



**REPUBLIC OF KENYA**

**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**AT NAIROBI**

**APPEALNO. 3 AND 4 (CONSOLIDATED) OF 2018**

**KENYA NATIONAL PARALYMPIC SWIMMERS.....1<sup>ST</sup> APPELLANT**

**JENNIFER WANJIRU KAMANDE.....2<sup>ND</sup> APPELLANT**

**-versus-**

**KENYA NATIONAL PARALYMPIC COMMITTEE.....RESPONDENT**

**And**

**LYDIA NDANU KIOLI.....INTERESTED PARTY**

**DECISION**

**Hearing:** 22<sup>nd</sup> March, 2018

**Panel:** John Ohaga - Chairperson,

Gabriel Ouko - Member &

Mary Kimani - Member

**Appearances:** Ms. Jeniffer Wanjiru Kamande in person (2<sup>nd</sup> Appellant)

Mr. Michael Obura, Advocate for the Respondent

Ms. Kuria for the Interested Party

**The Parties**

1. The 1<sup>st</sup> Appellant is a group of Paralympic swimmers while the 2<sup>nd</sup> Appellant is a Paralympic Coach and appears in person.

2. The Respondent is the Kenya National Paralympic Committee ('the KNPC' or 'the Committee') the Sports Association charged with the responsibility of running Paralympic sport in Kenya and is represented by Mr. Michael Obura, Advocate.

3. Lydia Ndanu Kioli has been joined as an interested party because she is the coach presently selected by the KNPC to coach Ann Wacuka, the Paralympic swimmer who will be representing Kenya at the 2018 Commonwealth Games.

### **Background**

4. The Appellants challenge the selection by the Respondent of the Interested Party as the coach for Ann Wacuka, the Paralympic swimmer who will be representing Kenya at the 2018 Commonwealth Games.

### **Preliminaries**

5. On 21<sup>st</sup> March 2018 when the matter came up, Counsel for the Respondent requested time to file a replying affidavit. The Tribunal accordingly adjourned the hearing to 22<sup>nd</sup> March at 2.15 pm to allow the Respondent to file and serve its replying affidavit. The short time allowed was due to the fact that the National Olympic Committee has already submitted the final list for Team Kenya to the Commonwealth Games and it was therefore necessary that the appeal be heard and determined as soon as possible.

6. In view of the short time allowed to the Respondent, the Tribunal also directed that the Respondent would be permitted to adduce viva voce evidence as well as produce documents in support of its position.

### **Submissions of the Parties.**

7. Whilst both parties made extensive submissions touching on matters which went beyond the issue of selection, the present decision is limited only to the issue of selection.

8. The submissions set out below are a summary of the arguments made on behalf of all the parties. While the Tribunal has considered all the facts, allegations, legal arguments and evidence submitted by the parties in these proceedings, we refer in this decision only to the submissions and the evidence we have considered necessary to explain our reasoning.

### **Discussion**

9. The matter before the Tribunal involves the selection of the coach for the para-swimmer selected to represent Kenya at the Commonwealth Games 2018 to be held in Gold Coast, Australia.

10. The facts are fairly straightforward: the Appellant Jennifer Wanjiru Kamande says that she does not understand how it is that she has been excluded from being the coach for the sole swimmer Ann Wacuka whom she has coached for the last 8 years and in fact played a significant role in enabling her to achieve classification and a Bronze medal in Mexico.

11. The Respondent has on the other hand selected Lydia Ndanu Kioli as the coach for these games.

12. At the hearing conducted on 22nd March, 2018, the Appellant appeared in person and made passionate submissions in support of her position. The KNPC was represented by Mr. Michael Obura, Advocate while the selected coach was selected by Mrs. Kuria, Advocate. In addition, several members of the executive committee of KNPC as well as several Para- swimmers were in attendance had the Tribunal allowed them to express their views with respect to the dispute. The Chairperson of the KNPC Ms. Agnes Oluoch was also present and was allowed to address the Tribunal. She had also sworn a replying affidavit setting out the basis upon which the Committee reached the decision to select Ms. Kioli.

13. The thrust of the Committee's position is as captured in the minutes of the meeting of 13<sup>th</sup> March, 2018 in which the Committee discussed *inter alia* the selection of the coach. The Committee's decision is recorded as follows:

***“After deliberation in regards to swimming coach, members settled on the KSF coach Lydia. This they attributed to the nature of the sport and its danger. In case of an incident we need someone who can rescue an athlete from water and someone who will assist an athlete both during in and out of competition zone” (sic)***

## **Jurisdiction**

14. The Tribunal has undoubted jurisdiction to hear and determine this dispute in view of the provisions of Section 58(a) of the Sports Act, 2013 which states as follows:

*The tribunal shall determine –*

*(a) appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including –*

*(i) Appeals against disciplinary decisions*

*(ii) Appeals against not being selected for a Kenyan team or squad*

15. Indeed, the policy reason for Parliament giving the Tribunal jurisdiction to determine matters of selection readily appears from the spirit in which the Sports Act, 2013 was promulgated. Without doubt, the purpose of selection of a team to an international event is to ensure that the country is able to send its very best competitors who would represent the country on the international stage. Once it is understood that the country expends funds to send sportsmen and women to international events, it becomes clear that such expenditure must be expended on the basis of the criteria that can be verified, that is ascertainable and objective, and this is in keeping with the constitutional principles set out at Article 10 (2) (c) which states that national values and principles include good governance, integrity, transparency and accountability.

16. Other than Section 58 of the Sports Act, 2013, which sets out the jurisdiction of the Tribunal, the Second Schedule to the Sports Act, 2013 also sets out certain mandatory matters which are to be provided for in the Constitution of all sports organizations, and these include:

***h) that the selection of the Kenyan team and the technical personnel shall be done in good time and transparently using fair criteria.***

17. This requirement is mandatory and must be complied with by all Sporting. Organizations.

18. In the present case, it is clear that the Committee did not set and adhere to any criteria for the selection of the coach. Indeed, the considerations which the Committee took into account do not contain any technical requirements and instead relate to matters not core to sports.

19. For instance, the Chairperson of the Committee informed us that she was attracted to Ms. Kioli because she appeared to be mature, a Christian, and appeared to be good at organizing galas and had also agreed to assist the traveling contingent while in transit and as a chaperone.

20. These considerations which the Committee took into account should not, however, detract from the fact that the Tribunal was impressed with Ms. Kioli’s resume which sets out her experience and qualifications. Unfortunately, this experience and qualifications was not subjected to any competitive process because she was the sole candidate. Without such competition it is not open to the Tribunal to reach any conclusion as to her suitability for the role of coach of the para-swimmer.

21. The Appellant on the other hand has set out a long and undisputed relationship with the athlete which dates back 8 years and covers various international events including Glasgow 2014 at which the athlete got to the finals for the first time ever in the history of para-swimming in Kenya; Mexico 2017 where the same athlete garnered a Bronze medal; and the World Championships held here in Nairobi February 2018. The athlete has herself written a letter expressing her desire to be coached by the Appellant, with

whom she is familiar and has trust and confidence. This relationship is also collaborated by the many para-swimmers who attended before the Tribunal and who were permitted to speak. Indeed, these para-swimmers have expressed support for the Appellant in writing by a letter dated 13<sup>th</sup> March 2018 addressed to the President of the National Olympic Committee of Kenya.

22. The Appellant is also licensed as a para-coach by the Chairperson of the Committee who said the focus was to win medals, the Tribunal is cognizant of the fact that the relationship between the athlete or a team with their coach is not a mechanical one and must have chemistry which comes from the confidence that the athletes place in their coach which leads to the level of performance that would result in qualifying for medals.

### **Decision**

23. The thrust of the foregoing is that whilst the Tribunal takes nothing away from the qualification of Coach Lydia Kioli, it is clear to the Tribunal that there was no objective basis on which she was selected and her appointment less than a month before the commencement of the games cannot improve the performance or have any appreciable impact in the performance of the athlete.

24. Therefore, putting all these considerations into the balance and having regard to the limited time available to the Committee to develop the pre-requisite criteria, it falls on the Tribunal to determine the most suitable person for the role of coach.

25. In the end the task is made relatively simple by the facts that we have outlined above and the clear support that the coach enjoys from the para-swimmers whom she coaches. The Tribunal comes to the inescapable conclusion that the selection of coach Lydia Kioli must be overturned and in her place the Tribunal appoints Coach Jennifer Wanjiru Kamande.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of March, 2018.**

**Signed:**

**John M Ohaga, FCI Arb**

**Chairperson, Sports Disputes Tribunal**

**In the presence of:**

**1. Gabriel Ouko, Member**

**2. Mary N Kimani, Member**



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