

**AN ASSESSMENT OF THE DISPUTE RESOLUTION FRAMEWORK IN SPORTS  
KENYA**

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## **Table of Contents**

DEDICATION .....	4
ACKNOWLEDGMENTS .....	5
DECLARATION .....	6
LIST OF ABBREVIATIONS.....	7
LIST OF CASES.....	9
ABSTRACT.....	11
Research Methodology .....	12
Chapter Breakdown .....	12
CHAPTER 1: BACKGROUND TO THE STUDY.....	13
Research Objectives.....	14
Research Questions.....	14
Hypotheses .....	14
Justification for the Study .....	14
Limitations of the Study.....	15
CHAPTER 2 THEORETICAL FRAMEWORK AND LITERATURE REVIEW .....	16
Introduction.....	16
i. Cultural Relativism .....	16
ii. Theory of Justice.....	18
Literature Review.....	19
i. Access to Justice and the History of Sports in Kenya.....	19
ii. Specific Nature of Sports and its interaction with Law.....	21
iii. Alternative Dispute Resolution and Sports .....	23
CHAPTER 3 THE UNIQUE NATURE OF SPORTS AND ITS INTEGRATION INTO LAW .....	25
Sports and its integration into Society .....	25

From Pastime to Business.....	27
Why the Legal System Needs to Recognise and Respond to Sports .....	29
CHAPTER 4 NATURE OF SPORTS DISPUTES AND ATTEMPTS AT REFORM .....	37
Cases before the Sports Act .....	37
a) Republic (through Maurice Odumbe) v Kenya Cricket Association & 2 others..	37
b) Isaiah Kiplagat & 2 Others v Eric Keter.....	43
Remedies brought by the Sports Act (2013).....	45
Definitions.....	45
Establishments .....	45
The Loopholes .....	47
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS .....	48
Conclusions.....	48
Recommendations.....	49
Bibliography .....	50
Books .....	50
Articles and Conference Papers .....	50
Website and Blog Articles .....	51

## **DEDICATION**

To God for His Grace during the writing of this dissertation and to my family for all their support and understanding

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I would like to specially recognise my supervisor, Ms Sarah Ochwada for her unfailing help and patience in the compilation of this dissertation.

I would also like to acknowledge my father for giving me office space and the provision of material to work on this dissertation.

## DECLARATION

I declare that this dissertation is my original work and has not been submitted for the award of a degree or any other award in any other university.

Signature: 

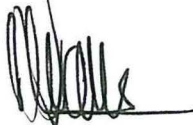
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**Ms Sarah Ochwada**

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## **LIST OF ABBREVIATIONS**

<b>ADR</b>	Alternative Dispute Resolution
<b>All ER</b>	All England Law Reports
<b>CAS</b>	Court of Arbitration for Sport
<b>CLR</b>	Commonwealth Law Reports
<b>Cap.</b>	Chapter
<b>EA</b>	East Africa Law Reports
<b>eKLR</b>	Electronic Kenya Law Reports
<b>HCCC</b>	High Court Civil Case (Kenya)
<b>ICC</b>	International Cricket Council
<b>ITA</b>	Income Tax Act of Kenya
<b>JSC</b>	Judicial Service Commission of Kenya
<b>KAAA</b>	Kenya Amateur Athletics Association
<b>KCA</b>	Kenya Cricket Association
<b>KLR</b>	Kenya Law Reports
<b>L.R Q.B</b>	Law Reports Queen's Bench
<b>NZLR</b>	New Zealand Law Reports
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>RFU</b>	Rugby Football Union of England
<b>SANZAR</b>	South Africa, New Zealand and Australia Rugby
<b>SCR</b>	Supreme Court Law Reports (India)
<b>V.C</b>	Vice Chancellor of the Chancery Division

**WADA**

World Anti-Doping Agency

**WLR**

Weekly Law Reports (England and Wales)

## LIST OF CASES

*Breen v Amalgamated Engineering Union* [1971] 1 All ER 179

*Collins v Wilcock* [1984] 1 WLR 1172

*David Wanjau Muhoro v Ol-Pejeta Ranching Limited* Cause 1813 of 2011 [eKLR]

*Dry Associates Limited v Capital Markets Authority and Another* Petition Number 328 of 2011 [eKLR]

*Enderby Town Football Club v Football Association Limited* [1971] Ch. 591

*Everett Aviation Limited v Kenya Revenue Authority* Income Tax Appeal 2 of 2009 [eKLR]

*Fall v Hitchen* [1973] 1 All ER 368

*George Kamau Ndiritu & Another v Intercontinental Hotel* Cause 2347 of 2012 [eKLR]

*Giella v Cassman Brown* [1973] EA 358

*Isaiah Kiplagat & 2 Others v Eric Keter* Civil Application 239 of 2000 (Court of Appeal Decisions of Kenya, 3<sup>rd</sup> Ed 2000)

*James Mwarari Gatome & 7others v R* Civil Application 25 of 2007

*Lee v Showman's Guild of Great Britain* [1952] 1 All ER 1175

*McInnes v Onslow Fane* [1978] 3 All ER 211

*R v London & Quadrant Housing Trust* [2009] All ER 19

*R v Kenya Cricket Association & 2 others ex-parte Odumbe* Miscellaneous Application 1723 of 2004 [eKLR]

*R.D. Shetty v The International Airport Authority of India and Others* [1979] 1 SCR 1042

*Republic v Rand* [1966] 1 LR QB 230

*Rootes v Shelton* [1967] 116 CLR 383

*Topi Flora Limited v Joel Odhiambo* Civil Appeal 207 of 2006 [eKLR]

*Whittaker v Minister of National Insurance* [1966] All ER 537

*Wilberforce Kilibwa v Mumias Sugar Company Limited* Cause Number 2052 of 2011  
[eKLR]

## **ABSTRACT**

This study is carried out on the background of the many disputes in sports in Kenya. The study takes an athlete-centred approach owing to the fact that they are the most affected parties in the event of a tussle. The first chapter sets out a basic background by which disputes occur in Kenya. It also introduces the elements that will be discussed in the following chapters.

The theories of cultural relativism and justice have informed my assertions about the avenues explored in dispute resolution in sports in Kenya. There is a study of two landmark cases, before the enactment of the Sports Act (2013), which show institutional attitude towards dispute resolution as well as the court's analysis of the decisions. The Sports Act attempts to mitigate the issues that arise from these cases though there are various legal technicalities by which the Act fails to fully canvas the issues that arose from the decisions.

Chapters 1-4 are more of informative chapters with decisions, articles and statistics and very little analysis. Further analysis is contained in the final chapter where the information is harmonised.

## **Research Methodology**

For this research topic, I intend to rely on both primary and secondary methods.

Primary sources shall include, but not limited to, available statistics, The Constitution of Kenya (2010), relevant legislation and subsidiary legislation.

Secondary sources shall make references to case law, scholarly writings, and credible newspaper articles.

## **Chapter Breakdown**

1. Background to the Study
2. Theoretical Framework and Literature Review
3. Unique Nature of Sports and Its Integration into Law
4. Nature of Sports Disputes and Attempts at Reform by Sports Act (2013)
5. Conclusion and Recommendations

## CHAPTER 1: BACKGROUND TO THE STUDY

Disputes in sports in Kenya are a common occurrence<sup>1</sup> and are also a hindrance to the development of the industry. This is due to different standards and legal principles being applied by the courts in deciding cases<sup>2</sup>. Furthermore, seeking redress from the ordinary courts to settle disputes in sports has not only retarded the development of sport but led to the disputants ignoring the court process and those with a lower bargaining power (usually the athletes) are forced to accept the sanction as it is; more often than not leaving the sport especially in a non-professional setting<sup>3</sup>.

The Kenyan Sports Act<sup>4</sup> of 2013 is a relatively new piece of legislation and it attempts to remedy this issue by establishing a tribunal for the arbitration of sports disputes under Section 56. The jurisdiction of this tribunal is limited to specific disputes (this is canvassed in the analysis of the Act in Chapter 4) and therefore the following enabling section, Section 60, is also confined to this jurisdiction of disputes.

Due to the nature of sports<sup>5</sup>, disputes may arise from different scenarios and different parties including but not limited to Players v Clubs, Clubs v Federations, Sponsors v Players/Clubs over various issues including disciplinary issues, contract issues and national team selection issues. According to Professor Wekesa, all sports bodies have set up an elaborate mechanism of dispute resolution which normally involves arbitration at two or three levels; first at the club level, and then at the federation/union level, recently the Sports Act has adopted a National Tribunal and the highest level being the Court of Arbitration for Sport (hereinafter CAS)<sup>6</sup>. The aims of this study are to assess the current dispute resolution framework for sports in Kenya, and to assess suitability of elaborate institutional Alternative Dispute Resolution (hereinafter ADR), as contrasted with traditional litigation as a means of dispute resolution.

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<sup>1</sup> Wekesa M, Towards a Sport Jurisprudence in Kenya 1 *Mount Kenya University Law Journal* (2012) 19.

<sup>2</sup> Further elaborated

<sup>3</sup> Wekesa M, Towards a Sport Jurisprudence, 19

<sup>4</sup> No. 25 of 2013

<sup>5</sup> Chapter 3

<sup>6</sup> Wekesa, Towards a Sport Jurisprudence in Kenya, 25

## **Research Objectives**

The following are my research objectives:

- To assess the nature and the autonomy of sport and to demonstrate the need for specialised dispute resolution mechanisms for the same.
- To assess some of the landmark disputes prior to the Sports Act.
- To demonstrate the suitability of internal and institutional ADR framework laid by the Sports Act.

## **Research Questions**

The following are my research questions:

- Should disputes in sports be categorised separately in the Kenyan legal system?
- Is internal, ADR a better alternative to litigation in sports?

## **Hypotheses**

This study is built on two hypotheses

- Sports is a unique discipline and ought to receive distinct recognition in a legal system
- Dispute resolution mechanisms are the key to the development of sports.

## **Justification for the Study**

This research is relevant in that it intends to investigate the best means possible to resolve disputes in sports. The Constitution provides that everybody is entitled to fair administrative action and the access to justice.<sup>7</sup> In light of this, the Constitution also provides for the use of ADR mechanisms such as reconciliation, mediation, arbitration in order to settle disputes<sup>8</sup>. These mechanisms are different in procedure and possible outcome and therefore there is a need to scrutinize whether ADR mechanisms are better suited as compared with the traditional judicial process.

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<sup>7</sup> Articles 47 and 48 respectively, *Constitution of Kenya* (2010)

<sup>8</sup> Article 159(2), *Constitution of Kenya* (2010)

This study is of utmost importance to the sports sector in Kenya-which has been riddled with disputes for time immemorial-due to the fact that sports is shifting from a mere pastime and evolving to become a lucrative business as well as a means of livelihood.

### **Limitations of the Study**

The integration of sports law as a unique branch of law has not been done in the Kenyan legal system. Only one University in Kenya, Strathmore University, offers Sports Law in their curriculum. The Sports Act is a new piece of legislation and is facing various implementation hurdles like the Sports Dispute Tribunal Rules and Registrar's Rules are yet to be implemented more than 2 years later after the promulgation of the Sports Act. Due to the above reasons, there is a limited amount of research, formal scholarly or academic work on the subject in Kenya. This dissertation is for the partial fulfilment of a Bachelor of Laws degree and hence I am subject to a word limit.

## CHAPTER 2 THEORETICAL FRAMEWORK AND LITERATURE REVIEW

### Introduction

This study seeks to juxtapose the theories of cultural relativism and justice, contextualise them with regard to sports, the disputes that arise from sports and the outcomes that are essential to the maintenance of the environment created by sports.

#### i. Cultural Relativism

Cultural relativism is the theory that suggests that good and bad are relative to culture<sup>9</sup>. The theory can be divided into two parts; strong cultural relativism and weak cultural relativism. Strong cultural relativism indicates that culture is the principal source of moral right and wrong this is not the same as radical cultural relativism which holds out that culture is the sole source of moral judgment. Weak cultural relativism holds that culture may be an important source of the validity of a moral right or rule. In a bid to measure these forms of cultural relativism across a continuum one must not only use a quantitative measure-in that the number of subscribers of a particular way of life is a conclusive determinant-but also incorporate qualitative measures where the substance of the practice is assessed and an objective judgment is made.

Certain aspects of human anthropology develop from a way of life i.e. culture. John Finnis speaks about play being one of the basic goods in human life. Just like the other 6 basic goods, (life, knowledge, aesthetic experience, sociability, practical reasonableness) play is developed within a cultural context<sup>10</sup>. The importance of sport in national culture is a global phenomenon despite varying intensity and institutional significance<sup>11</sup>.

To further demonstrate this idea that sports is a cultural construct, in order for a soccer/football player and a samba dancer to be considered 'good' they must display *jogo de*

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<sup>9</sup> Tilley J, Cultural Relativism, 22, *Human Rights Quarterly*, (2000), 501

<sup>10</sup> Finnis J, *Natural Law and Natural Rights*, Clarendon Press Oxford, 1980, 87 this assertion is furthered in Chapter 3

<sup>11</sup> Black D. and Nauright J, *Rugby and the South African Nation: Sports, cultures and power in the new and old South Africans*, Manchester University Press, 1998, 1

*cintura* which directly translated from Portuguese means 'waist game'<sup>12</sup>. A contextual translation offered by Lopes is the body's ability to provoke fascination and for this reason Brazilian football has acquired the identity of 'samba football'<sup>13</sup>. This identification of Brazilian football with dance is not a mere creation but an appreciation of cultural differences<sup>14</sup>.

This depiction of cultural significance on sport is not unique to the Brazilians. A more controversial example and closely knit to this theory of cultural relativism is the evolution of Rugby Union in South Africa. Rugby Union in South Africa has held and continues to hold significant prominence among the white population of South Africa who are the architects of the modern sporting structure in South Africa<sup>15</sup>. The coloured population of South Africa are less inclined to play rugby for various reasons including this socio-cultural demographic<sup>16</sup>.

The two divisions of the theory of cultural relativism (strong and weak), as opposed to radical relativism, also recognise the existence of universality based on circumstance. Sports bodies have grown to global entities outside conventional public authority and in time have created their own rules<sup>17</sup> and also depend on the conventional legal system to buttress the authority of these rules. This theory is important to legislative bodies as they incorporate sports into the legal system in that the solutions and provisions suggested by any law (which includes provision for dispute resolution) meant to govern sports are better provided by those actively involved in both sports and law<sup>18</sup>.

This theory is also an important indicator for the judiciary to consider in that it cannot afford to ignore violations of natural justice and human rights because they are outside the realm of sports dealings. The following chapters show how the court covered its eyes basing it on private dealing whilst the principles of natural justice were being flouted.

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<sup>12</sup> Available at <https://translate.google.com/?ie=UTF-8&hl=en&client=tw-ob#auto/en/jogo%20de%20cintura> 18/11/2015

<sup>13</sup> Leite L, *Successes and Contradictions in 'Multiracial' Brazilian Football in G Armstrong, R Giulianotti (eds) Entering the Field. New Perspectives on World Football*. Berg, Oxford, 1997

<sup>14</sup> Eduardo P. Archetti, *Anthropology of Sport*, University of Oslo, 3

<sup>15</sup> Black D. and Nauright J, *Rugby and the South African Nation: Sports, cultures and power in the new and old South Africans*, 1

<sup>16</sup> <http://www.theguardian.com/sport/2015/sep/10/springboks-not-racist-insists-head-of-south-african-rugby-oregan-haskins> 18/11/2015

<sup>17</sup> Wekesa M, *Towards a Sport Jurisprudence*, 21

<sup>18</sup> See Lord Denning dictum in *Enderby Town Football Club Ltd v. Football Association Ltd* [1971] Ch. 591

## ii. Theory of Justice

John Rawls<sup>19</sup> contends that "justice is the first virtue of social institutions, as truth is of systems of thought"<sup>20</sup>. Rawls continues to state that men in their being understand the concept of justice and that disagreement is usually due to the fact there is no congruence as to the principles that should govern their associations. For this reason, societies are seldom well-ordered for what is just and unjust is usually in dispute.<sup>21</sup>

In **McInnes v Onslow Fane**<sup>22</sup> Megarry V-C states:

*"Justice is far from being a "natural" concept. The closer one goes to a state of nature the less justice does one find. Justice, and with it natural justice, is in truth an elaborate and artificial product of civilization which varies with different civilizations."*

John Rawls gives a very hypothetical analysis of what justice is whereas Megarry VC conceptualises a practical theory of justice; that indeed it is a dictate of the circumstances of a particular civilization; a live indicator to the theory of cultural relativism being related to the theory of justice.

Dispute resolution in sports is usually, at first instance, occurs through internal tribunals coined by the various sports organisations. There lies the risk of the organisation being prosecutor and judge denying the athlete his right to natural justice.

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<sup>19</sup> Former Professor at Harvard University

<sup>20</sup> Rawls J, *A Theory of Justice*, the Belknap Press of Harvard University Press, 1999 at 3

<sup>21</sup> Rawls, *A Theory of Justice*, 5

<sup>22</sup> [1978] 3 All ER 211 at 219

## Literature Review

This literature review will be divided into 3 parts:

- i. Access to Justice and the History of Sports in Kenya
- ii. Specific Nature of Sports and its Interaction with Law
- iii. Alternative Dispute Resolution and Sports

### i. Access to Justice and the History of Sports in Kenya

Article 48 of the Constitution provides that access to justice is a right for all and that the State shall promote it. The court in **Dry Associates Ltd v. Capital Markers Authority & Another**<sup>23</sup> defines access to justice as,

*"...a broad concept that defies easy definition. It includes:*

1. *the enshrinement of rights in the law;*
2. *awareness of and understanding of the law;*
3. *easy availability of information pertinent to one's rights;*
4. *equal right to the protection of those rights by the law enforcement agencies;*
5. *easy access to the justice system particularly the formal adjudicatory processes;*
6. *availability of physical legal infrastructure; affordability of legal services;*
7. *provision of a conducive environment within the judicial system;*
8. *Expeditious disposal of cases and enforcement of judicial decisions without delay."*

Justice David Majanja in this decision, concedes to the fact that the concept of access to justice is a difficult one to put a finger on. However, he tries to construct a foundation by which one can attempt to conceptualise it. In this construction, the first aspect of the list is a

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<sup>23</sup> Petition 328 of 2011

matter of serious debate; the enshrinement of rights in law as it is or as it should be? Does that negate the creation of *rights in personam* for example in contract law? Each of these elements shall be expanded and contextualised to the topic of study.

Kariuki proposes that, "for this constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies.*"<sup>24</sup> These principles when focused upon imply the application of subjective standards in order to achieve access to justice.

Historically, the resolution of disputes in sports has been fairly inconsistent with little or no regard to the rights of the athletes.<sup>25</sup> Athletes have found themselves facing their organisations that possess a dual capacity of adversary and adjudicator i.e. the organisation prosecutes the matter and judges or appoints the panel of judges<sup>26</sup>. For instance, the former Kenya Amateur Athletics Association (KAAA) (now Athletics Kenya) in clause 21 (ii) of its constitution prior to review stated:

*"All disputes between KAAA and any athlete shall be submitted to an arbitration panel appointed by the KAAA Executive Committee. The decision of the arbitration panel under this section shall be final and binding on all parties. No right of appeal"*

This for a long time was the norm within sporting organisations and unions. In **R v. Kenya Cricket Association & 2 others Ex-parte Maurice Odumbe**, Maurice Odumbe, was suspended for violation of ethical regulations in the Cricket Code of Conduct. At first instance the tribunal was set up by the Kenya Cricket Association (KCA) and the International Cricket Council (ICC). Upon their finding and subsequently suspending the player, Odumbe applied to the court for judicial review proceedings seeking an order of *certiorari* to quash this decision. The court declined this application on the grounds that the

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<sup>24</sup> Muigua K, *Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, The Chartered Institute of Arbitrators, Kenya, 1, 2013, 43-78.

<sup>25</sup> Mew G & Richards MJ, *More Than Just a Game: Resolving Disputes in Modern Sport* presented at 14th Commonwealth Law Conference, London, England, 2005, 3

<sup>26</sup> See **R v. Kenya Cricket Association & 2 others (Ex-parte Odumbe)**

ICC and the KCA were not public bodies. This example depicts how the athlete had no recourse to an independent adjudicator; a form of imputed bias and ultimately a violation of natural justice. This particular case is analysed further in Chapter 4

The Sports Act in Section 59 attempts to remedy this anomaly as it states:

*"The Tribunal shall determine—*

- a. appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including —*
  - i. appeals against disciplinary decisions;*
  - ii. appeals against not being selected for a Kenyan team or squad;*
- b. other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and*
- c. appeals from decisions of the Registrar under this Act.*

However, upon careful reading of this section that highlights the jurisdiction of the Tribunal, one sees that the only way the Tribunal may be accessed is if the rules of the sports organisation allow for disputes to be referred there. One does not need a special eye for detail to see that there is still a gap retarding the access to justice by athletes.

## **ii. Specific Nature of Sports and its interaction with Law**

In order to determine the nature of anything, one has to understand how it came to be. Brasch in his writ as to how sports began states,

*"Sport was a natural result of a universal love of play and man's innate desire to compete with and to excel, if not dominate, others. Another mainspring of sport was man's need effectively to defend himself, his tribe and, later on, his country. In panic and fear when escaping from danger, he learned to run, jump and swim. To avoid defeat or to subdue opponents, he invented archery, judo and karate. And in order to be ready for combat, at all times he practised them and new sports evolved out of his martial training. Even football and baseball carry vestiges of battles between tribes...*

*... Sport thus assumed even cosmic significance. Definite rules in primitive ball games were religiously observed to direct the winds, the bringers of life. The two teams represented earth and sky and as no one would dare to cheat the gods, an umpire was unnecessary. No wonder that primitive man believed that sport, if not divine itself, was a gift of the gods. He was firmly convinced that 'to play the game' meant to accelerate the revival of nature and the victory of vegetation. The association of games with religious worship continued from prehistoric times well into the classical period.*<sup>27</sup>

On a similar wavelength, John Finnis writes that play is one of the six aspects of human well-being. He contends that it is a large and irreducible part of human culture and is enjoyed for its own sake. Play can be incorporated into any human activity, even the drafting of enactments but is always distinguishable from its serious context.<sup>28</sup>

The sports industry has evolved into a worldwide multi-billion enterprise contributing to approximately 2% of England's economy and employing approximately 400,000 people.<sup>29</sup> With this growth in the discipline, there is need for specific codification and formalisation for the protection of the subjects from exploitation.

Professor Gardiner argues that,

*"It is true to say that [sports law] is largely an amalgam of interrelated legal disciplines involving such areas as contract, taxation, employment, competition and criminal law but dedicated legislation and case law has developed and will continue to do so. As an area of academic study and extensive practitioner involvement, the time is right to accept that a new legal area has been born - sports law."*<sup>30</sup>

Professor Carter in proposing that sports law is an independent corpus of law states:

*"A field becomes a field not because it is inherently so but because in our public dealings we shape it as such, defining the concepts and legal norms*

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<sup>27</sup> Brasch, R, *How Did Sports Begin?* (1986), Sydney: Angus and Robinson, 1–5.

<sup>28</sup> Finnis J, *Natural Law and Natural Rights*, 87

<sup>29</sup> <https://www.sportengland.org/research/benefits-of-sport/economic-value-of-sport/> on 5 March 2014

<sup>30</sup> Gardiner S et al, *Sports Law*, 4, Routledge, 2012, 71

*that will prevail uniquely in that context. It becomes a field because enough people with power on all sides are so affected by it to require some special treatment of it in law*<sup>31</sup>

This proposition directs that indeed sports law is unique in its constitutive elements. The nature of sport as a form of play has evolved into an economic enterprise as has theatre and art. Affirming John Finnis, indeed codification is required but attention needs to be paid not erode the nature. This research partly seeks to critique the legal framework as it is with regard to dispute resolution in sports.

### **iii. Alternative Dispute Resolution and Sports**

Alternative Dispute Resolution (ADR) refers to the decision-making processes with regard to conflicts other than litigation.<sup>32</sup> ADR mechanisms include early neutral evaluation, negotiation, conciliation, mediation, and arbitration.<sup>33</sup> ADR prides itself for being a simple, quick, flexible, and private and an accessible dispute resolution system compared to litigation. It emphasises a win-win situations for both parties, is cost effective and maintains/fosters relationships between the parties.<sup>34</sup>

ADR mechanisms can be classified as can be classified as the facilitative, evaluative and determinative. A facilitative mechanism is one where the main role of the third party is to lead the disputants towards a solution e.g. mediation and conciliation. Moreover, the third party may assist the parties to identify issues that may arise in the course of the process and point them out to them and also offer recommendations without carrying out an evaluative role. In an evaluative mechanism, the third party, upon consideration of the evidence and the nature of the dispute, offers advice to the parties on a possible outcome and makes a non-binding decision. A determinative mechanism, like arbitration, is where the third party evaluates the dispute and makes a determination which is usually binding.<sup>35</sup>

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<sup>31</sup> Carter B W, What Makes a “Field” a Field? Social Science Research Network, 1999 available at <<http://papers.ssrn.com/abstract=2351495>> accessed 2 March 2015.

<sup>32</sup> Kariuki M and Kariuki F, *ADR, Access to Justice and Development in Kenya*, Strathmore Annual Law Conference, 2014, 3

<sup>33</sup> [https://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](https://www.law.cornell.edu/wex/alternative_dispute_resolution) on 5 March 2015

<sup>34</sup> Kariuki M and Kariuki F, *ADR, Access to Justice and Development in Kenya*, 4

<sup>35</sup> Xie Z, *The Facilitative, Evaluative and Determinative Processes in ADR*, 2011. available at

There are quite a number of ADR processes and there are similar to one another, so how to identify an appropriate process to a particular dispute in various ADR processes is highly important with respect to the dispute and the intended outcome.<sup>36</sup>

With regard to sports, Greenberg states, “Professional sports have not been immune to the recent proliferation of alternative dispute resolution methods. In fact, the use of alternative dispute resolution processes has become the norm within the professional sporting arena.”<sup>37</sup> Arbitration, in particular, is the most commonly used mechanism of dispute resolution.<sup>38</sup>

Arbitration is a final and legally binding process.<sup>39</sup> Due to the speed, informality, privacy, and finality of the arbitral process, it is often less costly than the process of litigation and the potential for appeals is lessened<sup>40</sup>. Arbitration as a determinative mechanism of dispute resolution is not suitable to all disputes as not all disputes are necessarily antagonistic and a simple direction by a third party may resolve it.<sup>41</sup> Most sports organisations have provided for arbitration as the only means of dispute resolution due to the finality of the arbitral award and ability to seek for its enforcement including at the highest level which is CAS.<sup>42</sup> Greenberg in writing on ADR in sports facility leases, states that most sports facility leases mandate that the parties must first mediate the dispute before subjecting the controversy to arbitration. This allows the parties to settle the dispute in good faith and therefore maintain their relationship and its privacy.<sup>43</sup>

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<http://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652> on 5 March 2015

<sup>36</sup> Xie Z, *The Facilitative, Evaluative and Determinative Processes in ADR*.

<sup>37</sup> Greenberg M, *The Stadium Game*, 2, Marquette University Press, 2001, 532.

<sup>38</sup> Greenberg M, Alternative Dispute Resolution in Sports Facility Leases, 16 *Marquette Sports Law Review*, 2005, 100

<sup>39</sup> Section 32A, *Arbitration Act* (Cap 49 Laws of Kenya)

<sup>40</sup> Greenberg M, Alternative Dispute Resolution in Sports Facility Leases, 103

<sup>41</sup> Xie Z, *The Facilitative, Evaluative and Determinative Processes in ADR*.

<sup>42</sup> Prof Wekesa, Towards a Sport Jurisprudence in Kenya, 25

<sup>43</sup> Greenberg M, Alternative Dispute Resolution in Sports Facility Leases, 103

## CHAPTER 3 THE UNIQUE NATURE OF SPORTS AND ITS INTEGRATION INTO LAW

This chapter seeks to investigate the growing body of sports law locally. It also seeks to justify why the legal system (from legislation to contractual practice and more importantly to this study, dispute resolution mechanisms) ought to accept this growth. To do this, conclusively, a scope of what sports is in itself; its nature, its integration into society as a form of play and its growth into a lucrative business and what this means (or should mean) to law needs to be assessed.

### **Sports and its integration into Society**

The Sports Act defines sports to include,

"all forms of physical or mental activity which, through casual or organized participation, or through training activities, **aims at expressing or improving physical and mental well-being, forming social relationships or obtaining results in competition at all levels**, and includes any other activity as the Cabinet Secretary may, from time to time and after consultation with the technical department responsible for sports, prescribe;<sup>44</sup>"

This definition is definitely not pulled from the sky it may be inferred from how sports began. Rudolph Brasch<sup>45</sup> states,

*"Sport was a natural result of a universal love of play and man's innate desire to compete with and to excel, if not dominate, others. Another mainspring of sport was man's need effectively to defend himself, his tribe and, later on, his country. In panic and fear when escaping from danger, he learned to run, jump and swim. To avoid defeat or to subdue opponents, he invented archery, judo and karate. And in order to be ready for combat, at all times he practised them and new sports evolved out of his martial training. Even football and baseball carry vestiges of battles between tribes..."*

Man's love for play is a basic aspect of his well-being hence the natural inclination towards it<sup>46</sup>. The performance could be individual or social albeit informally, highly structured or in

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<sup>44</sup> Section 2

<sup>45</sup> The author was a rabbi and an author. Officer of the Order of the British Empire and Member of the Order of Australia

<sup>46</sup> Finnis J, *Natural Law and Natural Rights*, 87

an *ad hoc* pattern<sup>47</sup>. Due to this play may be demonstrated at a simple social level e.g. between age-mates in the school yard, in an amateur though competitive setting or at a professional level governed by a global federation thereby depicting a taxonomical look at sports in society.

The interpersonal nature of play then dictates that for it to have meaning, the athletes must be aware of the rules and the aims of the game<sup>48</sup>. The scoring of points was as a result of primitive ways of counting and an separate individual would be the one to settle the differences; now known as the referee/umpire<sup>49</sup>. This is the first or most basic level at which the evolution of law in sports begins; the existence of rules and a separate decision maker.

Where rules exist, there is need for incentive to follow the rules; the offender cannot be accorded similar treatment as the non-offender<sup>50</sup>. In sports, and I will illustrate with rugby, offending teams are penalised and depending on severity of the offence the individual athlete receives a sanction<sup>51</sup>.

This law applies at a communal level, among those playing the game, viewing it from a bird's eye view; as an individual in the larger society, isolated from the happenings in the field they adopt a quasi-legal form i.e. in so far as they are rules backed with a sanction, there is no authority to compel their obedience. This can create the problem of athletes (who also live in the larger society) to disregard the rules of the game hence the need for authority of the rules and the rule maker. This assertion has been exemplified in the sport of rugby. The Rugby Football Union of England (hereinafter RFU) passed regulation to prevent the payment of rugby athletes<sup>52</sup>. This was at the time the administrative body that governed the sport of rugby in England therefore the regulations (which include the rules of the gameplay and the administrative rules for clubs and sub-unions) it passed would be applicable and enforceable by them in England. At that point there was no law within the English legal system prohibiting a parallel administrative body to be formed. It was thus, in 1895, that the

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<sup>47</sup> Finnis J, *Natural Law and Natural Rights*, 87

<sup>48</sup> Anthony J. Celano, Play and the theory of basic Human Goods *American Philosophical Quarterly* Vol. 28, No. 2 (Apr., 1991)

<sup>49</sup> Brasch, R, *How Did Sports Begin*, 6

<sup>50</sup> Fuller L, *Anatomy of the Law (1968)*, Encyclopaedia Britannica Inc., 15

<sup>51</sup> Law 10.5 of World Rugby Laws provides for the admonishing of, showing of a red or yellow card to a player offending Law 10 which is on foul play.

<sup>52</sup> <http://www.englandrugby.com/twickenham/world-rugby-museum/rugby-history/the-amateur-era/> 18/01/2016

Northern Union split and formed a parallel administrative body for rugby (now rugby league).

### **From Pastime to Business**

The initial data for this section of the chapter shall be a basic timeline of how rugby<sup>53</sup> evolved from an amateur sport to a professional sport and finally a look at global and local statistics for sports.

Rugby, as we know it, began in England at Rugby School. Initially it was a game played by the middle class of England but gained popularity amongst the working class<sup>54</sup>. In 1886 the RFU at an Annual General Meeting passed strict laws preventing the payment of rugby players<sup>55</sup>. As the sport grew and spread, there was pressure for the members of the RFU to keep the best players despite maintaining amateurism hence clubs would make illegal payments to athletes in cash or in kind<sup>56</sup>. The pressure of professionalism finally demonstrated itself in 1895 when there was a split between the RFU and the Northern Union and the sport of Rugby League<sup>57</sup> was born in Northern England which eventually spread to New Zealand and Australia<sup>58</sup>. The International Rugby Board (as it was then known) was dominated by the English who maintained this standard of amateurism for 100 years since the split of rugby codes<sup>59</sup>. In late 1994 the, rumours began to circulate that media tycoon Rupert Murdoch was intending to finance a breakaway professional league (to play rugby league) for elite rugby union players; millions of dollars had already been exchanged for players to switch codes after the 1995 Rugby World Cup<sup>60</sup>. It was the threat of the demise of rugby union that the game turned professional allowing South Africa, New Zealand and

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<sup>53</sup> The sport of rugby is chosen as an example due to the pressure for its conversion from strictly amateur to professional. It is also a very good example of how sports became a lucrative business and how money influenced great change.

<sup>54</sup> <http://www.englandrugby.com/twickenham/world-rugby-museum/rugby-history/the-amateur-era/> on 18/01/2016

<sup>55</sup> <http://www.englandrugby.com/twickenham/world-rugby-museum/rugby-history/the-amateur-era/> on 18/01/2016

<sup>56</sup> <http://www.englandrugby.com/twickenham/world-rugby-museum/rugby-history/the-amateur-era/> on 18/01/2016

<sup>57</sup> A separate code of the game of rugby with slightly different laws

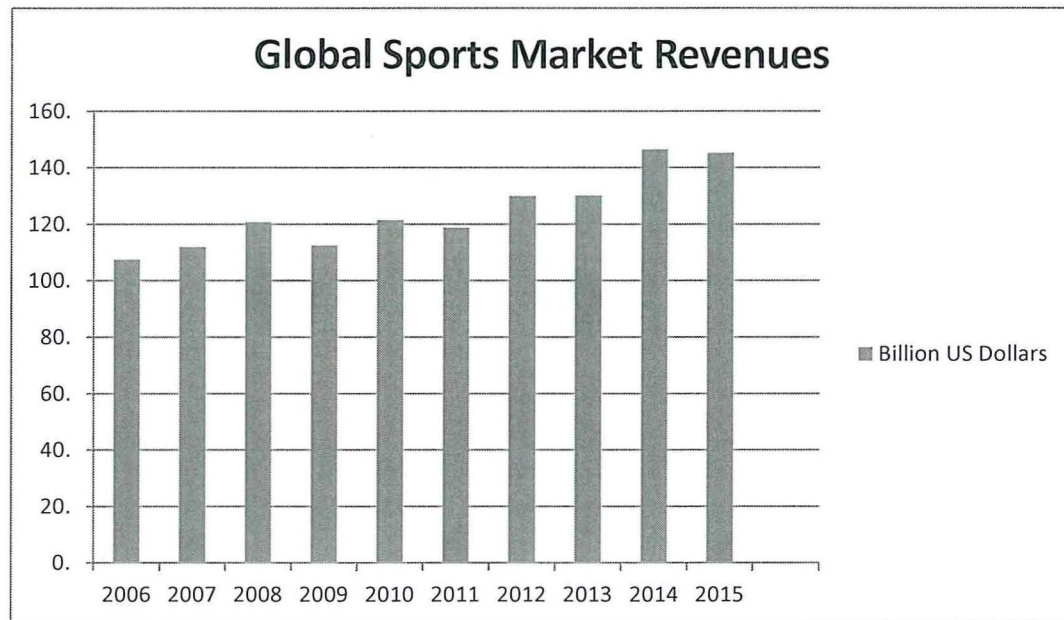
<sup>58</sup> <http://www.englandrugby.com/twickenham/world-rugby-museum/rugby-history/the-amateur-era/> on 18/01/2016

<sup>59</sup> <http://www.rugbyfootballhistory.com/timeline1990s.htm> on 18/01/2016

<sup>60</sup> Collins T, "The First Principle of Our Game": The rise and fall of amateurism: 1886-1995, Available at <http://www.cambridgescholars.com/download/sample/60716> on 20/01/2016

Australia (SANZAR) to sign a \$555 million television deal with Rupert Murdoch<sup>61</sup>. This story shows that indeed sport at its highest and most intense level is being shaped by large amounts of money.

Globally the sports industry has evolved into a multibillion dollar enterprise. PWC conducted a study in 2011 of revenues generated in the sports industry between 2006 and 2015 (between 2006 and 2010 the numbers are actual while the rest are forecasts) as follows:



In the same year, AT Kearney<sup>62</sup> estimated that the total value of the sports industry was between \$480-\$620 billion<sup>63</sup> while in 2014 Plunkett Research Ltd.<sup>64</sup> projected that the sports industry would be worth \$1.5 trillion<sup>65</sup> In Kenya, the sports industry is projected to grow to Kshs 12 billion by the year 2017<sup>66</sup>.

<sup>61</sup> <http://www.theguardian.com/sport/2015/aug/25/rob-andrew-wild-west-rugby-union-professional> on 18/01/2016

<sup>62</sup> Global Management Consulting firm. <https://www.atkearney.com/>

<sup>63</sup> Available at <https://www.atkearney.com/documents/10192/6f46b880-f8d1-4909-9960-cc605bb1ff34> on 18/01/2016

<sup>64</sup> Provider of industry sector analysis and research, industry trends and industry statistics. Available at <https://www.plunkettresearch.com/about-us/> on 18/01/2016

<sup>65</sup> <https://www.plunkettresearch.com/statistics/sports-industry/> on 18/01/2016

<sup>66</sup> Available at

[http://www.ipsos.co.ke/NEWBASE\\_EXPORTS/KQ/140422\\_The%20Daily%20Nation%20Smart%20Company\\_9\\_6e59c.pdf](http://www.ipsos.co.ke/NEWBASE_EXPORTS/KQ/140422_The%20Daily%20Nation%20Smart%20Company_9_6e59c.pdf) on 18/01/2016

## **Why the Legal System Needs to Recognise and Respond to Sports**

This section of the chapter provides an analysis of the above data and a rationale as to why the legal system needs to respond to the growth of the sports industry.

From the first section, it was established that sports does require the rules and the rule maker to command authority to give incentive for the players and federation members to abide by the rules. Other than administrative structure and procedure, the Sports Act compels sports organisations to include in their constitutions provisions for subscription to anti-doping policies and rules which conform with the World Anti-Doping Agency Code and compliance with the requirements set out in an anti-doping policy and rules of the National Anti-Doping Organization as well as subscription to Court of Arbitration for Sports policies and rules which conform with requirements set out in Sports Disputes Tribunal policy and rules for sports disputes resolution<sup>67</sup>.

The transition of sports from a pastime to a business gives rise to a myriad of legal issues. It is for this reason that it would not be inaccurate to say that indeed sports law is an overlap of the law of contract, taxation, employment, intellectual property, competition, private international law and criminal law<sup>68</sup>. However it is the unique application of these fields that puts sports law on a league of its own.

Aspects of pure contract law and labour law have been witnessed in sports disputes in Kenya. In Kenya, amateur sportspersons have suffered the brunt of informality prior to the Sports Act. In **Topi Flora Limited v Joel Odhiambo**<sup>69</sup> an appeal case at the High Court, the appellant had employed the respondent to harvest flowers at the appellant's farm and aside from that would play for the appellant's football team. During a football match, the respondent was tackled and broke his leg. He brought a suit before the Limuru Law Courts (court of first instance) where he sought compensation as an employee of the company for negligence on the part of the appellant for not providing protective clothing (shin pads). The trial magistrate found that whilst playing football for the appellant's football team the respondent is still an employee and the appellant is under statutory obligation to provide protective clothing. The appeal court set aside this judgment on the grounds that no evidence was adduced to show that the appellant was engaged in football as a professional business,

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<sup>67</sup> Second Schedule paragraphs (e) and (f)

<sup>68</sup> Gardiner S et al, *Sports Law*, 4, Routledge, 2012, 71

<sup>69</sup> Civil Appeal 707 of 2006

the respondent's engagement in football was absolutely voluntary and therefore the respondent did not establish that he was injured in the course of his employment. Furthermore, the respondent did not establish that the appellant was under any statutory or contractual duty regarding his engagement in football. First and foremost this appeal case took four (4) years to be determined notwithstanding the period of trial (which is not reported as it was a lower court matter) which is a very long time in sports especially for somebody who is continuing to play.

The case of **Wilberforce Kilibwa v Mumias Sugar Co Limited**<sup>70</sup>, took ten (10) years to be determined. The claimant played for the respondent club and sustained an injury during a match for the respondent club and it took a decade before the player could receive compensation. This is an awfully long time for a dispute in sports; especially involving a player as the centre. Another issue that arises is whether a professional sports person fits the statutory definition of an employee. The Sports Act defines a professional sports person, to the effect that, a person who is under a contract for the engagement and remuneration, training for the purpose of a sports competition<sup>71</sup>. The Employment Act<sup>72</sup> defines an employee as a person engaged under a contract of service -which differs from a contract for services which bind independent contractors-for a period of time<sup>73</sup>. Juxtaposing these definitions does not conclusively put a sports person under the definition of an employee; although the Employment Act does not offer an exception for sports persons.

In **Kilibwa v Mumias Sugar** the learned judge contended that professional footballers have rights and obligations like any other employees and labour and employment laws apply to them.

Are the obligations of a footballer similar to those of a conventional employee? Another question that arises is whether the work of a sportsperson is to train or to take part in competition or both? If there is no distinction between training and competition is it a denial of an athlete's right to not be selected into the competing team? The suffix of the definition of a professional sports person in the Act states that the ultimate engagement of the sports person is for the purpose of participating in competition. Therefore, at what point does the

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<sup>70</sup> Cause Number 2052 of 2011 [eKLR]

<sup>71</sup> Section 2

<sup>72</sup> Cap 226 Laws of Kenya

<sup>73</sup> Section 2

work of the athlete begin? At training on a regular basis or at the competition (think of doping prohibitions that apply specifically in-competition)? At the point of competition does the athlete assume the position of an independent contractor? Who is the employer of a professional sports person who plays for a club abroad and also makes his/her national team squad? These questions offer a justification as to how contract and labour law are indeed fundamental areas of sports law but need specialised and specific application for sports.

From Halsbury's Laws of England, the starting point for the modern test for ascertainment of a contract of employment includes not only the conventional integration or control tests but:

*"The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master ('mutuality of obligation');*

*he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master ('control');* and

*The other provisions of the contract are consistent with its being a contract of service*

*The final classification of an individual now depends upon a balance of all relevant factors, fine though that balance sometimes might be, with 'mutuality of obligation' and 'control' being seen as the 'irreducible minimum' legal requirements for the existence of a contract of employment. The factors taken into consideration may include: the method of payment; any obligation to work only for that employer; stipulations as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contributions how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit. In some cases the nature of the work itself may be an important consideration<sup>74</sup>"*

This view was upheld by the judge in **Everret Aviation Limited v Kenya Revenue Authority**<sup>75</sup> on the determination of whether freelance pilots hired by the appellants for a short period satisfied the definition of an employee. The judge also relies on **Whittaker v Minister of National Insurance**<sup>76</sup> where the holding of the court states, *inter alia*, that highly skilled professionals<sup>77</sup> such as engineers and surgeons may be employees despite the

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<sup>74</sup> Halsbury's Laws of England, 39, (2014) par. 4

<sup>75</sup> Income Tax Appeal No. 2 OF 2009

<sup>76</sup> [1966] 3 ALL ER 537

<sup>77</sup> To contextualize this word it is synonymous with a vocation undertaken for pay

little control imposed by their employers. Furthermore, the judge in **Everett**, in concluding that the pilots were employees, stated, as his most important point of consideration, that the employer bore the risk of loss and the chance at profit dependent on the failure or success of the pilots. The principle in **Everret** was also upheld in **George Kamau Ndiritu & another v Intercontinental Hotel**<sup>78</sup>. It suffices to say that the judiciary is lining its jurisprudence on contracts of service with this principle. Contextualising this principle in sport, the consideration to be made is whether the success or failure of a particular team has bearing on the profit or loss of the business as a whole. This then will direct the answer to the question as to whether the work of a professional sports person is to train or to compete.

Using the profit maximisation hypothesis, the marginal income from a win has to equal the marginal cost of the win<sup>79</sup>. Owners of sports teams are under no obligation to spend what they receive therefore a 'small' team may, in their accounting, have less overheads and related costs to acquiring their revenue in turn having a wider profit margin and subsequently a good return on investment. This is only practical if the teams maintain sporting success. With limited spending on players in a competitive league, sporting success may diminish and subsequently fan interest hence reducing revenues from ticket sales, kit sales et al. If spending on players increases, then fan interest may be reignited and revenues from ticket sales increase but only to a particular point; the players cost money to buy and maintain<sup>80</sup>. This assertion, from an external point of view, points very much to the notion that the work of a professional sports person in a business is to compete. From the club's point of view, the players individually are liabilities (they cost money to maintain) and put together as a team, a single asset. With this basis it would be simplistic to argue as the judge did in **Kilibwa** a more meticulous approach ought to be taken bearing in mind these differences.

The facts and judgment in **Fall (Inspector of Taxes) v Hitchen**<sup>81</sup> provides a more conclusive approach to the issues laid afore. The dictum of Pennycuik VC which concludes that the respondent is an employee is informed by the following facts:

“The taxpayer is engaged to work for a minimum period of rehearsals plus 22 weeks, and thereafter until the contract is determined by a fortnight's notice on either side; he is engaged

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<sup>78</sup> Cause 2347 of 2012

<sup>79</sup> Szymanski S, Hall S, Making Money out of Football, *The Business School, Imperial College London*, (2003) 2-3

<sup>80</sup> Szymanski S, Hall S, Making Money out of Football, 5

<sup>81</sup> [1973] 1 All ER 368

to work full-time during specified hours for a regular salary; the company has the first call on his services, and indeed the exclusive call subject only to this, that their consent to the taxpayer performing elsewhere shall not be unreasonably withheld; and then, again, the company provides and owns the gear used by the taxpayer, with one exception. All these indicia point to the conclusion that he is not a person who is performing those services in business on his own account; and there are really no indicia to the contrary.”

However, the question as to what point the work of a professional sports person begins is still not answered. Furthermore, I do not find it entirely incorrect to claim that professional sports persons do provide their services on their own account; their performance dictates their (individually or through their agents) bargaining power in contract negotiations and exposure to endorsement deals. Suppose the judgements in **Kilibwa** and **Fall** are harmonised and it is the position of the judiciary that the employment laws apply in the same way to ordinary employees and to professional sports persons, there are specific sections of the **Employment Act** that sports teams contradict. Section 5(5) provides that an employer shall pay his employees equal remuneration for work of equal value. The concept of work of equal value is discussed in **David Wanjau Muhoro v Ol-Pejeta Ranching Limited**<sup>82</sup> as ‘*work which is different in content, involving different responsibilities, requiring different skills or qualifications.*’ The concept also denotes every worker, to receive equal pay, for the same or similar work<sup>83</sup>. If a professional sports person is an employee then majority of the first team individuals in professional teams should earn the same salary. It is self-evident this is not the case; different players receive different remuneration<sup>84</sup>.

Taxation of sports persons is a growing issue for professional sports in Kenya<sup>85</sup>. The Income Tax Act <sup>86</sup>(herein after ITA) provides that income from employment or services or any amount deemed to be income will be charged income tax<sup>87</sup>. This without a doubt ropes in income and allowances of sportspersons. Section 3(1) of the ITA states that the income ought to have accrued or have been derived from Kenya. This issue becomes even more complex when a professional sports person plays for a club abroad and also represents the national

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<sup>82</sup> Cause No. 1813 of 2011 [eKLR]

<sup>83</sup> Cause No. 1813 of 2011, paragraph 190

<sup>84</sup> See <http://www.telegraph.co.uk/sport/football/teams/arsenal/9782420/Arsenal-manager-Arsene-Wenger-defends-his-socialist-wage-plan.html> and <http://rugbywc15.com/rugby-players-salaries-wages/> on 23/1/2016

<sup>85</sup> <https://sbotieno.wordpress.com/2014/03/01/is-it-lawful-to-tax-sports-income-a-legal-analysis/> on 23/1/2016

<sup>86</sup> Cap 470 Laws of Kenya

<sup>87</sup> Section 3 (2)

team i.e. they are residents in more than one jurisdiction. Section 5 of the ITA provides for charging income from employment. Pertinent to this study, an employee who is a resident of Kenya's worldwide income is deemed to have been derived from Kenya<sup>88</sup>. In Kenya the requirements for residency are:

1. A permanent home and presence in Kenya for the year of income
2. No permanent home but:
  - a. Presence in Kenya for a period amounting to 183 days on aggregate
  - b. Present in Kenya in that year of income and in each of the two preceding years for periods averaging 122 days in each year of income.

The Kenya Premier League, for example, lasts a period of approximately 90 days<sup>89</sup>. If a player is away from Kenya during the off-season or is a new signing to a team then they do not satisfy the residency threshold. For income tax, these players are not entitled to the personal relief and the insurance relief granted by the Act therefore subjecting them to a relatively higher tax liability<sup>90</sup>.

The Organisation for Economic Development and Cooperation (OECD) formulated special rules for performing artistes and sportsmen under Article 17 of the Model Convention<sup>91</sup> to tax sportspersons in their area of activity notwithstanding residency. The justification given for this double-taxation is due to the fact that sportsmen and artistes, due to the nature of their work, are very mobile and may shift residency to tax havens<sup>92</sup>. This article is an exception to the Article 15 of the Model Convention which is solely for income from employment. This distinction further points to the earlier observation that even though there is indeed a doctrinal overlap between the substantive law on employment and contracts for sportsmen, there is factual uniqueness to the workings of the sports industry. Kenya has 11 double tax treaties in force with the last one ratified in 1985<sup>93</sup>. None of these Double tax treaties has any regard for income derived from sportspersons meaning any income made by a Kenyan sports person anywhere on earth is subject to double tax. This double taxation of sportsmen may be

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<sup>88</sup> Section 5(1)

<sup>89</sup> Available at <http://www.kpl.co.ke/kenya/fixtures> on 6/2/2016

<sup>90</sup> Third Schedule Head A. Income Tax Act

<sup>91</sup> OECD Model Convention with Respect to Taxes on Income and on Capital

<sup>92</sup> Molenaar D, International Artistes and Sportsmen, Article 17 OECD Model, Problem of Double Taxation *OECD Commentary* (2010) available at <http://www.oecd.org/ctp/treaties/45784208.pdf> on 6/2/2016

<sup>93</sup> Available at <http://www.taxwise-consulting.com/international-tax> on 6/2/2016

seen as a problem but can also be a tool to incentivise sports growth in a country. If a country has minimal tax for sportsmen yet the clubs are well paying then this may be an incentive for professional sports persons to sign for clubs of that country and the reverse is true.

Violations of sports rules and regulations may also overlap with criminal law and tort law. Doping is a growing issue in sports in Kenya with accessibility to modern science, lack of education/information, and pressure from coaches to succeed<sup>94</sup>. Doping may involve substances that are usually legal but prohibited in competition in certain sports (e.g. alcohol in motorsports and archery<sup>95</sup>) and also illegal narcotics like cocaine<sup>96</sup>. The process of adjudicating these violations also differs from conventional criminal procedure. The standard of proof in criminal trials is that of beyond reasonable doubt by the prosecution, requiring substance samples before the court with government certification<sup>97</sup>. Doping in sports is on a basis of strict liability; when an adverse finding is made, it is upon the athlete to prove Therapeutic Use Exemption (T.U.E) or to mitigate the severity of the punishment<sup>98</sup>. Furthermore, unlike in criminal procedure where police require a warrant to search property, sports persons are subject to random checks to ensure compliance.

Foul play does occur in sports from a tackle against the rules, on-field brawls among other things. These actions in tort law may be classified as negligence and/or battery<sup>99</sup>. Participation in contact sports gives rise to risk of injury from foul play. Establishing tortious liability to the offending player cannot be subject to the same standards as applied to individuals on the street. Various risks are present in sports e.g. unlevelled playing fields and dangerous debris on the field, studs on playing boots, negligent/inattentive referees, unclear warning protocol following accidents in motorsports<sup>100</sup> etc. The defence of *volenti non-fit injuria* and knowledge of inherent risk are very applicable to these suits of negligence and battery<sup>101</sup>. This poses the challenge of insurance companies seeking to cover sports persons at

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<sup>94</sup> <http://www.lawinsport.com/articles/item/anti-doping-what-more-needs-to-be-done-to-combat-doping-in-kenya>

<sup>95</sup> WADA Doping List 2015 P1

<sup>96</sup> [http://www.lawinsport.com/sports/rugby/item/shaun-cleary-banned-for-two-years-after-positive-test-for-cocaine?category\\_id=154](http://www.lawinsport.com/sports/rugby/item/shaun-cleary-banned-for-two-years-after-positive-test-for-cocaine?category_id=154) on 6/2/2016

<sup>97</sup> Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994

<sup>98</sup> Available at <https://www.wada-ama.org/en/questions-answers/strict-liability-in-anti-doping>

<sup>99</sup> Dictum of Goff LJ in *Collins v Wilcock* [1984] 1 WLR 1172

<sup>100</sup> This negligence can give rise to criminal liability as in the New Zealand case of *Police v Osborne* [2001] 145 NZLR 31

<sup>101</sup> *Rootes v Shelton* [1967] 116 CLR 383-385

reasonable premiums. Furthermore, if there is an injured player, and the matter is subject to litigation, which has been seen to take a long time, the player might be denied timely compensation by the insurance<sup>102</sup> thereby creating a justification for a faster, more specialised and alternative mode of dispute resolution.

It can be deduced that indeed sports has or has the potential to mature into its separate field of law. Instances of factual peculiarities creating need for specialised analysis have been seen. Elements of sports regardless of code or discipline have been seen to interrelate creating a certain harmony in practice and overlapping and many a times contradicting with various principles of common law and statutory law and its economic significance too large to ignore. Doctrinal overlap is not denied and should not be ignored as it is not ignored in other fields of law. It should be noted that certain disputes also require quick settlement but they cannot be subject to tribunals or quasi-judicial bodies because they are directly concerned with civil and/or criminal wrongs but specifically occur in a sport setting thereby calling for a need of reform of the legal system whilst maintaining the social nature and structure of sports.

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<sup>102</sup> Schot N, *Negligent Liability in Sport*, *Bond University* (2005), 8

## **CHAPTER 4 NATURE OF SPORTS DISPUTES AND ATTEMPTS AT REFORM**

The previous chapter displayed how various areas of law are not completely tailored to suit issues that may arise in the business of sports. This chapter seeks to show the legal issues that arose from some disputes that have been decided before the Kenyan courts prior to the Sports Act (2013) and also to show how the Sports Act has attempted to remedy some of the legal issues regarding dispute resolution that arise from those disputes.

### **Cases before the Sports Act**

#### **a) Republic (through Maurice Odumbe) v Kenya Cricket Association & 2 others<sup>103</sup>**

Maurice Odumbe brought before the court a matter of Judicial Review seeking orders of certiorari and prohibition following a decision, informed by the constitution of the International Cricket Council (hereinafter ICC), by the Kenya Cricket Association (hereinafter KCA) to ban the applicant from playing cricket competitively.

Prior to this motion in court, allegations of match fixing and misconduct were floated against Odumbe. The KCA convened a Tribunal to hear the matter and it is said that the rules of natural justice were flouted and the bulk of the witnesses consisted of Mr Odumbe's former girlfriends<sup>104</sup>.

Mr. Odumbe applied to the court seeking orders of certiorari and prohibition and the application was opposed by the KCA and ICC claiming that the court lacked jurisdiction on the matter. They relied on the following facts:

- THAT the ICC and KCA were private bodies
- THAT there was an alternative remedy already exhausted by Mr. Odumbe
- THAT the KCA cannot be sued in a Judicial Review matter as it is an association.

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<sup>103</sup> MISCELLANEOUS APPLICATION 1723 OF 2004

<sup>104</sup> <http://www.businessdailyafrica.com/How-far-can-courts-intervene-in-sports-dispute/-/539444/936972/-/item/0/-/guqlvcz/-/index.html> on 25/1/2016

In support of these facts, the advocate for the ICC and KCA argued that the ICC was a company limited by guarantee incorporated in the British Virgin Islands and had no share capital and Kenyan cricket players subscribe to it through the Kenya Cricket Association. The subscription was contractual making it private therefore not susceptible to Judicial Review. Therefore the decision to ban Mr. Odumbe was a denial of a private right hence not subject to judicial review.

The crux of the argument in favour of Mr. Odumbe's case was on the point that the ICC was an international body charged with overseeing cricket administration globally and hence its decisions would necessarily impact the public. Furthermore, he argued that the Tribunal convened by the ICC and KCA was not private since it exercised quasi-judicial functions.

In coming up with the judgment, Justice Wendoh considered the following issues:

- Whether the ICC and KCA are indeed public bodies
- Whether the alternative remedy sought by the applicant would render this matter *res judicata*
- Whether the KCA being a club could be sued in its name

In dealing with the first issue, the judge considers that the ICC was company whose object is to advance development, coordinate, regulate and promote cricket globally in co-operation with its members. KCA is a member of ICC and their objectives are aligned, save that the KCA is a National Club. It was also observed that from the ruling of the Tribunal, Mr. Odumbe was bound by the terms of the agreement he made with KCA where he agreed to be bound by all the rules, by-laws ad code of conduct at all times hence this created a contractual relationship between him and the KCA, and by extension the ICC. In concluding this issue, the judge stated that the KCA and ICC,

*“In disciplining the applicant have not performed any duty of a public nature nor were the consequences of the performance of their duty of a public nature. The Respondent's duty to the applicant was strictly within their terms and conditions of membership of the club and did not involve the public. Cricket is a sport and depends on individual interest.”*

The decision was private and well within the rules of the KCA and ICC hence the court had no jurisdiction to entertain an application for judicial review.

As to the issue regarding an alternative remedy, the judge found that the decision of the Tribunal was not final as it was subject to an official enquiry and ratification by the International Cricket Council Executive Board. This led the judge to conclude that this scrutiny was supposed to protect the rights of the affected party. The judge also found that Mr. Odumbe did exhaust his right of appeal under the contract and hence no remedies were available to him under Public Law<sup>105</sup>.

As to the third issue, the advocate for Mr Odumbe never raised any objection to the fact that KCA was wrongly sued and hence the judge struck them off as a party to the suit.

The decision of the KCA Tribunal stood and Mr. Odumbe was suspended for 5 years as a consequence.

A number of legal issues arise from the circumstances and decision of this dispute:

- Whether Mr. Odumbe denied his right to natural justice
- Whether the court misdirected itself in concluding the KCA and ICC were not public bodies
- Whether the court analysed the undertaking of the Tribunal in the ambit of Judicial Review

### *Natural Justice*

It is in the interest of sports bodies or sports in general that disputes are resolved internally<sup>106</sup>. In the first attempt at resolving the dispute, the KCA found itself in the dual role of an adversary and the adjudicator i.e. the association was aggrieved by an alleged breach, of its agreement, by Mr. Odumbe and hence formed a Tribunal to make a decision as to its grievances.

The principles of natural justice include:

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<sup>105</sup> He noted that even though Judicial Review was not an applicable remedy, Mr Odumbe had a private law remedy though none was stated.

<sup>106</sup> Rao S, Rules of Natural Justice as Applied in Sports, 32, *Commonwealth Law Bulletin* (2006), 247

- a. Right to a hearing
- b. Rule against bias
- c. Justice must not only be done but must be seen to be done

As to the issues afore, it is not debatable that Mr Odumbe was actually afforded a hearing prior to the decision to suspend him. The real issues lie as to whether there was bias in the formation of the Tribunal and whether the process of trial did manifest justice.

The interpretation of the rule against bias lies in two broad classes; firstly where an adjudicator can by reason of a personal interest be regarded as being a part and secondly whereby reason of a form of interest or by reason of conduct there is a real possibility of bias<sup>107</sup>. The Court of Appeal in Kenya in **James Mwarari Gatome & 7 others v R**<sup>108</sup> quoted Blackburn J in **Republic v Rand**<sup>109</sup> where he holds, *inter alia*, that if any adjudicator holds a primary interest no matter how small in the subject matter he/she is disqualified in making a judgment of the same. The Tribunal was formed by the KCA; which was the offended party and was chaired by Justice Ebrahim; a former cricketer in Zimbabwe and a long standing cricket administrative official in Zimbabwe<sup>110</sup>. Ebrahim was for all intents and purposes an official in a rival cricket administrative body; perhaps an interest in seeing the demise of Kenyan Cricket which had been rather successful from 1996<sup>111</sup>. The bias in this situation is seen as the KCA is the prosecutor of the matter also appointed a Tribunal to hear the matter. This particular element was not considered in the judgment of the application for review. Justice Wendoh sought not to interfere or to inquire into the conduct of the KCA in setting up the Tribunal in a bid to maintain the sanctity of the contract between the KCA, ICC and Odumbe. In **Lee v. Showmen's Guild of Great Britain**<sup>112</sup> Denning L.J states,

*“Although the jurisdiction of a domestic Tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The Tribunal must, for instance, observe the principles of natural justice.”*

<sup>107</sup> Halsbury's Laws of England, 61, (2010), par. 631

<sup>108</sup> Civil Application No. 25 OF 2007

<sup>109</sup> [1966] 1 L.R. QB 230

<sup>110</sup> Available at <http://www.espnricinfo.com/zimbabwe/content/player/55398.html> on 26/1/2016

<sup>111</sup> See <http://www.espnricinfo.com/magazine/content/story/784519.html> on 26/1/2016

<sup>112</sup> [1952] 1 All ER 1175

Justice Wendoh did not put on a balancing scale the freedom of contract and the rights of the aggrieved party. In **Breen v Amalgamated Engineering Union(A.E.U)**<sup>113</sup> the court held, *inter alia*, that despite the fact that sports federations derive their power from contract, the rules form a legislative code to be obeyed by its members and just like any other legislation should be subject to judicial control like any statute passed by parliament. These two holdings are more alike to the Odumbe case than the ones quoted in the judgment.

***Whether KCA and ICC satisfied the threshold of being public bodies***

It is not debatable as to whether the ICC was a private company and the KCA a private club. This was established in the evidence tendered before the court and was sufficient for the judge to conclude that they were not public bodies; hence were not under the ambit of judicial review.

Judicial review will apply against anybody who performs a public duty; this applies to private Tribunals that have acquired a public concern<sup>114</sup>. A public body is defined by the **Interpretations and General Provisions Act**<sup>115</sup> as a government or any department thereof, a local authority or any authority, board, commission, committee or other body, whether paid or unpaid, which is invested with or is performing, permanently or temporarily, any function of a public nature<sup>116</sup>. This final section of this decision reads the same as Section 6 (3) (b) of the United Kingdom's **Human Rights Act (1998)**. In this case, in order to establish whether KCA and ICC were public bodies it must be demonstrated that they carried out functions of a public nature. As a starting point to determine whether a body is carrying out a public function, the courts have tended to explore whether the action was funded publicly or privately. The court in **R (on the application of Weaver) v London and Quadrant Housing Trust**<sup>117</sup> contends that aside from this, there needs to be a consideration as to whether the functions of the body are private in form but public in substance. In **R.D Shetty v The International Airport Authority of Indian & Others**<sup>118</sup> the court set out criteria in establishing whether a body is a public body as follows (enlisted are those relevant to this argument):

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<sup>113</sup> [1971] 1 All E. R. 1148

<sup>114</sup> Prof. Lumumba PLO, *An Outline of Judicial Review in Kenya*, 1, UON, 1999, 12

<sup>115</sup> Cap 2 Laws of Kenya

<sup>116</sup> Section 3 (1)

<sup>117</sup> [2009] All ER (D) 179

<sup>118</sup> [1979] 1 S.C.R. 1042

- a. “where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;
- b. whether the corporation enjoys monopoly status conferred by the State;
- c. whether the body has deep and pervasive State control”

For the ICC, it was a company incorporated outside Kenya and its shares were limited by guarantee. The KCA was a member of this company and bound by its objects. The Kenyan government has been funding cricket in Kenya and at a point disbanded the board of the KCA citing financial mismanagement<sup>119</sup>. The government is under no obligation to interfere with the use of funds by an association/society not unless it is providing the funds or the association is big enough to have public importance. This shows that the first criterion has been fulfilled.

The KCA was the only body recognized globally in the administration of cricket in Kenya. No other body would purport to create a team of Kenyan cricket players and call it the Kenya National Cricket team<sup>120</sup>. This was recognised by the Ministry of Sports and Culture (as it was then) therefore affording the KCA monopoly, supported by the State, over the administration and growth of cricket in Kenya. This assertion covers the second and third criteria. The decision of the Tribunal then had force in the public sphere as Mr. Odumbe could not play cricket anywhere in Kenya and globally.

It has been established indeed that the formation of the KCA was private in form through the agreements by which it was bound. It is not debatable that the substance of its actions assumed a public nature; funding from the government, monopoly in the administration of cricket countrywide, using the national flag and name in its team to represent the country in global competitions. The judge erred on his analysis of the law in denying the fact that KCA was a public body thereby denying Mr Odumbe the remedy of judicial review.

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<sup>119</sup> <http://www.espnricinfo.com/kenya/content/story/145277.html> on 27/1/2016

<sup>120</sup> See Societies Act (Cap 108 Laws of Kenya), Section 11(2)(f)

**b) Isaiah Kiplagat & 2 Others v Eric Keter<sup>121</sup>**

This case arises from an application by Isaiah Kiplagat (1<sup>st</sup> Applicant), David Okeyo (2<sup>nd</sup> Applicant) and Kenya Amateur Athletic Association (3<sup>rd</sup> Applicant), collectively the Applicants, for stay of execution of the order of the High Court, to include Eric Keter (Respondent) in the Kenya Athletics team (the team) to the Olympic Games, pending the lodging and hearing of an intended Appeal from the ruling and order of the High Court.

In his plaint to the High Court<sup>122</sup>, the Respondent claimed that he had maliciously and fraudulently been excluded from representing Kenya in the 400 m hurdles at the Olympics of the year 2000 despite the fact that in the determinative period he had satisfied the time requirements (annexed in the evidence) and ranking requirements of the 3<sup>rd</sup> Applicant in the All Africa Games and the national Olympic Games trials. The Respondent sought relief by way of a mandatory injunction to compel the 3<sup>rd</sup> Applicant to include him in the team. Appearance was entered for the 3<sup>rd</sup> Respondent seeking the stay of this suit and in support of this claim, the 3<sup>rd</sup> Respondent quoted its constitution that provided, *inter alia*:

“All disputes between the K.A.A.A (3<sup>rd</sup> Respondent) and any athlete shall be submitted to an arbitration panel appointed by the K.A.A.A Executive Committee. The decision of the arbitration panel under this Section shall be final and binding on all parties. No right of appeal will lie<sup>123</sup>.”

The parties came to a consensus that the application by the Respondent for a mandatory injunction and the 3<sup>rd</sup> Applicant’s application for stay be heard together. The Association focused on its application and did not challenge the facts deposed by the Respondent.

On the application for stay by the 3<sup>rd</sup> Applicant, the trial judge held that the clause aforementioned was void as it offended the principles of natural justice for reason that the 3<sup>rd</sup> Applicant would assume the role of the prosecutor and judge at the same time. Their application for stay was hence denied hence this appeal.

The 3<sup>rd</sup> Applicant’s appeal was on the ground that this clause 21(ii) bound the Respondent since he participated in the Olympic Game trials and that it formed an arbitration agreement under the **Arbitration Act**<sup>124</sup> which under section 6(1) required the Respondent’s plaint to be

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<sup>121</sup> Civil Application Number 239 of 2000

<sup>122</sup> H.C.C.C. Number 1223 of 2000

<sup>123</sup> Clause 21 (ii) of the K.A.A.A Constitution

<sup>124</sup> Cap 49 Laws of Kenya

stayed. The Court of Appeal on this point held that clause 21(ii) of the 3<sup>rd</sup> Applicant's Constitution was in conflict with the principles of natural justice and that it does not satisfy the threshold set in Sections 4(2) and (3) of the Arbitration Act.

Another ground of appeal by the 3<sup>rd</sup> Applicant was that a mandatory injunction cannot be granted on mere affidavit evidence alone. The court held that it is so only if the evidence is challenged and in this case the 3<sup>rd</sup> Applicant did not challenge the evidence at trial. The court concluded that the intended appeal was frivolous and upheld the order of the High Court.

This case does not have many points of contention though when juxtaposed with the Odumbe case, we see various inconsistencies in 'sports' jurisprudence. There are a number of similarities, the courts' jurisdiction was invoked in a bid to temper the internal decisions of the respective associations, the associations dispute resolution mechanisms showed little regard for the rights of the athlete in the formation of the Tribunal and the recourse upon its decision. The differences lay in the legal avenues explored by the person aggrieved by the decision of the internal Tribunal. Maurice Odumbe sought a remedy in judicial review while Eric Keter sought an equitable remedy in the form of a mandatory injunction either requiring different forms of presentation. For judicial review, judicial authority insists on the proof of a public body making a decision of a public nature and does not insist on the substance of the decision but the process by which it was arrived at. For a mandatory injunction the claimant needs to show, with a probability of success, that without the injunction irreparable damage that cannot be settled by an award for damages will occur<sup>125</sup>. True to it the circumstances of the athletes were different at the time of the decisions of the Tribunal (Keter would miss the Olympics that were in a month and Odumbe would lose a source of income for 5 years) and the avenues sought by their respective advocates were sufficient.

The courts' involvement in the dealings of sports federations especially regarding the rights of athletes cannot be denied via a contract/constitution. However, the courts should not intervene on the executive running of the federation<sup>126</sup>

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<sup>125</sup> *Giella v Cassman Brown* [1973] EA358

<sup>126</sup> Garcia B, *From Regulation to Governance and Representation: Agenda Setting and the EU Involvement in Sport*, 5 *Entertainment and Sports Law Journal*, 2007, 22

## **Remedies brought by the Sports Act (2013)**

There are a number of provisions of the sports act that enhance the dispute resolution process for sports in Kenya.

### **Definitions**

The first point of focus as to how the Sports Act has mitigated dispute resolution lies in Section 2; the definition/interpretation section. The Act has defined a ‘national sports organisation’ as an umbrella body responsible for all sports or for a particular sport. This reduces the chances of litigation as to whether a national sports organisation is a public body or not; because it is, as it requires mandatory endorsement by the government to operate<sup>127</sup>, possess a monopoly over the administration over a particular sport<sup>128</sup>, subject to inspection at any time<sup>129</sup> and its management changed by the Cabinet Secretary<sup>130</sup>.

The definition of a professional sports person is also an important addition of the Sports Act. The Act mandates that there ought to be a contract and remuneration. This will reduce potential litigation as to who is a professional sports person and what can be considered professional sports.

### **Establishments**

The most important establishment the Sports Act makes with regard to dispute resolution is the Sports Dispute Tribunal. The Tribunal is established in Section 56 and will consist of:

- a. A chairperson who is qualified to be a Judge of the High Court and
- b. at least two other members who shall
  - i be advocates of the High Court of Kenya with at least 7 years of experience
  - ii have experience in legal matters relating to sports or have been involved in sport in any capacity
- c. At least two and not more than six other person who have experience in sport, in any capacity, of 10 years.

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<sup>127</sup> Section 47(1) read with Section 65

<sup>128</sup> Section 48

<sup>129</sup> Section 53

<sup>130</sup> Section 55

These members have a 5 year term and can be reappointed for one other term giving them security of tenure<sup>131</sup>. Furthermore, the Tribunal is independently appointed by the Judicial Service Commission (hereinafter JSC) and sports organisations only serve on a consultative basis<sup>132</sup>.

The Tribunal's jurisdiction is on appeals against decisions made by national sports organisations whose rules **specifically** allow for appeals to be made to the Tribunal on that issue (including disciplinary decisions, appeals against not being selected to a Kenyan team or squad; ring a bell?), other sports related dispute that all parties agree to refer to the Tribunal and that the Tribunal agrees to hear and appeals from decisions of the Registrar under the Sports Act.

The Second Schedule of the Act provides for matters that ought to be included in the constitutions of sports organisations including, pertinent to this study, subscription to Court of Arbitration for Sports policies and rules which conform to the requirements of the Tribunal policy and that selection of the Kenyan team and technical personnel shall be done in good time.

These laws are an attempt at mitigating the nature of the disputes analysed above. Furthermore, the requirement that the Tribunal requires lawyers who have an understanding of or exposure to sports is a plus. In Chapter 2 we discussed the theory of cultural relativism whereby we established sports as a construct of culture and a person outside a particular way of life/culture will not understand or appreciate fully the merits of the culture. It is therefore an important step by the legislature to recognise that lawyers with adequate exposure to both the law and sports are best suited to handle sports disputes.

With regards to the right to access to justice, in chapter 2 we saw the court in **Dry Associates v Capital Markets & Another**<sup>133</sup> indicates that access to justice, among other things, entails:

- Enshrinement of rights in the law- The Sports Act does not explicitly spell out the rights of an athlete however, implicitly; one has the right to be selected to a Kenyan team and may air out this grievance to the Tribunal.
- Awareness of and understanding of the law- The Sports Act does not compel any athlete to go through basic legal training to understand their limitations and rights.

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<sup>131</sup> Section 57 (1)

<sup>132</sup> Section 56 (2)

<sup>133</sup> Petition 328 of 2011

- Equal right to the protection of those rights by the law enforcement agencies, easy access to the justice system and availability of physical legal infrastructure- The Tribunal allows for an impartial avenue for athletes to seek legal remedy.
- Affordability of legal services- ADR tends to be more cost-effective than litigation<sup>134</sup>
- Expeditious disposal of cases- The Tribunal is a quasi-judicial body that uses ADR methods which have been deemed to be quick, flexible and private<sup>135</sup>

### **The Loopholes**

The first loophole, relevant to this study, found in the Sports Act lies in the section on appointments to the Tribunal. There is the use of the phrase *involved in sport in any capacity* as a condition for the appointment of the other (than the chairperson) members of the Tribunal. This means any mediocre sports fan fits the description of appointment.

The next loophole lies in the jurisdiction of the Tribunal. The appellate jurisdiction of the Tribunal is subject to the rules of the sports organisation and the decisions of the Registrar<sup>136</sup>. The subordination of the appellate jurisdiction of the Tribunal with regard to the decisions of sports organisations is one of the problems that the parties faced in **Maurice Odumbe** and **Eric Keter**. Furthermore, the act does not compel the sports organisations to observe the rules of natural justice.

Another loophole or point of contention in the establishment of the Tribunal is that it is in essence a part of the judiciary and for this reason, from a purely procedural point of view, its decisions cannot be appealed in CAS<sup>137</sup>. It acquires its status in the Judiciary from the Constitution of Kenya (2010) as a local tribunal established by an Act of Parliament<sup>138</sup>. This therefore might cause potential parties to a dispute eschew from presenting the dispute to the Tribunal and might soon render the Tribunal irrelevant. As to the appeals from the decisions of the Registrar, CAS has no jurisdiction to hear the dispute owing to the fact that they cannot interfere with the decision of a government body.

<sup>134</sup> Kariuki M and Kariuki F, *Access to Justice and Development in Kenya*, 4

<sup>135</sup> Kariuki M and Kariuki F, *Access to Justice and Development in Kenya*, 4

<sup>136</sup> Section 59(a)(c)

<sup>137</sup> See <http://sportingconsultancy.com/2015/02/14/the-sports-disputes-tribunal-of-kenya-how-to-manage-and-exceed-expectations/> on 28/1/2016

<sup>138</sup> Article 169 (d)

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

The essence of this chapter is to conclude the aims of this study which were:

- To assess the nature and the autonomy of sport and to demonstrate the need for the legal system to respond to it.
- To assess some of the landmark disputes prior to the Sports Act.
- To demonstrate the suitability of internal and institutional alternative dispute resolution framework laid out by the Sports Act

### **Conclusions**

#### **a) Sports Law is a growing field of its own**

From Chapter 3, we established that conventional fields of law as practiced in Kenya through various decided cases are not conclusive as to the determination of legal issues that occur or may occur in sports. This study found that, for example, the **Employment Act** and the **Income Tax Act** are vague as to the dealings of sports with regards to professional athlete employment status, professional athlete remuneration and the tax liability of professional athletes plying their trade in more than one jurisdiction. This poses the risk of professional athletes being taxed twice and facing the tax rate of a contractor. Furthermore, this vagueness of the law is a potential for long winding litigation owing to the fact that these issues cannot be determined by quasi-judicial bodies.

#### **b) Internal Dispute Resolution for Sports needs oversight**

From the Odumbe and Keter cases, it was seen that internal tribunals are likely to ignore the athlete's right to natural justice. Sports bodies are inclined to protect the sanctity of their institution's dealings from the interference by the court however it was found that certain disciplinary hearings; those that would ban the athlete from their source of income need an avenue for review due to the gravity of their sanctions.

#### **c) The claim to Natural Justice is Limited in sports**

Everybody has a right to be heard before conviction and freedom from bias in the process. It was found that sports organisations are likely to flout these principles in their internal tribunals. However, certain circumstances limit this right for example the strict liability nature of offences related to doping and determining contentious outcomes in competition.

## **Recommendations**

- a) An amendment of the Employment Act to harmonise the definition of an employee with that of a professional sports person. This is for the reason that sports teams will be compelled to offer adequate insurance to their team members and an opportunity for decent pay. Subsequently an amendment to the Income Tax Act to reduce income tax on sports persons to incentivise investment in local sports.
- b) An amendment of the Sports Act regarding the establishment of the Tribunal. The tribunal should be established by one of the sports institutions in Kenya and not the Act so as it is no longer a part of the Judiciary. Speculatively, as the Rules are yet to be passed, the Rules of the Tribunal may expressly permit appeals to CAS however this point is still arguable and may be a source of future conflict within a sports organisation.
- c) Power for the sports institutions to supervise internal hearings in sports organisations to ensure equitable procedure and judgments ensue.
- d) An emphasis by the sports institutions for sports organisations to apply facilitative methods of dispute resolution, internally, before they engage in determinative and evaluative methods.

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