

**PRE-MATURE IMMIGRATION OF AFRICAN ATHLETES: THE
PROBABLE LEGAL CATALYSTS AND MECHANISMS FOR
CHECKS AND BALANCES**

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1. Introduction

Sports can and does bring joy and happiness to millions around the world. And in particular to the less privileged, it is a ladder to financial success and economic development.

In most developing countries, athletes desire to work hard not only for themselves and their families but also for the pride and ambassadorial benefits their success and images could bring to their native countries. It would therefore be for good cause that the immigration of athletes from Africa to the western world – at the right age, at the right time and through the right channels should be encouraged.

The problem however arises when this departure happens to athletes who have hardly had the mental, physical, cultural experience or preparation of actually

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competing and living outside their home soil.

Whereas age plays a significant role in assessing one's experience, an athlete's inexperience cannot be ruled out merely because he or she is relatively older. And we cannot turn our eyes away from the ills brought about by pre mature immigration of athletes from the developed world. They remain gullible and exposed to various social risks, which include but are not limited to the following:

1.1 *Educational interruptions*

Constitutions of most African countries provide for the right to education, for instance the Kenyan constitution Article 53(1)(b) states "*Every child has the right to free compulsory basic education*".¹

However most athletes and particularly minors run the risk of failing to complete their elementary schooling and educational studies when crossing borders in search of fulfilling their sporting dreams. Although most of them have access to and are offered the chance of continuing their basic education, they generally prefer to abandon their studies thinking that they have or are close to sporting success. The problem is, they have only just begun and most of them do not succeed in their chosen sports, thereafter having little else to look forward to.

1.2 *Illegal immigrant status*

Players who fail to make it in sports and also happen not to have completed their basic education, are left with little choice but to stay in the streets and try to eke out a living. With expired passports or non-renewable residence cards, they do often end up as illegal immigrants.

Up until 2010, the situation was even worse for Kenyan athletes because Kenya did not allow its citizens to hold dual nationality. It hence meant that Kenyan track and field athletes who wished to compete for other countries had to first surrender their Kenyan passport in order to be eligible to run for their newly adopted countries. The problem would then arise in case the athlete is later dumped or zealously stripped off the citizenship of his newly adopted country on grounds such as contravening the laws of his adopted country. These, of course, are situations athletes hardly envisaged but which have actually happened to a number of immigrating athletes, such as former long distance runner Leonard Mucheru.²

1.3 *Vulnerability and adaptation complications*

Being exposed to totally new environments, cultures and languages, it is quite obvious for these athletes to remain vulnerable due to their ignorance. Language barriers also play a part and they could easily fall prey to fraudsters or fall on the

¹ Constitution of the Kenya Article 53 Specific application of rights on Children.

² www.aipsmedia.com/index.php?page=news&cod=677&tp=n.

wrong side of the law without wishing to do so. This is especially the case when the athletes do not receive adequate advice on tax, social security issues etc. This may ultimately end up interfering with their performance and/or integration with the rest of the team, and may lead to their sporting failure.

2. *The Legal Laws Catalysing Premature Immigration of Sportsmen*

Given these risks, all the bodies governing sports at international levels agree that measures must be taken to curb, check and control this immigration; albeit human trafficking in some instances. They have individually enacted several laws to control this immigration, most of which have been addressed in the latter parts of this article. It is however evident that these laws have proved to be insufficient in their fight against illegal and/or pre mature departure of athletes.

So just where do the lacunae lie in the national laws as well as the international sporting laws such that the said pre mature departures are hastened?

2.1 *Frail anti-corruption and antifraud laws*

Corruption has and continues to be a medieval nemesis in both sports and other matters around the world. More often than not, sportsmen find themselves having to forge their documents in order to be eligible to take part in certain sporting events which have certain age requirements. Despite the existence of laws which punish those involved in fraud, forgery and/or falsification of documents, Africa's generally low economic status and the lure to quick cash is too much of a temptation for the perpetrators – most of who work in the governments as civil servants – to resist. Needless to say that Africa can only safeguard its sporting future by engaging in anti-corruption campaigns and also enforcing its national anti-corruption laws to the letter.

2.2 *Vague Adoption Laws*

Taking Kenya as an example, under Section 82 (3) of Kenya's Children Act, custody of a child may be granted to any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for three months preceding the making of the application.³

This provision has easily acted as a loophole for the illegal or premature immigration of Kenyan minors in the realm of sports. The relatively low economic status of a majority of Kenya's families and the lures offered to them by unscrupulous sports agents have continued to pave the way for the migration of minors. Sadly, the parents or guardians simply consent to or give custody to such agents in exchange for money. Thereafter, the agents have the minor in their custody for three months or more and later make formal applications for adoption.

³ See section 82(3) Kenya's Children Act No 8 of 2001.

Upon receiving adoption documents, they begin the process of moving these talented sporting minors to the developed countries.

Going hand in hand with the flawed adoption laws are the marriage laws, which contain loopholes allowing parties to engage in sham marriages for their own interests, most of which are imaged at securing immigrant status.

2.3 *The Olympics Eligibility Rules*

In addition to national laws, one can also say that a number of international sports regulations could be fosters of athlete immigration.

Under Bye-law to Rule 42 of the Olympic Charter, "*1.A competitor who is a national of two or more countries at the same time may represent either one of them, as he may elect. However, after having represented one country in the Olympics Games, in continental or regional games or in world or regional championships recognized by the relevant IF, he may not represent another country unless he meets the conditions set forth in paragraph 2 below that apply to persons who have changed their nationality or acquired a new nationality.*"⁴

However subsection 2 of rule 42 goes on to provide that such an athlete can represent another country "*provided that at least three years have passed since the competitor last represented his former country*" and that "[t]his period may be reduced or even cancelled, with the agreement of the NOCs and IF concerned, by the IOC Executive Board (...)."

This is a window through which young and inexperienced athletes from the developing countries could potentially exploit and leave their mother countries with the assistance of unscrupulous agents. Many African athletes who have excelled at the world youth championships have taken advantage of this provision by changing their citizenships, only for things not to turn out as expected.

Similar provisions have been enshrined under rule 5.1 of the IAAF Competition Rules 2010-2011 which despite requiring its members to only be represented by Citizens of the Country or Territory which the affiliated Member represents, provides that having once represented a Member in an International Competition an athlete can only thereafter represent another Member in an International Competition after three years following the date of the athlete's acquisition of new citizenship. This period of three years may however be reduced or cancelled:

- to 12 months with the agreement of the Members concerned or;
- in truly exceptional cases by the IAAF Council.

According to the IAAF statistics, the number of athletes who have changed their allegiance for one reason or the other between 1998 and 2008 stands at a staggering 28,584 of whom are from Africa! Interestingly, none of the athletes from the rest of the continents changed their allegiance to Africa.

⁴ See Rule 42 of the olympic charter.

3. *The Agents Regulations*

The trafficking of sportsmen is the illegal recruitment, transportation, transfer, trade or receipt of Athletes by means of coercion, of fraud, of deception and of taking advantage of these vulnerable boys and girls for the purposes of gaining personal financial profit from such transactions and for exploitation.

Apart from FIFA⁵ and the IAAF⁶, there appears to be no other sport which contains regulations that seriously govern the activities and operations of sports agents. Although it is safe to say that football and athletics are today's most marketable sports, one cannot turn their eyes away from the fact that the lesser sports such as basketball and volleyball continue to produce unknown talents from Africa. The inadequacy of regulations governing agents involved in these sports continues to pave the way for premature migration of minors.

Young African athletes are usually made to believe that they have the talent to gain a professional career at major clubs, by unscrupulous fake agents. For this their families will often give everything to make sure this dream comes true. These agents usually go missing once they have the money from the athletes and have transferred them to Europe, leaving them without money in a foreign land. One may wonder why these boys and their families go to these lengths, to trust and pay agents money. Here is the answer. It is because they believe that this is the only possible way in which they can hope to lead a privileged western life. The repercussions of this activity are that these fake agents steal resources from these poor families plus their hopes and dreams. Never mind the precarious situations which the children are often left in.

And notwithstanding the tight agents regulations enacted by FIFA and the IAAF, there appear to be loopholes which the agents still use to manipulate the premature departure of an athlete. A couple of countries and Federations in Europe have developed specific regulations for sports agents. However African Nations and Federations have not been so keen in developing legislations that will regulate, monitor and control activities of agents, but instead they have opted to rely solely on the regulations and statutes legislated by international federations. This together with the inability of these international federations to regulate unlicensed agents is the main reason for Sportsmen trafficking.

4. *Football's Transfer Compensation System*

The FIFA regulations on the status and transfer of players contain mechanisms which allow selling clubs and/or clubs involved in the training and education of players to receive some sort of money (training compensation and/or solidarity contribution) once a player who passed through their system is transferred to a new club.⁷

⁵ Fifa players' Agents Regulation 2008.

⁶ IAAF Athletes Representatives Regulations.

⁷ See annexes 4 and 5 of the FIFA Regulations on the Status and Transfer of Players.

In particular, training compensation is usually paid for players trained up to the age of 23, unless it is evident that a player has already terminated his football training and education before the age of 21.

In view of the above, most African football clubs continue to strive to ensure that their players leave for Europe as young as they possibly are in order to be guaranteed of receiving training compensation – at least until they attain the age of 23.

Whereas these fees do contribute towards the development of the economies of these African clubs, not all the players make the professional grade and majority end up in the streets.

5. Areas of appraisal

The fight against premature immigration or even the trafficking of minors in sports requires a concerted effort. Collaboration between the legislators of international laws, the national law makers and those charged with the responsibility of enacting the international sports federations' regulations especially in as far as the vices of corruption, fraud and unscrupulous agents are concerned.

Whereas it is important to say that the current legal mechanisms in force do play a role in curbing athlete immigration, it is also fair to say that better mechanisms can be placed to curb this immigration.

5.1 Quotas

Despite being a proponent of the “sports for all” campaign and the free movement of players, sports still needs quotas; especially in as far as the movement of minors is concerned.

FIFA recognizes this as evident under article 19 of the FIFA Regulations on the Status and Transfer of Players, which states that:

“International transfers of players are only permitted if the player is over the age of 18.” subject to three exceptions:

1. The player's parents move to the country in which the new club is located for reasons not linked to football.
2. The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfill the following minimum obligations:
3. The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighboring association is also within 50km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent.

In addition, FIFA's subjection of all international transfers of minors to the approval of the subcommittee appointed by the FIFA Players' Status Committee is a good move, as is the right granted to the former association to submit its position in relation to a minor's transfer.

FIFA indeed acknowledges the misfortunes which could befall such minors in case they fail to succeed in football by mandating clubs which sign minors to:

1. Provide the player with an adequate football education and/or training in line with the highest national standards.
2. Guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football.
3. Make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, appointment of a mentor at the club, etc.).

5.2 *The UEFA Homegrown Players Rule*

A move in this direction has already been adopted in European football, with the introduction of the UEFA Homegrown Players Rule. This rule has roots from Article 17.08 of the UEFA Champions League Regulations (UCL Regulations) which reads:

"No club may have more than 25 players on List A during the season. As a minimum, places 18 to 25 on List A (eight places) are reserved exclusively for "locally trained players" and no club may have more than four "association-trained players" listed in places 18 to 25 on List A.

Under this rule, UEFA requires the squads of all clubs participating in the Champions League and the UEFA Cup to have a minimum number of homegrown players, i.e. players who, regardless of their nationality, have been trained by their club or by another club in the same national association for at least three years between the age of 15 and 21. This is a minimum of eight home-grown players to be included out of the entire twenty five man squad to be drafted by clubs for all UEFA club competitions.

Questions however linger as to whether these rules curtail the basic societal rights guaranteed by both the EU and football association's laws of engaging in sports as a tool of recreation.⁸

⁸ Further reading, see *"Quotas - The Return; an excavation into the legal deficiencies of the FIFA 6+5 Rule and the UEFA Home-Grown Player's Rule"* Asser international sports law journal, by Felix Majani.

5.3 *The Pre Bosman Era*

There were other international measures which existed and contributed, either directly, indirectly or unintentionally towards curbing athlete migration. One such measure were football's pre Bosman⁹ rules under which clubs were allowed to demand a transfer fee from players who were no longer contracted to them, in order to allow them to be eligible to sign for new clubs. Again, prior to the famous Bosman ruling, the national federations of various European countries maintained minimum quotas and restrictions on the number of EU foreign players who were eligible to feature in certain UEFA competitions and European leagues. These rules certainly discouraged athletes from leaving their mother countries as they were not sure they would play in European football.

This was of course until the 1995 Bosman judgment by the Court of Justice of the European Union, ruling out both transfer fees after the expiration of a contract, and the nationality quota rules, that allowed national football associations to limit the number of foreign, but European Union football players a team was fielding.

5.4 *The FIFA 6+5 Rule*

The contentious Bosman judgment did certainly set the ball rolling and debates have continued to rage over whether quotas should return, in one form or another. Testament to this was the famously proposed yet unpopular FIFA 6 + 5 rule, first proposed in February 2008. It sought to compel all clubs to field, at any given match, a minimum of six local players who would otherwise be eligible to play for the national team of the country in which their club is domiciled.

The EU however swiftly criticized this proposed rule, saying it was contravened labor laws and based on direct discrimination on the grounds of nationality, and thus against one of the fundamental principles of EU law. FIFA hence heeded the EU recommendations and scrapped its plan to implement this rule.

6 *Tighter Work Permit Rules*

Although aimed at ensuring quality in the standards of the English premier league, the English premier league work permit rules have indirectly acted as a check and comptroller of the immigration of minors in English football.

Under these rules, a player is only eligible to play in the English premier league if he has featured in more than 2/3^{rds} of the international matches played by his country over the last 2 years. These rules also require an English premier

⁹ *ASBL v. Jean-Marc Bosman Case C 415/93, ASBL v. Jean-Marc Bosman, ECR I – 4921.*
http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61993J0415.

Fleague club to sign a player from a national team which is ranked 70 and above by IFA in order for the player to be eligible for a UK work permit. The said rules have proved to be good in locking out any possible moves by agents to transfer talented yet unprepared players from lower FIFA ranked African countries into the English premier league.

7. Recommendations and Possible Solutions

7.1 Legislations and Regulating Agents

The professionalization of sports must bring with its tranquility in as far as the stakeholders involved in sports are concerned. FIFA and the IAAF have gone a long way in regulating agents involved in their sports. But perhaps all sports should consider having one unified set of agents' regulation governing their conduct and practices. Certain criteria should be established especially in as far as their relationship with minors is concerned.

Implementing rules, laws and legislations governing the activities of sports agents is a difficult proposition; this is mainly because of the international nature of these activities. Rules adopted by National Sports Federations are without doubt those that reflect the specificities of each sport. This is different from the government regulations which are usually more general in nature. There is an exodus of African Athletes to Europe and other continents mainly because of the perceived financial security these leagues present. Legislations with proposed minimum pay for the Athletes in Africa will be sufficient to curb this exodus. More applicable legislations on regulations by sports federations supported by public authorities given the ethical and legal problems to which sports activities can present, particularly in their cross border dimension. An establishment of binding codes of conduct drawn up jointly by sportsmen, sports agents, sports federations, and clubs with the aim of preventing this issue of illegal immigration of African Athletes.

7.2 Amendments to the Eligibility Rules

Could it be for the betterment of the sport and in the interests of safeguarding illegal or premature immigration in sports that the Olympic movement should for example, consider:

- Doing away with the requirement that the 3 year period an athlete is required to wait before being eligible to represent his newly adopted country can be cancelled or reduced with the agreement of the NOCs and IF concerned?
- Extending the aforementioned waiting period, for example, to 5 years? Could these extensions infringe on an athlete's internationally recognized and protected human rights? To what extent will they deter agents, parents

and the athletes themselves from securing illegal and/or hastened immigration?

Perhaps the answers not only lie in education but also in political, moral and legal correctness.

7.3 *Safe Migration Policies*

The constitutions of almost countries guarantee their citizens the right to freely move within and outside their borders.

Taking this into account, as well as the reality that people will always migrate for socio-economic reasons, it is clear that the African states should look to put in place measures that promote the safety of their migrants.

One way this can be achieved is by providing the general public with information that would equip potential migrants with the ability to make informed choices on travel and work and subsequently, to protect themselves from the threat of human trafficking and other forms of exploitation. Such information should be comprehensive enough to include: realities, benefits and risks of migration; relevant legal information on migration, labor and basic human rights; and information on mechanisms for seeking protection and redress in abusive situations.

The onus of creating awareness and educating the public on safe migration is obviously not only on the governments but also on the media, civil society organizations, schools, community leaders and the private sector.

Of course, providing information on safe migration is not enough if there are no laws and policies in place to criminalize various forms of exploitative practices inflicted on migrants, including human trafficking. Such laws would only be truly effective if they take into consideration the human rights of migrants, including those who have been trafficked.

Various laws therefore need to be legislated. On top priority should be laws against human trafficking, forced labor, child labor and sexual exploitation.

It is also important to strengthen the capacity of embassies and high commissions abroad so that their mandate goes beyond providing visas and renewing passports. A more important task given the present reality would be to protect the millions of Africans visiting, living, studying and working abroad.

Joint liaison by Africa, through the Africa Union with the European Union and other international organizations should be fostered. Among the regulations adopted by FIFA aimed at ensuring the safe migration of minors is article 19 of the FIFA regulations on the status and transfer of players. Indeed, FIFA has for a long time monitored this provision and through the Court of Arbitration for Sport, recently reiterated that minors can only move from country to country for educational reasons and not for football related reasons.

This was emphasized in *CAS 2008/A/1485 FC Midtjylland A/S v FIFA*.¹⁰

¹⁰ CAS 2008/A/1485 FC Midtjylland A/S V/ FIFA.

In this matter, in February 2007, Danish club FC Midtjylland was reported to FIFA for allegedly and systematically transferring minor Nigerian players contrary to article 19.1 of the FIFA transfer regulations. The scheme involved FC Midtjylland registering the Nigerian minors as “students” in its football academy but thereafter granted them resident permits to study in Denmark. The Danish club tried to argue that they had not contravened the FIFA regulations and that the players were amateurs and not professionals.

The CAS held that article 19 applies to both amateurs and professionals. It reiterated that paragraph 1 refers to players in general, not professionals.

It added that the word “transfer” from the phrase “international transfers involving minors” is to be linked with the notion of registration, which applies to both amateur and professional players as stipulated under article 5.1 of the FIFA transfer regulations.

Furthermore, the CAS stated that article 19 refers to protection of minors without specific mention of their status. It was hence clear to the CAS that this provision extended to players in general, regardless of whether they were amateur or professional. The CAS also emphasized that if article 19 were solely applicable to professional minors; it would deprive amateur minors off the benefits and protection which these provisions intended to accord them. Even though article 19.2 provides exceptions for the transfer of minors, of which one is studies. However, none of these exceptions applied to the present case because:

Midtjylland was found not to have adduced evidence substantiating that the minors relocated for academic reasons.

The CAS went on to study the cooperation agreement between Midtjylland and the minors’ former Nigerian club, and held that it revealed that the sole reason for the relocation of the minors to Denmark was to enable Midtjylland to find new talents in football.

The CAS emphasized that *“even if the transferred player is studying in a public school and is attending a serious and recognized educational program, that does not mean that the relocation of the player was driven by reason of education and not for sporting reasons and as such it is not sufficient for such players to benefit from one or two additional exceptions permitted by FIFA.”*

The minors were found to have moved for reasons related to football and not for education.

7.4 Criminal Sanctions

Trafficking of minor athletes is squarely a criminal justice problem. In order to eradicate trafficking of these young athletes, the trafficking agents and managers need to be deterred from engaging in the business. From a legal and economical perspective, optimal deterrence is reached through a sentence or fine which is just greater than the benefit to the criminal. Stiff criminal sanctions should be imposed

on the agents found engaging in this illegal practice. This will require collaboration between International Organizations on Human rights, International Sports Association, National governments and National Sports Federations.

7.5 *Public Awareness*

Efforts should be made to increase public awareness of the problem of trafficking in sports through public information campaigns, the media and other means. When raising awareness through the media, the perception of trafficking in sports brought forward should include a clear explanation of the phenomenon and a realistic portrayal of the victims. To maximize public knowledge and awareness, these campaigns should be conducted with media professions.

Public awareness campaigns can motivate changes in a number of ways. People might be motivated to join community coalitions advocating for the stop of these practices, donate money for good causes, support law reforms that will help victims as well as prevent future occurrences of these practices, work closely with the police, or may simply be well informed in order to make wiser decisions when faced with similar circumstances.

7.6 *Civil Litigation*

A victim of sports trafficking has the right to claim material and non-material damages suffered by him or her as a result of these activities carried out by sham agents and managers. When criminal law fails to seek restitution for the victims, civil litigation may provide the means by which victims of sports trafficking maybe made whole, and the litigation can provide forms of relief that may not be available through a restitution order. This method will also discourage sports agents and managers from engaging in this criminal practice of sports trafficking. Through this method, victims will get the opportunity to confront their offenders, which is important in healing and empowerment of the victim.

When considering civil litigation on behalf of the victim, the following factors should be put into consideration;

- Are there potential defendants who can satisfy a good judgment?
- Is the victim ready to testify against the defendant?
- Where are the potential defendants located?
- Is the victim ready to endure the process and years of litigation?
- Are there safety concerns for the victim and his or her family?
- How will the civil litigation impact on the criminal case? (if there is any going on)
- If the civil litigation has any impact on the victim's immigration status.
- Is the criminal case already instituted by the prosecutor on behalf of the victim?
- Depending with the state and/ or Nation where the case is presented, the

lawyers handling it should be well conversant with the procedure and rules of the local courts.

The victim is also entitled to the claim of lost income or lost earnings. The victim's lost income and earnings for purposes of restitution can be calculated according to the time/ period in which the victim was under the control of the agent by salary he or she was presumably supposed to earn back in his country.

Victims also have a right to compensation for any other out of pocket losses they suffered as a result of the crime. The victim should be able to document all expenses incurred. Receipts or other similar documentations are the most effective means in calculating actual losses.

A guilty verdict in a criminal case may be used in a subsequent civil action to prove the facts upon which it was based. However keep in mind that guilty verdicts usually have collateral estoppels on the guilty party.

Conclusion

A contemporary sport is caught between the freedom of movement of athletes on the one side and financial security which is presented as the contractual stability on the other side. FIFA has through its regulations attempted to provide rules and regulations on how to balance these two concepts, contractual stability and international mobility. One of the challenges is diversity of national regulations in sports which has internationalized rapidly. The Dispute Resolution Chambers (DRC) and the Court of Arbitration for Sport (CAS) in their decisions have always insisted on the importance of specificity of sport.

As already presented in the recommendations the rules, laws, and regulations governing transfer of players as well as immigration should be regulated in a uniform manner in order to stop illegal premature immigration of African athletes. Public awareness, aid, and free legal representation to the victims should be the best way of dealing with this matter.