



Arbitration CAS 2018/A/6052 Maqbull Abdi Karim v. Gor Mahia Football Club, award of 14 August 2019

Panel: Mr André Brantjes (The Netherlands), Sole Arbitrator

Football

Contractual dispute

Case of CAS' ex officio control of its jurisdiction

Criterion for CAS' jurisdiction as final instance in domestic matters

- 1. Where a respondent's defense was filed untimely and denied accordingly, CAS should examine its jurisdiction *ex officio*.**
- 2. Article 58(1) of the FIFA Statutes does not by itself grant jurisdiction to CAS as a final instance in domestic matters. Said article can only apply directly in case it is considered that it forms an integral part of the domestic rules enacted by a national federation.**

I. THE PARTIES

1. Mr Maqbull Abdi Karim (the "Player" or the "Appellant") is a professional football player of Kenyan nationality.
2. Gor Mahia Football Club (the "Club" or the "Respondent") is a football club with its registered office in Nairobi, Kenya, currently playing in the Kenyan Premier League. The Club is affiliated with the Kenya Football Association (the "FKF"), which in turn is affiliated to the Fédération Internationale de Football Association (the "FIFA").

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the evidence examined in the course of the present arbitration proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.
4. The Player entered into an employment agreement with the Club on 12 January 2017 for a fixed term of 4 years, valid until 12 January 2021. The Player's monthly salary was United States Dollar ("USD") 650 (equivalent to Kenyan Shilling ("KSH") 65,000) (the "Employment Agreement"). The Player was also entitled to KSH 500 "*training allowance*" per day, as well as several incentives.

5. After June 2017, the Player was sent out on loan to various clubs in Kenya.
6. On 14 February 2018, the lawyer of the Player asked the Club for payment of his January 2018 salary and to allow him to resume training with the Club.
7. On 11 April 2018, the Player filed a claim against the Club before the Sports Dispute Tribunal in Nairobi, Kenya (the “SDT”), stating, *inter alia*, that the Club had breached the employment contract by not allowing him to train and by not paying him his salary over the months of January, February and March 2018.
8. On 15 May 2018, the Club filed its response against the Player’s claim, objecting to the jurisdiction of the SDT and arguing that the Player’s claim was to be rejected.
9. On 20 November 2018, the SDT decided (the “Appealed Decision”) that the Club did not breach the employment agreement and rejected all the claims of the Player. The SDT issued the following operative part:
 - a) *The Preliminary Objection dated 15th May, 2018 is disallowed;*
 - b) *The Tribunal finds that the Respondent did not breach the player agreement contract by terminating the agreement;*
 - c) *The reliefs sought in the Statement of Claim dated 11th April, 2018 are denied;*
 - d) *Each party shall bear its own costs”.*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

10. On 6 December 2018, the Appellant lodged a Statement of Appeal with the Court of Arbitration for Sport (“CAS”), in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration Rules (the “Code”), challenging the Appealed Decision. In his statement of appeal, the Appellant requested that this procedure be referred to a Sole Arbitrator.
11. On 18 December 2018, the Appellant filed his Appeal Brief in accordance with Article R51 of the Code.
12. On 3 January 2019, the parties were informed by the CAS Court Office that the Respondent had not indicated its preference as to the number of arbitrators within the time limit granted and that the President of the CAS Appeals Arbitration Division would, therefore, decide the issue pursuant to Article R50 of the Code.
13. On 11 February 2019, the Appellant asked for an expedited procedure to be implemented, in accordance with Articles R44 and R45 of the Code because the Respondent had not filed its Answer timely.

14. On the same day, 11 February 2019, the CAS Court Office informed the Parties that the Respondent had not filed an Answer within the time limit provided and invited the Respondent to respond to the Appellant's request for an expedited procedure to be implemented. At the same time, pursuant to Article R54 of the Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that Mr André Brantjes, Attorney-at-Law in Amsterdam, the Netherlands, was appointed Sole Arbitrator.
15. On 13 February 2019, the Respondent objected to this procedure, generally, and more specifically, objected to the jurisdiction of CAS to decide this dispute.
16. On 27 February 2019, on behalf of the Sole Arbitrator, the CAS Court Office invited the Appellant to comment on the admissibility of the Respondent's submission of 13 February 2019, considering that such submission was not filed within the timeframe of Article R55 of the Code.
17. On 5 March 2019, the Appellant responded to the Respondent's submission and its objection to CAS jurisdiction, maintaining that CAS did indeed have jurisdiction.
18. On 11 March 2019, the CAS Court Office informed the parties that the Sole Arbitrator would not consider the Respondent's letter dated 13 February 2019 as the Respondent's Answer, as it neither timely filed nor in compliance with the requirements set out in Articles R55 and R31 of the Code.
19. On 11 and 15 March 2019, respectively, the Appellant asked for an award to be issued on the basis of the Parties' written submissions only, whereas the Respondent indicated its preference for a hearing to be held.
20. On 9 May 2019 the CAS Court Office, on behalf of the Sole Arbitrator, invited the Appellant to submit a complete set of the Rules of the SDT and to indicate the date these rules were implemented.
21. On 4 May 2019, the Appellant returned a duly signed copy of the Order of Procedure to the CAS Court Office.
22. On 9 May 2019, the Respondent informed the CAS Court Office that it was unable to sign the Order of Procedure because the Player would not be present at the hearing on 21 May 2019, while the Club wanted the Player to be cross-examined as a witness, which was the reason for the Respondent's request to hold a hearing.
23. The day before the hearing, on 20 May 2019, the Respondent's Counsel informed the CAS Court Office by email sent at 17h09 that he was unwell and requested the hearing date to be rescheduled.
24. On 21 May 2019, just before the start of the hearing, the CAS Court Office informed the parties that the Respondent's request to adjourn the hearing was denied and that the hearing would

proceed as scheduled, but that the start of the hearing was delayed from 9h30 to 10h00 and that the Sole Arbitrator would try to contact Respondent's Counsel by telephone.

25. On 21 May 2019, a hearing was held in Lausanne, Switzerland. In addition to the Sole Arbitrator and Mr Brent Nowicki, Managing Counsel to the CAS, the following persons attended the hearing:

For the Appellant:

- Mr Maqbull Abdi Karim, the Player, by videoconference;
 - Mr Agustin Amoros, Counsel;
 - Mr Elvis Majani, Counsel Appellant, by videoconference;
 - Mrs Flora Mwendwa, Interpreter, by videoconference.
26. At the start of the hearing, the Sole Arbitrator called the Respondent's Counsel to ask if he was available for the hearing by videoconference or telephone. According to his secretary, he was out of office at another hearing. The Sole Arbitrator asked the secretary to inform the Respondent's Counsel to call the CAS Court Office number within 15 minutes in order for him to join the hearing, but that if he would not, the hearing would be held without his presence.
27. As the Respondent's Counsel did not call in, the hearing was held without him attending by telephone or videoconference.
28. The Sole Arbitrator heard evidence from the Player. The Appellant and the Sole Arbitrator had the opportunity to examine the Player. The Appellant was offered full opportunity to present his case, submit his arguments and answer the questions posed by the Sole Arbitrator.
29. The Sole Arbitrator asked the Appellant why he did not provide the CAS Court Office with a final version of the SDT Rules and the date of implementation of such rules, as requested earlier in the procedure. The Appellant responded that he would submit these Rules and further information related thereto immediately after the hearing.
30. Before the hearing was concluded, the Appellant expressly stated that he did not have any objection against the procedure adopted by the Sole Arbitrator and that his right to be heard had been respected.
31. On 22 May 2019, the Appellant submitted a copy of the SDT Draft Rules and a statement that these rule were "*Approved and awaiting gazettelement at the AG's office*".
32. On 27 May 2019, the Respondent argued that the SDT Draft Rules could only come into operation upon gazettelement and that the Rules submitted were thus merely a draft.

33. The Sole Arbitrator confirms that he carefully heard and took into account in his deliberations all of the submissions, evidence and arguments presented, even if they have not been specifically summarized or referred to in the present Award.

IV. PRAYERS FOR RELIEF

34. In his statement of appeal, the Appellant sought the following relief:

“I. Accept this Appeal against the decision of the SDT dated 20th November 2018 and adopt an Award declaring:

- a) The Respondent breached the Appellant’s employment contract by refusing to allow him to train and refusing to pay him a salary.*
- b) The Respondent breached the Appellant’s contract by terminating the contract without just cause.*
- c) The Respondent to pay the Appellant’s terminal dues, being loss of income for the unexpired contract period.*
- d) The Respondent to pay interest as CAS would deem just and at its rates.*
- e) The Respondent to compensate the Appellant for the costs of this appeal with interest thereon as CAS rates”.*

35. In his appeal brief, the Appellant modified his request for relief as follows:

“[T]he appellant prays that this Honourable court do set aside the Judgment entered by the Sports Disputes Tribunal on the 20th of November 2018 and do enter judgment in the appellant’s favour and award as follows:

- I. A declaration that the Respondent breached the Appellant’s employment contract.*
- II. An Order directing the Respondent to pay the claimant the calculated sum as hereby particularized:*
 - Loss of income for the unexpired contract period (usd 650 × 32 months) = USD 20,800*
 - With interest thereon at the Court of Arbitration for Sport rates*
 - Costs incurred by the Appellant in pursuit of this case.*
- III. Any other relief as the Court of Arbitration for Sports would deem just and expedient to grant”.*

36. The Respondent did not timely file an answer in accordance with Article R55 of the Code.

V. APPLICABLE LAW

37. Article R58 of the Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

38. Article 15 of the Employment Agreement provides as follows:

“Any dispute on this contract is to be settled by Arbitration in accordance to the Arbitration Act 1995 or any statutory modification or re-enactment therefore for the time being in force or in accordance with the FIFA Regulations for the Status and Transfer of Players”.

39. The Sole Arbitrator observes that the present case involves Kenyan parties as well as a Kenyan Tribunal. Neither of them are domiciled in Switzerland. The present dispute is, however, brought before CAS, an arbitration institute with its registered seat in Lausanne, Switzerland. The arbitration is, therefore, governed by the provisions of Chapter 12 of Switzerland’s Act of Private International Law (the “PILA”).

40. Article 186 PILA provides that the arbitral tribunal shall rule on its own jurisdiction, which principle is also reflected in Article R55 of the Code.

41. The Sole Arbitrator is, therefore, satisfied that he is competent to rule on his own jurisdiction, *i.e.* the so-called *Kompetenz-Kompetenz*.

VI. JURISDICTION OF THE CAS

42. The Appellant’s submissions on jurisdiction may be summarized as follows:

- According to Articles 59 and 60 of the FIFA Statutes, CAS can decide on appeal decisions made by FIFA. The Appellant, furthermore, asserts that according to Article 67/68 of the Constitution of the FKF, appeals will be held at CAS.
- Moreover, the Appellant argued that decisions of the SDT can be appealed to the CAS according to Article 28 SDT Draft Rules.
- The Respondent’s objection to jurisdiction was filed on 13 February 2019, therefore, after the time limit set in Article R55 of the Code.
- On 5 March 2019, the Appellant submitted that it was determined in Article 15 of the employment contract that any disputes were to be settled by arbitration in accordance with the “*Arbitration Act 1995*”. The Appellant submitted that this Sports Act “*gives jurisdiction to the Sports Disputes Tribunal and appeals to the Court of Arbitration for Sports*”.

- The Appellant also maintains that the SDT Draft Rules have been in operation since 2015.

43. Article R47 of the Code states the following:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body”.

44. In this case, where the Respondent filed its defense untimely and its Answer was denied accordingly, CAS should examine its jurisdiction *ex officio* (see ATF 120 II 155 of 19 April 1994).

45. First, it is clear that the Appealed Decision was not issued by any committee or body of FIFA, but by the SDT, a domestic dispute resolution body established under Kenyan law. Different from final and binding decisions issued by any committee or legal body of FIFA, the FIFA Statutes do not provide for the possibility to appeal a domestic decision directly to CAS in appeal.

46. Article 58(1) FIFA Statutes provides as follows:

“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question”.

47. This provision, however, cannot be invoked by the Player directly in order to establish the jurisdiction of CAS to rule on appeals against decisions issued by the SDT.

48. There is ample CAS jurisprudence that Article 58(1) FIFA Statutes (a provision that was previously numbered as Article 67(1) FIFA Statutes but which did not materially change) does not by itself grant jurisdiction to CAS as a final instance in domestic matters (CAS 2008/A/1525; CAS 2013/A/3058, with further references to CAS 2011/A/2472, CAS 2009/A/1910, CAS 2008/A/1656, CAS 2005/A/952, CAS 2004/A/676, and CAS 2002/O/422).

49. As maintained by the CAS panel in CAS 2014/A/3474, a decision referred to by the Appellant during the hearing, Article 58(1) FIFA Statutes can only apply directly in case it is considered that such provision forms an integral part of the domestic rules and regulations enacted by the national federation (*i.e.* by the FKF).

50. The relevant provisions in the FKF Constitution provide as follows:

“Article 66 Arbitration

1. *FKF shall create an Arbitration Tribunal, which shall deal with all internal national disputes between FKF, its Members, and Players, Officials and match and players’ agents that do not fall under the jurisdiction of its judicial bodies.*
2. *The National Executive Committee shall draw up special regulations regarding the composition, jurisdiction and procedural rules of this Arbitration Tribunal.*
3. *The rules so drawn shall be consistent with internationally recognised principles of arbitration such as natural justice, party autonomy, separability, competence and finality of the arbitral award.*
4. *As long as within the territory of Kenya no national sports Arbitration Tribunal has been installed and recognised by the General Meeting of FKF, any dispute of national dimension may only be referred to the arbitration tribunal established by the National Olympics Committee.*

Article 67 Jurisdiction

1. *FKF, its Members, Players, Officials and match and player’s agents will not take any dispute to Ordinary Courts unless specifically provided for in these Statutes and FIFA regulations. Any disagreement shall be submitted to the jurisdiction of FIFA, CAF or FKF.*
2. *FKF shall have jurisdiction on internal national disputes, i.e. disputes between parties belonging to FKF.*
3. *FIFA shall have jurisdiction on international disputes, i.e. disputes between parties belonging to different Associations and/or Confederations.*

Article 68 Court of Arbitration for Sport

1. *In accordance with the relevant Articles of the FIFA Statutes, any appeal against a final and binding FIFA decision shall be heard by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.*
2. *CAS shall not, however, hear appeals on violations of the Laws of the Game, suspensions of up to four matches or up to three months, or decisions passed by an independent and duly constituted Arbitration Tribunal of an Association or Confederation.*
3. *FKF shall ensure its full compliance and that of its Members, Players, Officials and match and players’ agents with any final decision passed by a FIFA body or CAS”.*

51. The Sole Arbitrator finds that the above provisions do not support the Appellant’s contentions as to the competence of CAS to hear the present appeal.

52. To the contrary, Article 67(2) and (3) FKF Constitution provide that whereas FKF has jurisdiction to hear domestic disputes (which it may in turn delegate to the SDT), FIFA is competent to hear international disputes.
53. By the same time, whereas Article 68(1) FKF Constitution determines that decisions of FIFA can be appealed to CAS, Article 68(2) FKF Constitution determines that CAS shall not hear appeals on “*decisions passed by an independent and duly constituted Arbitration Tribunal of an Association or Confederation*”.
54. It is not in dispute that the present matter is a domestic dispute, nor is the independence or the due constitution of the SDT disputed.
55. The Sole Arbitrator finds that the FKF Constitution does not contain an arbitration clause in favour of CAS. The mere fact that Article 13(1)(a) FKF Constitution obliges members to comply with the FIFA Statutes does not provide such members with a right to invoke Article 58(1) FIFA Statutes directly.
56. As to the Player’s reliance on Articles 59 and 60 FIFA Statutes, the Sole Arbitrator finds that these provisions cannot be invoked to establish the jurisdiction of CAS to deal with a domestic dispute in Kenya.
57. Article 59(3) FIFA Statutes provides as follows:
- “The associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the association or disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the association or confederation or to CAS”.*
58. The Sole Arbitrator finds that Article 59(3) FIFA Statutes does not serve as an arbitration clause to CAS. Rather, it obliges the FKF to implement a system of arbitration, and that such system can entail domestic arbitration or arbitration by CAS. It, therefore, does not give members of the FKF the unfettered right to directly rely on Article 59(3) FIFA Statutes to challenge the Appealed Decision before CAS.
59. Article 60 FIFA Statutes provides as follows:
1. *The confederations, member associations and leagues shall agree to comply fully with any decisions passed by the relevant FIFA bodies which, according to these Statutes, are final and not subject to appeal.*
 2. *They shall take every precaution necessary to ensure that their own members, players and officials comply with these decisions.*
 3. *The same obligation applies to intermediaries and licensed match agents”.*

60. The Sole Arbitrator does not see the relevance of Article 60 FIFA Statutes in establishing the jurisdiction of CAS in the matter at hand.
61. Finally, the Player also relies on Article 28(b) SDT Draft Rules, which provision provides as follows:
- “A party may appeal a decision of the Tribunal to the Court of Arbitration for Sport if the rules or policies of the relevant International Federation or NSO so provide”.*
62. As to the applicability of the SDT Draft Rules, the Sole Arbitrator notes that Article 3 SDT Draft Rules provides as follows:
- “Section 61 of the Act provides that “the Chief Justice may in consultation with the chairperson of the Tribunal, and by notice in the Gazette, make rules governing the practice and procedure of the Tribunal having regard to the objectives of the Sports Act 2013””.*
63. The Sole Arbitrator infers from this provision that the SDT Draft Rules only enter into force after *“notice in the Gazette”*, while it is not disputed between the Parties that no such notice has been given. Indeed, on 22 May 2019, the Appellant himself indicated to CAS that these rule were *“Approved and awaiting gazettelement at the AG’s office”*.
64. Accordingly, the Sole Arbitrator finds that the applicability of the SDT Draft Rules has not been established.
65. Consequently, the Sole Arbitrator finds that CAS does not have jurisdiction to rule on the merits of this case.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Court of Arbitration for Sport does not have jurisdiction to decide the appeal filed by Mr Maqbull Abdi Karim against Gor Mahia Football Club on 6 December 2019.
2. (...).
3. (...).
4. All other and further motions or prayers for relief are dismissed.