



REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

APPEAL NO. 33 OF 2016

POLYCARP MBOYA OPIYO.....PETITIONER

-VERSUS-

SITTING VOLLEYBALL FEDERATION....RESPONDENT

DECISION

Hearing: 12th, 19th & 26th July, 2016

Panel: John Ohaga Chairperson

Gichuru Kiplagat Member

Mary Kimani Member

Appearances Mr. Polycarp Mboya Owino - Petitioner

For the Respondent – Various

The Parties

1. The Petitioner is a former **Player Representative** in the Respondent. He has ably presented his own case before the Tribunal.
2. The Respondent is a national sports organization whose main object is to promote, administer, organize, develop and stage the sport of para volley in Kenya for persons with disability.

Background

3. The Petitioner has filed an appeal to the Tribunal vide letter dated 13th May, 2016 and Notice of Appeal in prescribed Form 1 dated 20th May, 2016 laying out the claim against the Respondent.
4. The Petitioner's grievance is that he was disqualified from participating as a candidate for the position of Chairman of the Respondent in the elections that were held on 13th May, 2016 at Nyayo National Stadium.

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

i. A declaration that the elections of 13th May, 2016 be declared null and void.

6. The matter was first heard on 12th and 19th July, 2016 where the Petitioner indicated that he had served the Ministry of Sports who were summoned to appear before the Tribunal. Submissions were also heard from the Petitioner, Charles Nyaberi from the Kenya National Sports Council (KNSC), the current chairman of the Respondent one Joseph Ndungu, a former chairperson of the Respondent one Duncan Karanja and Alfred Simiyu the Secretary General of the Nairobi County Para-volleyball organization.

7. The Tribunal held a further hearing on 26th July, 2016 where it received presentations from Messrs. Akama, Nyaberi, Atuti and Mr. Ombemba from KNSC, the Ministry of Sports and the Registrar of Sports respectively; the Tribunal also heard further submissions from the Petitioner.

8. The Respondent did not file any reply but made oral submissions to the Tribunal.

The Petitioner's Case

9. The Petitioner has filed this appeal against the Respondent after being disqualified from participating as a candidate for the position of Chairman of the Respondent in the elections that were held on 13th May, 2016 at Nyayo National Stadium.

10. The Petitioner stated that on the material date of voting the returning officers present Mr. Charles Nyaberi and Richard Ombeba read his nomination form and later on disqualified him on the floor without giving him any reason.

11. Despite his pleas to know the reasons for such disqualifications he was overruled by the returning officers and told to sit down.

12. He further contends that the elections should be declared null and void as non-members were allowed to vote and that there was no representation from the umbrella body namely Kenya National Paralympic Committee (KNPC) since they were not allowed to come in.

13. Furthermore, he notes that he was not served with disqualification letter or informed in good time about his disqualification and that he was singled out from among other candidates.

14. Moreover, he notes that the elections that were carried out on that material day did not meet the requirements of the Constitution of the Federation.

15. The Petitioner states that the letters from the World Amputee Football Federation expelling the Kenya Amputee Football Federation for failing to pay outstanding debt of 1500 USD meant for annual registration fee and penalty were addressed to the Kenya Amputee Football Federation and not to him in his individual capacity.

16. He further notes that he sought the intervention of the Ministry of Sports to come to the aid of the Kenya Amputees Football Federation and liquidate the outstanding dues but to no avail.

17. He contends that there was no impropriety on his part and the expulsion related to failure to meet financial obligation by the Kenya Amputee Football Federation.

18. The Petitioner indicated that he had never received any complaint either written or otherwise with respect to any allegations of impropriety on his part. Further, he stated that in his long career in sports, he has never received complaints of any nature. In any event, he added that had there been allegations levelled against him as the treasurer of the Federation then the complainants should have sought redress or pursued disciplinary proceedings against him.

19. Moreover, the Petitioner submitted that he is the present chairperson of the Amputee Football Federation and that though he was

vying for chairmanship of Sitting Volleyball as there were no conflict of interests that could make him fail to manage both organizations.

20. The Petitioner states further that the rule of law and fairness were not at play during the election exercise.

The Response

21. Mr. Atuti from the Ministry of Sports stated that the disqualification of the Petitioner not to vie for the position of Chairman was in order as the Petitioner was the treasurer of the Kenya Amputee Football Federation which federation has since been expelled from World Amputee Football Federation for failing to pay outstanding debt of 1500 USD meant for annual registration fee and penalty.

22. Mr. Charles Nyaberi one of the returning officer concurred fully with Mr. Atuti's submissions and stated that there were investigations that were ongoing and that it was not proper for the Petitioner to vie for the position of Chairman for the Respondent yet there is an outstanding case against him with another federation.

23. Mr. Nyaberi indicated that he was informed of several issues that touched on the Petitioner from Amputee Football. He added that the information was given to him very authoritatively from senior officials in the Ministry. His stated that his duty was only to receive the list from the secretary general.

24. He further indicated that when the Petitioner was told of the decision, he did not object and that meant that he had accepted the decision. He stated that in fact the Petitioner went ahead to participate in the elections.

25. Mr. Simiyu indicated he is the Secretary General, Nairobi County Office Representative and that they had a valid nomination for the Petitioner. He stated that he did not know the reason as to why the Petitioner's name was taken off the list.

26. Mr. Simiyu further stated that he was not aware of any allegations against the Petitioner before making the nomination as all that he did was to receive forms from the candidates for the elections.

27. Mr. Karanja indicated that Mr. Charles Nyaberi conducted the elections and he was the one who took the Petitioner's name of the list. The reason given was that he had some outstanding issues with Amputee Football Federation.

28. On his part Mr. Ndung'u indicated that he was aware of allegations of impropriety against the Petitioner which included allegations of misappropriation of funds and misusing grant money. He stated that he came to know of these allegations from a previous office that is being restructured and which the Petitioner was a part of.

29. Mr. Ombeba from the Office of the Sports Registrar who was also a returning officer stated that the Respondent was aware of the letter and its contents from the World Amputee Football Federation and that the expulsion letter was given to the local Federation as a body.

30. Mr. Atuti conceded that he was not aware whether the Respondent had been given the opportunity to defend himself against the allegations levelled against him. He further stated that the Ministry was not itself aware of any misappropriation of funds by the Petitioner or any allegations of impropriety against him.

31. Mr. Atuti went on to clarify that the officials of Amputee Football sought the help of the Ministry of Sports to help them clear the outstanding debt. He noted that the letters by the world body expelling Amputee Football were addressed to them as officials of that federation and not to the Petitioner in his personal capacity.

Discussion

32. The jurisdiction of this Tribunal to determine this dispute is conferred upon it by Article 25 (b) of the Respondent's constitution

that provides:

“The PVK shall also recognize, subscribe to and conform to the policy and rules of the Sports Dispute Tribunal set out under the Sports Act of Kenya.”

33. The issue that comes up for determination by the Tribunal is whether the elections of 13th May, 2016 at Nyayo National Stadium to elect the chairman of the Respondent were free, fair and procedural and whether the Petitioner’s right to participate in the elections were abrogated.

34. As we have stated in previous decisions, 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, the Constitution of the Respondent and past decided cases.

35. The Tribunal has analyzed all the submissions from all parties and all those who were summoned by the Tribunal to appear before it on various dates.

36. Article 19 of the Respondent’s Constitution states:

a. Elections at all levels including at branches and associations shall be conducted by an independent body and shall be free and fair and in accordance with the general principles for the electoral system as stipulated in Article 81 of the Constitution of Kenya.

b.

c. Only paid up registered members shall be eligible for voting and all voting shall be done directly by members.

d.

37. Article 81 of the Constitution of Kenya states that the electoral system shall comply with the following principles:

a.

b.

c.

d. universal suffrage based on the aspiration for fair representation and equality of vote; and

e. free and fair elections which are

i. by secret ballot;

ii. free from violence, intimidation, improper influence or corruption;

iii. conducted by an independent body;

iv. transparent; and

v. administered in an impartial, neutral, efficient, accurate and accountable manner.

38. The landmark decision of the **House of Lords** in **Ridge v. Baldwin** [1964] AC 40 clarified the law, that the rules of natural justice, in particular right to fair hearing, (*audi alteram partem rule*) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

- a. **the right to be heard by an unbiased tribunal.**
- b. **the right to have notice of charges of misconduct**
- c. **the right to be heard in answer to those charges.**

39. On his part, Lord Reid when dealing with class of cases of dismissal from office “**where there must be something against a man to warrant his dismissal**” said at page 66:

“There, I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation.”

40. In the case of **Judicial Service Commission v. Hon. Justice Mbalu Mutava & Anor.** Court of Appeal Civil Case Appeal No.52 of 2014, the Court said that.

“The right to fair hearing as a rule of natural justice, a part of the common law, has in modern times been variously described as “fair play in action”, justice of the common law”; “common fairness” “fairness of procedure” or simply as “duty to act fairly.”

41. We note that the returning officers failed to give adequate notice to the Petitioner about the allegations facing him. He was also not afforded the right to be heard and to defend himself. The fact that he was summarily disqualified on the day of elections was both callous and an affront to both the Constitution of Kenya and the Respondent’s Constitution.

42. Article 81 of the Constitution of Kenya to which the Respondent’s constitution makes express reference provides that the elections shall be free and fair, free from violence, intimidation, improper influence or corruption, transparent, conducted by an independent body that is impartial, neutral, efficient, accurate and accountable manner.

43. In **Morgan v. Simpson** (1975) 1 Q.B 151, Lord Denning summarized the essence of Section 37 of Britain’s Representation of the People Act, 1949 in three propositions:

- a. **If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not;**
- b. **If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls-provided that it did not affect the results of the election;**
- c. **But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls- and it did *affect the result- then the election is vitiated.***

44. While giving legal effect to Articles 81 and 86 of the Constitution of Kenya, the Supreme Court of Kenya in the case of **Peter Munya v. Dickson Mwenda Kithinji and 3 Others**, Petition No.2B of 2014:

“These two Articles establish the constitutional threshold against which the conduct of elections is to be measured, to determine whether it meets established standards of a democratic franchise. Article 88 (5) of the Constitution, on the other

hand, provides that the Independent and Electoral Boundaries Commission, as the agency charged with the mandate of managing the conduct of elections, is to *exercise its powers and perform its functions in accordance with this Constitution and national legislation.*”

45. The barring of the Petitioner from participating in the elections by persons charged with the management of the elections (the returning officers) without due process can only mean that the conduct of the elections failed to meet the constitutional threshold of a democratic franchise thus the elections are vitiated.

46. Mr. Charles Nyaberi one of the returning officers stated that the Petitioner is still under investigation for the offences he allegedly committed. He fails to provide any documentary support such as letters addressed to the Petitioner laying out the allegations or letters at the bare minimum showing that the Petitioner is under investigations.

47. The allegations against the Petitioner with respect to financial impropriety against him must fail. It is crystal clear that the letters from the World Amputee Football Federation expelling the Kenya Amputee Football Federation was all about the failure to pay outstanding debt of 1500 USD meant for annual registration fee by Kenya Amputee Football Federation. The letters were neither addressed to him in his individual capacity nor did the World Body impute any personal culpability on his part for any financial impropriety.

48. The exclusion of the Petitioner from the elections to fill the vacant position of chairman for the Respondent meant that the election was a sham and did not meet the requirements laid out in the Constitution of Kenya and the Respondent’s Constitution.

49. We have only pronounced ourselves with respect to the elections for the post of chairman of the Respondent and not the entire elections exercise as this is what was at the center of the petition.

50. Our constitutional and statutory mandate as a Tribunal is to shepherd the sporting industry and we therefore direct that the Federation shall undertake all measures to ensure that for all future elections proper and elaborate rules guiding the exercise including disqualification rules shall be published. This document shall have legal force and shall be presented for approval at the General Meeting of the Federation.

Conclusion

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

- a. The Appeal is allowed;
- b. The elections of 13th May, 2016 at Nyayo National Stadium with regard to the position of Chairman are declared null and void.
- c. The Federation shall conduct fresh elections to fill the vacant position of chairman within 90 days;
- d. The ParaVolley Federation shall prepare for discussion amongst its stakeholders and publish a document that provides for elections of officials and any disqualification therefrom for adoption at the General Meeting;
- e. This matter shall be mentioned on **30th August, 2016** to confirm compliance and for issuance of further directions;
- f. Each party shall bear its costs attendant to this appeal.
- g. Orders accordingly.

52. The Tribunal thanks all the parties and all those summoned for their extremely helpful contribution and the cordial manner in which they conducted themselves.

Dated and delivered at Nairobi this 2nd day of August, 2016.

Signed:

John M Ohaga

Chairperson, Sports Disputes Tribunal

In the presence of:

- 1.
- 2.
- 3.



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