



REPUBLIC OF KENYA

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

PETITION NO. 37 OF 2016

ISSA ABDALLAH.....APPELLANT

VERSUS

BEN EKUMBO..... 1ST RESPONDENT

KENYA SWIMMING FEDERATION..... 2ND RESPONDENT

DECISION

Hearing: 28th July, 2016

Panel: John M Ohaga Chairperson
Elynah Shiveka Vice Chairperson
Edmond Gichuru Member

Appearances: Caxtone Kigata h/b for Allen Gichuhi instructed by Wamae & Allen Advocates for the Appellant
Patrick Muyah – Vice Chairman, Kenya Swimming Federation

The Parties

1. The Appellant, Issa Abdallah is a swimmer who intended to represent Kenya at the 2016 Olympic Games in Rio De Janeiro, Brazil.

2. The 2nd Respondent is a national sports organization responsible for the sport of swimming in Kenya. It is affiliated to the Federation International de Natation (FINA), Confederation Africaine de Natation (CANA), National Olympic Committee of Kenya (NOCK) and the Kenya National Sports Council (KNSC). The 1st Respondent is the President of the 2nd Respondent.

Background

3. The proceedings have been commenced by way of a Notice of Appeal filed on 22nd July, 2016 on an urgency basis. The nature of the urgency is that the team representing Kenya in swimming at the 2016 Rio Olympic Games 'is due to depart for Brazil anytime during the week commencing 25th August (sic), 2016 to participate in the swimming events which commence on the 5th August, 2016.'

4. The Appellant has indicated that the decision being appealed against is on account of selection misconduct made by the Respondents in confirming Hamdan Bayusuf as the male representative of the Kenya National Swimming Team to the 2016 Rio De Janeiro Olympics.

5. The Tribunal was invited to make the following order:

i. Suspension of the whole of the decision as regards the selection of the male swimming representative.

6. The matter was mentioned on Tuesday 26th July, 2016 for the purpose of taking directions. The Tribunal directed that it would hear the Appeal on Thursday 28th July, 2016 at 11.00 a.m; the Appellant was directed to file and serve the Appeal together with a Hearing Notice.

7. An Affidavit of Service was filed on 28th July, 2016 evidencing the efforts undertaken by the Appellant to effect service on the Respondents culminating in affixing copies of the Pleadings and Hearing Notices on the 2nd Respondent's door at its Kasarani Sports Centre offices. Prior to this, an advance copy of the Appeal had been forwarded via email to both Respondents on 23rd and 27th July, 2016.

8. At the hearing on 28th July, 2016, the Kenya Swimming Federation's ('**the Federation**') Vice Chairman, Patrick Muyah appeared before the Tribunal. He indicated that he had not perused the pleadings filed but was aware of the general nature of the Appeal and was thus ready to proceed. He requested and was granted time to peruse the Appeal.

9. The hearing commenced and Mr Muyah very ably presented a defence and response on behalf of the Federation.

The Appellant's Case

10. The Appellant pleaded that the first time he became aware of the decision to exclude him from the Kenya National Swimming Team to the 2016 Rio Olympics Games was when he received an e-mail from Swimming Stakeholders addressed to Rebecca Kamau's parents stating that Hamdan Bayusuf had been selected to be the male swimmer to represent Kenya.

11. He pleaded that to his knowledge, the Federation has neither held a meeting nor passed any resolution regarding the selection of male and female swimmers to represent Kenya at the 2016 Rio Olympic Games. He added that the 1st Respondent, Mr Ben Ekumbo forwarded the names of Hamdan Bayusuf and Talisa Lanoe to FINA in a secretive and mala fides manner.

12. The Appellant pleaded that the Federation has not provided to them any material indicating the selection criteria used and in any event, there is no selection criteria that could possibly have been used to justify the selection of Hamdan Bayusuf over him.

13. He further pleads that no notification was given to him to allow him sufficient time to lodge any grievance and/or appeal.

14. He alleged that the Federation was deliberately discriminating against him in favour of Hamdan Bayusuf by completely ignoring the selection criteria set by the world body governing the Olympics and Swimming. On this, he added that on the FINA point ranking system he has 655 points while Hamdan Bayusuf has 646.

15. He thus alleges breach of the rules of natural justice and that the selection process was actuated by malice, bias, discrimination and it defies logic.

16. The Appellant's Counsel, Mr Kigata indicated that he was not aware of the qualifying times for the 2016 Rio Olympic Games for swimming.

17. He submitted that even though Hamdan Bayusuf was already in Rio, the appeal should be heard and allowed so as to guide Federations on selection processes as the Tribunal is vested with that jurisdiction under Section 59(a) of the Sports Act, 2013.

18. With respect to the apparent delay from 12th July when the decision appears to have been announced by the Federation and 22nd July, 2016 when the appeal was filed, Mr. Kigata submitted that it was only on 21st July that the Appellant became aware of the final decision of the Federation via the email of Coach Anthony Ndirangu. He stated that he was instructed on 20th July and that he filed the appeal on 21st July. He added that his client thought that because of the media attention around the non-selection of Rebecca Kamau, the decision would be overturned.

The Response

19. Responding on behalf of the Federation, Mr. Muyah asserted that the selection criteria had not been breached by the Federation in selecting Hamdan Bayusuf. He argued that meeting the qualifying times is what would give a swimmer qualification as of right and that there was no Kenyan swimmer who had met the qualifying times.

20. He informed the Tribunal that there are currently five (5) top swimmers in the country being Hamdan Bayusuf, Issa Abdalla, Emily Muteti, Rebecca Kamau and Talisa Lanoe. The Federation had therefore had difficulty in selecting only two (2) swimmers as those were the slots given to them by FINA under the universality slot and the selection process took into account complex considerations including the events the Federation has sent swimmers to compete in previous years. It was the Federation's view that in these circumstances, it had latitude and discretion to make decisions which would promote the spirit of competition in a wide variety of events in the sport of swimming in Kenya.

21. Faced with the present situation, the Federation had picked backstroke as the event in which it would select swimmers because over the past years the Federation had sent athletes in other events other than backstroke and in an attempt to be fair to backstroke swimmers and grow the field, backstroke became the participating event for Kenya at the Rio Olympic Games. He added that as a general observation, most swimmers prefer Free Style and Breaststroke and thus the Backstroke had somewhat been ignored. He, however, acknowledged that this was not communicated to Swimming Stakeholders as being the ultimate selection criteria as it was a boardroom decision.

22. In respect of notification to parents and other stakeholders, he informed the Tribunal that the information as to the Rio Olympics was commonly disseminated at Galas and the Qualification and Selection criteria were sent in a letter in March following concerns raised in a stakeholder's forum by parents.

23. He further stated that Mr. Bayusuf has a longer history of excellence in backstroke and that Mr. Abdalla came to the limelight recently. He added that the position of back stroke is the best right now due to the performance of Mr Bayusuf.

24. He made reference to the decay curve as it applies to sportsmen and women and pointed out that even though they are of about the same age (21 years), the older one is Mr Bayusuf and thus Mr Abdalla had more time and opportunities to take advantage of in the future. He added that Mr Abdalla is in the list for selection for the World Championship at the end of the year to be held in Canada.

25. In response to the averment that Mr Abdallah has more FINA ranking points than Mr Bayusuf, Mr Muyah stated that the Federation does not use FINA rankings as the Federation has its own ranking system which even takes into account rankings and points sent by athletes who train abroad. He added that the FINA ranking system is not based on individual best events but on an accumulation of points as gained by participating in international events.

26. He concluded by stating that the female swimmer chosen, Talisa Lanoe is a Backstroke swimmer as well.

27. While noting the disappointment and anguish suffered by swimmers recently due to being left out of the Kenyan Olympic Swimming team, he undertook on behalf of the Federation to come up with psychological mechanisms to help athletes cope with being left out and apologized for the pain caused. He urged the Tribunal to be lenient to the Federation and give them an opportunity to grow in areas in which they may have fallen short.

Discussion

28. The jurisdiction of this Tribunal to determine this dispute is conferred upon it by Section 59(a)(ii) of the Sports Act which provides as follows:

The Tribunal shall determine—

a. Appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including-

i.;

ii. appeals against not being selected for a Kenyan team or squad.

29. In addition, we agree with the assertion by the Claimant that the jurisdiction of this Tribunal in respect of this dispute is further conferred by Clause 42 of the Federation's Constitution.

30. Clause 42 provides for the resolution of disputes by arbitration (to the exclusion of Courts of Law) to the National Olympic Committee-Kenya Sports Arbitration Commission.

31. The Claimant has pleaded that since the National Olympic Committee-Kenya Sports Arbitration Commission does not exist, that jurisdiction is now vested on the Tribunal. We agree with this argument and restate the position expressed in the decision of this Tribunal in **Appeal No. 28 of 2016: Robert Williamson vs Football Kenya Federation** wherein we stated as follows:

"There must be some assurance in a contract that in the event of a dispute therefrom, the parties therein are assured of a consistent and predictable manner in which disputes would be resolved. This notwithstanding there was an intention that the parties to the Agreement shall pursue alternative dispute resolution mechanisms and not a court of law to resolve any dispute arising therefrom.

The policy and purpose of the Sports Act as stipulated in the Preamble is to ensure, among others, that sports are harnessed for development and that there is proper administration of sports in our country. The obligation upon the Tribunal is to ensure that where there is absence of a mechanism for legal redress, the Tribunal acts as the avenue subject to the provisions of the Sports Act, where legal redress can be sought.

Bearing in mind the provisions of Article 159(2), Article 48 of the Constitution as well as Section 59 of the Sports Act, and in light of the absence of a valid arbitration clause, we find that this Tribunal has jurisdiction over the dispute herein."

32. The issue that comes up for determination by the Tribunal is whether discretion was properly exercised by the Federation in selecting Hamdan Bayusuf and in effect not selecting the Appellant.

33. The Claimant placed before the Tribunal the Qualification System for the Games of the XXXI Olympiad -Rio 2016 ('**the Qualifications System for the 2016 Rio Olympic Games**') and an extract from the FINA website giving general information on qualification for the sport of swimming as well as a copy of an e-mail dated 16th July, 2016 by FINA Press addressed to nock@iconnect.co.ke.

34. From the above mentioned documents, it is clear that the qualification procedure for swimming is as follows:

i. For each individual event at the Olympic Games, the FINA Bureau will establish Standard Entry Times of two types: an '*Olympic Qualifying Time*' (OQT/'A' Time) and an '*Olympic Selection Time*' (OST/'B' Time);

ii. Swimmers who achieve the OQT/'A' Time in one or more individual events are automatically qualified to participate in the Olympic Games;

iii. Swimmers who achieve OST/'B' Time may be invited to ensure that all National Olympic Committees ('**NOCs**') represented at

the 2015 World Championships in Kazan, Russia will have an eligible swimmer to participate in the Olympic Games;

iv. NOCs can only enter one (1) athlete per event having achieved an OST/'B' Time. Swimmers invited through OST/'B' Time are only allowed to compete in the events for which they have received the FINA invitation;

v. NOCs with no swimmers who have achieved and OQT/'A' Time or who have been selected by FINA for an OST/'B' Time may enter a maximum of one male and female representative for the Universality places (Unqualified Athletes) provided that those swimmers participated in the 2015 World Championships in Kazan, Russia and are approved by FINA to compete;

vi. The universality swimmer may be entered in one (1) individual event only;

vii. NOCs must submit their applications for Universality places to FINA for approval by 3rd July, 2016 and FINA shall confirm the Universality Places to NOCs by 5th July, 2016.

35. It was common ground that no Kenyan swimmer had achieved either OST/'A' or OST/'B' and the Federation therefore had to fall back on Kenya being accorded a Universality place.

36. Universality, as specified in the Olympic Charter, is a fundamental aspect of the Olympic Games and is established to give a fair and equal opportunity for the best athletes in the world to participate in the Olympic Games, as well as to ensure universal representation. Under the Universality allocation, where countries who have no swimmers with an "A" time or a selected "B" time may enter up to 1 man and 1 woman for Rio, presuming that man and woman competed at the 2015 World Championships. Each can swim in just 1 individual event.

37. As can be seen from the foregoing, the issue of nomination of a swimmer for the Universality places is an exercise of discretion by the Federation whose decision is then forwarded to FINA for validation.

38. The email sent to National Olympic Committee of Kenya ('NOCK') by the FINA indicates that:

'In this context, Kenya had two choices among men-Hamdan Bayusuf and Issa Hemed Mohamed – and also two options among women -Talisa Lanoë and Emily Muteti.

*The national choice of Kenya, communicated to FINA, was for Mr Bayusuf among men and Ms Lanoë in the women's field. **As this selection was made in accordance with the rules, FINA naturally validated this choice.** [Emphasis added]*

39. As a statutory body charged with the responsibility of determining sports disputes in this country, we are guided by a body of law that includes the Constitution, the Sports Act as well as the Olympic Charter and in this particular instance the Qualification System for the Rio 2016 Olympic Games developed by FINA.

40. We acknowledge that having been invited to quash the decision of the Federation selecting Mr Bayusuf, we have been invited to exercise a power in the nature of judicial review. In this respect, we are guided by a litany of case law that stipulate that while exercising our powers we must not seek to substitute our opinions with that of the body that made the decision.

41. In the English case of **Chief Constable of North Wales Police -vs- Evan [1982] 3 All ER**, the Court made the following remarks:

A Court will not act as a court of appeal from the body that made the decision complained of. It should not interfere with the exercise of any power or discretion conferred on that body unless it has been exercised in a way which is not within that body's jurisdiction or the decision is unreasonable.

The function of the court is to see that lawful authority has not been abused or used unfairly. Where the Court tasks itself with the functions of that body in the belief that it is preventing abuse of power, then the Court is guilty of usurping power.

42. We have before us an email from the international body in charge of the sport of swimming indicating that the selection of Mr Bayusuf and Ms Lanoe was in accordance with the rules. We must say this bears some probative value to the Tribunal.

43. Whilst we accept that Mr. Abdalla may have a better FINA ranking than Mr. Bayusuf, we observe that the statistics made available to the Tribunal by the Appellant would seem to indicate that Mr. Abdalla does not infact swim Backstroke and the rankings would therefore not be a proper point of comparison where the Federation is required to select a swimmer for only one event.

44. With respect to the argument regarding fair administrative action, we must note that the athletes having failed to automatically qualify to the Olympic Games lost the right to participate in the 2016 Rio Olympic Games. This is certainly because only those athletes who achieved the OQT/'A' Time could assert a right of participation to the Olympic Games.

45. It must be noted that the Olympic Charter (Invitations and Entries) at Article 44.3 stipulates as follows:

Any entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds. Nobody is entitled as of right to participate in the Olympic Games.

46. Article 27 of the Olympic Charter places exclusive authority on the NOCs in respect of team selection. This supports the acceptance by FINA of the nominations by the Federation provided that the said selection was in accordance to the established rules. The Article provides as follows:

The NOCs shall have the exclusive authority for the representation of their respective countries at the Olympic Games and at the regional, continental or world multi-sports competitions patronized by the IOC.

47. We take cognizance of the immense effort and time expended by an athlete in their desire to participate in the penultimate point of success in the sporting fraternity, being the Olympic Games. We also note with regret the disappointment and deflation of spirit occasioned to any athlete upon learning that they will not be part of their national Olympic team. True to say, this is not peculiar to Kenya as this is a season characterized by such headlines. Nonetheless, the decisions by the sports organizations must be scrutinized from a point of legality within the parameters of the law and not on the basis of emotion. To this end, we find that the selection of Mr. Abdalla was properly exercised and was well within the discretion afforded to the Federation.

48. The principles of natural justice are set out in a litany of cases. We rely on the decision in [Grace Kazungu & Another vs. NSSF\[1\]](#) the Court discussed the issue of natural justice as follows:

“The fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered. Second, they will be provided with the specific aspects of the case that are under consideration so that an explanation or response can be prepared and thirdly, they will be provided with the opportunity to make submissions to the case”.

49. In the circumstances of this case, the threshold set out in the **Grace Kazungu** case was fulfilled in part. We say this because no Kenyan swimmer made the OQT/'A' Time and as such they all knew that any decision to have them participate in the Olympic Games would have an element of discretion. Nonetheless, before this discretion was exercised all the top five swimmers must have participated in the World Championships held in Russia in 2015 for them to be eligible for selection for the Universality places. In respect of the Invited Athletes, FINA would only have invited those athletes who have achieved an OST/'B' Time until the total quota of 900 is reached.

50. The Kenyan swimmers eligible for Universality places were not made aware of the criteria to be used by the Federation in deciding the two names to forward to FINA. This is where we call into question the exercise of discretion by the Federation because the parties to be affected by the decision were not made aware beforehand of the criteria to be used.

51. Nonetheless, we note that there was consistency in selecting Backstroke as the event in which the male and female athletes who have the Universality places would compete in. Mr Muyah put forward the reasons for the decision to select Backstroke as the event for the two swimmers to take part in. It is our considered view that questioning why backstroke was chosen and not any other event,

would be usurping the powers and functions of the Federation.

52. Since our statutory mandate is to promote proper governance in sports, we direct that the Federation shall undertake all measures to ensure that for future world events, the criteria for qualification is published well in advance so that athletes are not caught in between the cross hairs of 'boardroom' decisions a few days to the said international events. This document shall acquire the status of a legally binding document and shall be subjected to approval of the General Meeting of the Federation.

Conclusion

53. The Tribunal has sympathy for Mr. Abdallah and accepts that he will be disappointed; however, if we were to reverse the decision of the Federation, there would be another disappointed athlete.

54. In these circumstances, the following orders commend themselves to the Tribunal:

- i. The Appeal is disallowed;
- ii. The Federation shall prepare for discussion amongst its stakeholders and publish a document that provides for the Qualification System for all international events;
- iii. This matter shall be mentioned on **25th October, 2016** to confirm compliance and for issuance of further directions;
- iv. The Federation shall meet the Appellant's costs attendant to this appeal.

55. The Tribunal thanks Counsel for the Appellant as well as Mr Muyah for their extremely helpful contribution, and the cordial manner in which they conducted themselves.

Dated and delivered at Nairobi this 29th day of July, 2016.

Signed:

John Ohaga

Chairperson, Sports Disputes Tribunal

In the presence of:

- 1.
- 2.

[1] Cause No. 703 of 2010

