oluoch. He argued therefore that this could be construed as a sanction that escaped the official's attention under Article 77(a) and urged that Article 77 should not be strictly interpreted.

33. Mr. Makori concluded by pointing out that the throwing of the projectiles onto the playing field is not merely improper conduct and should be treated as a serious offence; he urged the Tribunal to play its role in ensuring discipline in the football fraternity.

### **Discussion**

34. The panel has given careful consideration to all the submissions made by the parties even if no explicit reference has been made to them in the summary set out above.

35. The jurisdiction of the Tribunal, which is not disputed, is conferred by Section 59(a)(i) of the **Sports Act, 2013** ('the 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**

36. Further, Rule 8.4(c) of the RKF, 2015 Edition confers jurisdiction on the Tribunal as follows:

**A member can appeal the decision of the National IDAC on their case to the Sports Tribunal.**

37. From the outset we must state that the Tribunal is mandated to ensure that the aspirations set out in the long title to the Sports Act are achieved, being to ensure that sports are harnessed for development and that sports administration is carried out in a manner that promotes good governance.

38. Having heard the very interesting arguments of Counsel for the Club and KPL, read the rival pleadings and submissions filed before us and examined the facts as set out in the decision of IDCC and which was upheld by IDAC, we find that the primary issues for our determination are firstly, whether the decision of IDCC to penalize the Club for the conduct of its fans by docking three (3) points from the Club's points tally complied with the principles of legality and proportionality; and secondly whether the disciplinary measure taken by the IDCC against Mr. Boniface Oluoch was valid.

**Preliminary issue**

39. Article 116 of the FDC provides as follows:

**1. The judicial bodies may decide not to communicate the grounds of a decision and instead communicate only the terms of the decision. At the same time, the parties shall be informed that they have ten days from receipt of the terms of the decision to request, in writing, the grounds of the decision, and that failure to do so will result in the decision becoming final and binding.**

**2. If a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal, where applicable, begins upon receipt of this motivated decision.**

**3. If the parties do not request the grounds of a decision, a short explanation of the decision shall be recorded in the case files.**

40. The Club has argued that the grounds for the decision made by IDAC were not communicated to it and that it has therefore assumed that those grounds were the same as those relied upon by IDCC.

41. Under Article 116 (1), the responsibility for notifying the parties that the reasoned decision would be made available should any of the parties consider it necessary to appeal, lies on the disciplinary body making the decision. In this case, that body was IDAC. Article 116(2) cannot kick in until the disciplinary body has informed the parties that they have a limited period within which to request the grounds of the decision. Only then does the obligation of the party to request the reasoned decision come into play in default of which the decision becomes final and binding.

42. In this case, there has been no material placed before us to suggest that IDAC notified the parties that the reasoned decision could be made available upon request. In the absence of such notification, we are unable to fault the Club's presumption that IDAC

did not arrive at a reasoned decision and merely adopted the reasoning of the IDCC in arriving at its own decision.

43. The preliminary issue is therefore determined in favour of the Club.

#### **Standard of proof**

44. The Club has argued that because of the nature of sanctions that could be imposed on it arising from the offence with which it is charged, the standard of proof should be beyond reasonable doubt.

45. In considering the question of the standard of proof to be applied, the CAS Panel hearing the dispute in **FC Zenit St. Petersburg v. Russian Football Union (Award of 7 October 2013)**<sup>[3]</sup> observed that jurisprudence with regard to disciplinary proceedings has been developed through a wide number of CAS cases and that it has been decided that the standard of proof to be applied in this kind of cases is the “*comfortable satisfaction*” of the Panel.

46. This standard was explained as follows by the Panel in **Deportivo Petare FC v. Fédération Internationale de Football Association (FIFA)**<sup>[4]</sup> (award of 21 March 2014):

*In practical terms, the standard of proof of ....under Article 97 of the FIFA Disciplinary Code coincides with the “comfortable satisfaction” standard widely applied by CAS panels in disciplinary proceedings. According to this standard of proof, the sanctioning authority must establish the disciplinary violation to the comfortable satisfaction of the judging body bearing in mind the seriousness of the allegation. It is a standard that is higher than the civil standard of “balance of probability” but lower than the criminal standard of “proof beyond a reasonable doubt”*

47. The Tribunal adopts this position and considers that this to be the standard of proof applicable in the case at hand.

#### **Conduct of Spectators**

48. Article 67 of the FDC provides as follows:

**i. The home association or home club is liable for improper conduct among spectators, regardless of the question of culpable conduct or culpable oversight, and, depending on the situation, may be fined. Further sanctions may be imposed in the case of serious disturbances.**

**ii. The visiting association or visiting club is liable for improper conduct among its own group of spectators, regardless of the question of culpable conduct or culpable oversight, and, depending on the situation, may be fined. Further sanctions may be imposed in the case of serious disturbances. Supporters occupying the away sector of a stadium are regarded as the visiting association’s supporters, unless proven to the contrary.**

**iii. Improper conduct includes violence towards persons or objects, letting off incendiary devices, throwing missiles, displaying insulting or political slogans in any form, uttering insulting words or sounds, or invading the pitch.**

**iv. The liability described in par. 1 and 2 also includes matches played on neutral ground, especially during final competitions.**

49. These provisions are recognized as providing strict liability and do not depend on fault.

50. Article 146 of the FDC ‘...associations are obliged to adapt their own provisions to comply with the Code for the purpose of harmonising disciplinary measures’. The Articles stipulates those provisions and measures of the FDC which associations must adopt without amendment and those which they are allowed to modify. We agree with the observation by Mr. Wasuna that Article 67 of the FDC is one of the provisions which associations are allowed to modify and that the RKF have somewhat modified Article 67 in the manner in which it has worded Rules 3.4 and 3.5 of the RKF.

51. Rule 3.4 (a) provides as follows:

## Responsibilities of Clubs

**(a) Members and Supporters: Clubs are responsible for the conduct of their members and supporters and must ensure that they behave in a fair manner and refrain from violent, threatening, abusive, obscene and other provocative and unsporting conduct or language at a match.**

52. Rule 3.5 (Match Arrangements) then stipulates as follows at sub-rule (b) and (c):

## Security and Safety

**The home club is responsible for the welfare, safety and security of all officials and visiting clubs. If a home club fails to make reasonable hosting and security arrangements the committee may change the venue for their home matches until the club presents a detailed security plan and budget acceptable to the committee.**

**Protection of Fields Home clubs are responsible for preventing spectators and other unauthorized personnel from encroaching on the playing field except for safety reasons. They must take adequate measures to prevent the throwing of missiles, bottles and other potentially harmful or dangerous objects or substances onto the playing field.**

53. Arising from the modification by RKF of Article 67 of the FDC, Mr. Wasuna made very elaborate submissions the thrust of which was that while both home and away clubs had responsibility for the conduct of their supporters, the responsibility of the away club did not extend beyond the terraces and the home club was, by dint of Rule 3.5(c), responsible for the protecting the playing fields and any allegation that there had been a breach of the integrity of the playing field could only be the responsibility of the home club.

54. These arguments necessarily invite an examination of the effect of the modification of Article 67 by Rules 3.4(a) and 3.5 (b) and (c) of RKF.

55. Under Article 146(3) of FDC, even though associations are allowed to modify certain provisions of the FDC to meet their particular circumstances, nonetheless, ‘... associations are obliged to ensure especially that the infringements mentioned in these provisions and the appropriate sanctions are strictly incorporated and that the general principles are adhered to’. (emphasis ours).

56. **FC Zenit St. Petersburg v. Russian Football Union (Award of 7 October 2013)**<sup>[5]</sup> concerned an appeal to CAS<sup>[6]</sup> brought by FC Zenit St. Petersburg against a decision of the Appeals Committee of the All-Russian Public Organization of Russian Football imposing various sanctions on FC Zenit following alleged violations of the Russian Football Union rules by the FC Zenit fans in the course of a football match against FC Dynamo Moscow.

57. After considering the rival arguments which centered around the liability of FC Zenit for the conduct of its fans, the CAS Panel held *inter alia*, that:

*i. A very important principle in football is the principle of liability of a club for the behaviour of its supporters. This principle fulfils a preventive and deterrent function. Its purpose is not to punish the club itself, which may have nothing to feel guilty about, but to pass the responsibility on the club for its supporters’ faulty behavior;*

*ii. Security obligations of a home club and strict liability of a club for its supporters’ behaviour are two different elements which can lead to different sanctions. The fact that the home club failed to fulfil some of its order and security obligations, for which it was sanctioned, does not prevent the application of the strict liability principle of the visitor’s club for its supporters’ behaviour.*

58. In **Koninklijke Nederlandse Voetbalbond (KNVB) v. Fédération Internationale de Football Association (FIFA)**, (award of 30 January 2015<sup>[7]</sup>), the CAS Panel held *inter alia*, that:

*The strict liability created pursuant to article 67 para. 1 of the FIFA Disciplinary Code (FDC) is not “unjust” per se and is justified in the context of the need to fight violence in football safeguarding all persons present in stadiums with law and order maintained therein.*



59. In our ruling of 15<sup>th</sup> March, 2016 in the matter of **Sammy Sholei & Others versus Samson Nyamweya & Others**[8], we recognized the authority of the jurisprudence emanating from decisions of CAS in so far as the decisions of this Tribunal are concerned and we are of the view that the holding in **FC Zenit** (supra) as read with the proviso to Article 146(3) of FDC is sufficient answer to the propositions put forward by Mr. Wasuna.

60. With respect to the question whether the projectile question was thrown by the Club's supporters, Mr. Wasuna candidly acknowledged that this was a water bottle and that it did in fact come from the area of the terraces occupied by the Club's supporters.

61. As we understood it, the more vexed question was whether Blackie, the intruder was in fact a supporter of the Club. We accept that the burden of prove regarding this allegation remained with the KPL at all material times. enyafor proving this

62. In **N.& V vs. UEFA**, (award of 5 May 2011)[9], which concerned a corruption allegation, the CAS Panel held that *'the party bearing the burden of evidence, in order to satisfy it, needs to convince a panel that an allegation is true by a "balance of probability", i.e. that the occurrence of the circumstances on which it relies is more probable than their non-occurrence. In this context, the panel needs however to be comfortably satisfied that the relevant facts have been established, bearing in mind the seriousness of the allegation which is made.*

63. Further, that *'Disciplinary rules enacted by sports authorities are private law (and not criminal law) rules. Consequently, any legal issue concerning the satisfaction of the burden of proof should be dealt within the context of the principles of private law of the country where the interested sports authority is domiciled'*.

64. Whilst we accept Mr. Wasuna's contention that that there was without doubt a complete failure in the security arrangements with respect to the protection of the playing field, the Tribunal has no difficulty in finding that the intruder can only have been a supporter of the Club. The preponderance of evidence and events points to this inescapable conclusion for the simple reason that following the award of a hotly contested penalty against the Club in the 70<sup>th</sup> minute of the match, the Club's supporters were clearly aggrieved and would have been the only ones with a motive to invade the playing field and vent their frustrations on the match officials.

65. The result of the foregoing is that the Tribunal is satisfied that the Club failed to control its members and supporters contrary to Rule 3.4(a) of RKF and the IDAC was correct in upholding the finding of the IDCC to this effect.

### **Three (3) points lost**

66. The Club has then challenged the sanction imposed on it by IDCC which was the deduction of three (3) points from the Club's points tally.

67. Article 7.3(c) of RKF provides as follows under the heading **'Penalties for Misconduct**

**After confirming the reported misconduct of a member the committee has the power to make one or more of the following decisions:**

- i. To suspend the member permanently or for a stated period from all or specified activities organized or authorized by FKF;**
- ii. To fine the member;**
- iii. To order the member to pay compensation to another member;**
- iv. To close the playing field of the member for a stated period;**
- v. To order the member to pay all the expenses related to the case; and**

**vi. To meet any other conditions set by the committee.**

68. It seems to us that the IDCC, contemplating a challenge to the sanction imposed on the Club, also placed reliance on Rule 30 of FDC which provides as follows:

**A club may have points deducted from those already attained in the current or in a future championship.**

69. Rule 7.3(c)(vii) gives the IDCC the power to impose a further and/or any other condition on the offending member which condition has not been stipulated under Rule 7.3(c). It is our finding whilst Rule 7.3(c)(vii) of the RKF does not confer on IDCC the power to order KPL to deduct points from the Club's tally of points attained or to be attained, nonetheless, the penalty remains valid because of the reliance by the IDCC on Rule 30 of the FDC.

70. Under Article 62(4) of the FKF Constitution, the IDCC is given the following powers:

**The committee may pronounce the sanctions described in these Statutes and the Disciplinary Code of FKF on Members, Officials, Players, Clubs and match and players' agents.**

71. Article 65 of the FKF Constitution then stipulates as follows:

**The disciplinary measures are primarily:**

1.....

2.....

**3 For legal persons:**

**(h) deduction of points.**

72. We find therefore that a purposive reading of the FDC, the RKF and the FKF Constitution lead to the conclusion that the IDCC did not fall into error in imposing the sanction which required the deduction of points from the Club's tally.

73. In regard to the question whether the sanction meted out by IDCC was proportional to the offences committed, our answer is in the affirmative. The Club was aggrieved that the finding of the IDCC against it was informed by allegations of its prior unsporting conduct and as such the finding was not within the confines of legality in the Rules of Kenyan Football.

74. However, Rule 7.8 of the RKF (Responsibility of Clubs for Misconduct) clearly provides that:

**'The committee has the discretionary power to take disciplinary action against clubs for gross or repeated misconduct by the officials, players or supporters of their club. For example, the club may be suspended, fined and/or relegated if their players accumulate an excessive number of warnings and cards for misconduct or...'** [Emphasis added]

75. In view of the foregoing, it is our finding that the IDCC in ordering KPL to deduct three points from the Club's tally of points made a decision that was both lawful and proportional.

76. As observed in **N.& V vs. UEFA** (supra), *the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence.*

77. We do not find this to be the case here in view of all the circumstances of the case. Further, as the apex body responsible for resolving sports and sports-related dispute, it does not escape us that the football scene is marred with violent and unsporting conduct such as hooliganism to the extent that it borders on criminal behavior. While we appreciate that sport dispute resolution

bodies can have the full powers to mete out appropriate sanctions, we urge football clubs to rise to the responsibility of ensuring lawful and proper conduct of their members and supporters so that this sport is harnessed for development.

### **Boniface Oluoch**

78. At para. 34(b) of the IDCC Ruling, the IDCC made the following order:

*Mr. Boniface Oluoch is hereby banned from playing for Gor Mahia FC for one match, namely the next match organized by the KPL involving Gor Mahia FC with effect from the date of this decision, and from attending that match in the area immediately surrounding the field of play.*

79. Mr. Wasuna submitted that even though Mr Oluoch had served the said punishment, the Club would like a reversal of the finding of guilt made by the IDCC. The said finding was:

*Mr Boniface Oluoch assaulted the 2<sup>nd</sup> assistant referee, contrary to Rule 6.1 of the Rules of Kenyan Football.*

80. This prayer was supported by the submission that the offence committed by Mr Oluoch while acknowledged during the IDCC hearing was not sanctioned during the match and as such the IDCC did not have the jurisdiction to make a decision on it.

81. He made reference to Articles 72 and 77 of the FIFA DC which stipulate as follows:

#### **Article 72**

- 1. During matches, disciplinary decisions are taken by the referee.**
- 2. These decisions are final.**
- 3. In certain circumstances, the jurisdiction of the judicial bodies, may apply (cf. art. 77) Article 77**

**The Disciplinary Committee is responsible for:**

- a) sanctioning serious infringements which have escaped the match officials' attention;**
- b) rectifying obvious errors in the referee's disciplinary decisions;**
- c) extending the duration of a match suspension incurred automatically by an expulsion (cf. art. 18, par. 4)**
- d) pronouncing additional sanctions, such as a fine.**

82. Mr. Makori has submitted, quite logically, that Mr. Boniface Oluoch was convicted on his own plea of guilty. Indeed, at the IDCC hearing, Mr Oluoch confirmed that he assaulted the 2<sup>nd</sup> assistant referee because he was upset with the decision to award a penalty against his team.

83. We note, however, that it was not disputed by KPL that Mr Oluoch was not sanctioned for such unsporting conduct during the match and thus the decision not to sanction him became a final decision.

84. *The question therefore would be whether it escaped the minds of the referees to punish the said offence" This is what is contemplated under Articles 72(3) and 77(a) of the FIFA DC. On this, we find that the nature of the assault against the 2<sup>nd</sup> assistant referee was not one that could possibly have escaped his attention or that of any other referee officiating the match and as such the non-punishment became a decision under Rule 7.3(b) of the RKF and was therefore not open for inquiry or review by the IDCC. We therefore find for the Club on this aspect of the appeal.*

**Conclusion**

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

- i. Order (a) of the IDCC dated 26<sup>th</sup> May, 2016 and affirmed by IDAC on 15<sup>th</sup> June, 2016 is upheld.
- ii. Order (b) and holding (c) of the IDCC Ruling of 26<sup>th</sup> May, 2016 is hereby quashed; and
- iii. Each party shall bear its own costs attendant to this appeal.

86. The Tribunal commends Counsels for their very helpful submissions and the cordial manner in which they conducted themselves.

**Dated at Nairobi** this 30<sup>th</sup> day of *August 2016*

Signed:

**John M Ohaga FCI Arb**

**Chairman, Sports Disputes Tribunal**

Delivered in the presence of:

\_\_\_\_\_

**Member**

\_\_\_\_\_

**Member**

\_\_\_\_\_  
[\[1\] www.gormahiafc.co.ke](http://www.gormahiafc.co.ke)

[\[2\] www.kpl.co.ke](http://www.kpl.co.ke)

[\[3\] CAS 2013/A/3047](#)

[\[4\] CAS 2013/A/3323](#)

[5] CAS 2013/A/3047 (supra)([www.tas-cas.org](http://www.tas-cas.org))

[6] The Court of Arbitration for Sport is an international quasi-judicial body established to settle disputes related to sport through arbitration. Its headquarters are in Lausanne and its courts are located in New York, Sydney and Lausanne.

[7] CAS 2014/A/3578

[8] SDT Appeal No. 6 of 2015 consolidated with Appeal No. 9 of 2015 & Appeal No. 19 of 2015

[9] CAS 2010/A/2266



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