



**REPUBLIC OF KENYA**

**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**SDT APPEAL NO. 003 OF 2021**

**KABRAS SUGAR RFC..... APPELLANT**

**VERSUS**

**KENYA RUGBY UNION.....RESPONDENT**

**AND**

**DERRICK ASHIUNDU..... INTERESTED PARTY**

**DECISION**

**Hearing:** Matter proceeded via Written Submissions.

**Panel:** Elynah Shiveka - Vice Chairman

Gabriel Ouko - Member

Allan Mola - Member

**Appearances**

Ndegwa Kiarie & Co. Advocates for the Appellant; Orare & Company Advocates for the Respondent

**Abbreviations**

KRU Kenya Rugby Union

KRRA Kenya Rugby Referees Association

WR World Rugby

DDO Designated Disciplinary Officer

**Parties**

1. The Appellant is a rugby team competing in the Kenya Cup, being the top tier league organized by the Respondent.
2. The Respondent is the governing body in charge of the sport of Rugby Union in Kenya.
3. The Interested Party is a registered player in the Appellant's team.

## **Background**

4. This is an appeal that arose following the decision of Duncan Ndegwa, Judicial Officer in a disciplinary hearing against the Interested Party herein on 23rd March 2021 and upheld on 6th April 2021 wherein the said player was sanctioned to a nine (9) match week ban from all rugby related activities based on violation of Regulation 17.9.17 of the World rugby regulations for tackling a player in the air.
5. In the said proceedings it is stated that the charge emanated from the Kenya Rugby Union Competitions department who on the 22nd March 2021 sent a notice of disciplinary summons to the Interested Party to appear for a disciplinary hearing on 23rd March 2021.
6. At the end of the proceedings the Judicial Committee imposed on the Interested Party a 9-match week ban from all rugby related activity which was upheld on appeal.
7. Being aggrieved by the said decision, the Appellant on the 8th of July 2021 approached the Sports Dispute Tribunal via a Certificate of Urgency supported by the affidavit of Philip Jalango seeking the following orders:
  - i. **THAT** the Judicial Committee's findings and sanctions of 23rd March 2021 and upheld on 6th April 2021 be reviewed and/or set aside.
  - ii. **THAT** the disciplinary sanction was null and void ab initio.
  - iii. **THAT** the disciplinary sanction was illegal and unprocedural and violated the provisions of the KRU regulations; and hence should be struck off the player's disciplinary record.
  - iv. **THAT** the Kenya Rugby Union be compelled to strictly follow its constitution and regulations in all its decision-making processes.
  - v. **THAT** the Interested Party be allowed to play pending the outcome of the hearing
8. Following several appearances before the Tribunal, the Appellant filed its submissions on 8th July 2021 while the Respondent filed its submissions on 23rd July 2021.
9. The matter was set for hearing on 23rd July 2021. However, due to technical hitches with TEAMS platform, the hearing did not take place. However, the parties by mutual consent on the same day informed the Tribunal that that they were both happy to have the matter determined by way of Written Submissions.
  - a. The Panel constituted to consider the matter consisted of:
    - i. ii. iii. Elynah Shiveka, Panel Chair; Gabriel Ouko, Member; and Allan Mola, Member
10. The Panel accordingly adjourned to deliberate and now issues its considered decision in the matter.

## **Arguments**

### **A. The Appellants' Case**

11. The Appellants raised 7 issues for this Tribunal to consider:

i. Whether the Judicial Tribunal was properly constituted and any decision it arrived at was Void Ab initio.

ii. Whether the Judicial Officer erred in Law and fact by adjudicating on a

complaint lodged directly without the involvement of a Designated Disciplinary Officer contrary to regulations 20.6.1

iii. Whether the Judicial Committee acted suo moto without a formal complaint lodged by a Designated Disciplinary Officer and without any investigations having been conducted contrary to Regulation 20.6.1. and 20.7.2 and in the circumstances acted as both the prosecutor and juror in a manner that was prejudicial to the Appellant.?

iv. Whether the Judicial Committee imposed sanctions upon the appellants despite the appellants not being accorded enough time to mount a Defence and thereby flouted regulation 20.14 of the World Rugby Regulations.

v. Whether the Judicial Committee acted Ultra Vires the World Rugby Regulations by imposing sanctions on the Appellant without a fair trial contrary to Rules of Natural Justice and in disregard of Regulation 18 Appendix 2.3

vi. Whether the Judicial Officer presided over a complaint that arose in a matter where he had personal involvement and interest in the complaint so lodged and in the circumstances flouted regulation 182.5 of the World Rugby Laws thereby causing prejudice to the Appellants.

vii. Whether the sanction so imposed is commensurate to the alleged complaint and is contrary to the principle of proportionality in the circumstances.

#### **B. Respondent's Case**

12. On their part, the Respondent submitted that the appeal is gravely misconceived, gravely misplaced, frivolous, vexatious and should therefore be dismissed with costs.

13. They submitted three issues for determination by the Tribunal as follows:

i. Whether the judicial tribunal/disciplinary committee was properly constituted"

ii. Whether there existed a conflict of interest by the judicial officer in respect to the disciplinary proceedings"

iii. Whether the sanction meted out by the judicial tribunal/disciplinary committee was proportional to the offence committed"

#### **Issues for Determination?**

14. As what we have before us is a first appeal, we remind ourselves of the Court's mandate on a first appeal as set out in **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De Lestang stated:

*"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.*

*However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either **that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.**"*

15. Further in considering the appeal this Tribunal remains guided by the principles enunciated in **PIL Kenya Ltd vs Oppong [2009] KLR 442**, that is that it will not interfere unless it is satisfied that the decision making body misdirected itself in some matter and as a result arrived at a wrong decision, *or that it is manifest from the case as a whole that the decision making body was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.*

16. With the above principles in mind, we have considered the appeal before us and from the written submissions, the authorities cited and the issues for determination, it appears to the Panel that the appeal is fairly straightforward and presents a simple issue for our determination: that is, whether the Respondent arrived at its decision in accordance with the WR regulations.

17. The bone of contention between the parties and which is also the crux of this appeal appears to be whether the regulations were followed to the letter or whether the Respondent acted without due regard to the regulations.

#### **i. Whether the judicial tribunal was properly constituted**

18. One of the requirements of Regulation 18.8.2 of World Rugby is that the notice that is sent out to the player should include a notification of the appointed Judicial Committee or Judicial Officer. This is important for the person concerned to be able to raise any issues that they may have against the committee members.?

19. In the notice that was sent to the player, he was informed that there would be 4 committee members sitting but they were not named. However, on the day of the hearing there were only two members. Once KRU has set the procedures, it would be expected that it would keep to the rules that have been set, including the number of judicial committee members. It is not a discretionary matter to be amended at the whim of the Union.

20. The player should also be accorded the opportunity to know the sitting bench and to be able to raise any issues that he may have. However, this was not done. This goes against all the rules of natural justice to accord the accused a fair hearing.

21. This Tribunal does not doubt the competence or the independence of Duncan Ndegwa, and while it notes the inference by the Appellant to his lack of independence due to a past dispute, is not convinced of his inability to adjudicate fairly. However, the Tribunal, as noted earlier is convinced that KRU failed in its duty to pronounce itself to the naming of the officers to hear the matter.

#### **ii. Whether the Respondent followed the correct procedure in handling the complaint**

22. Key among the issues raised by the Appellant, is that they were not accorded a chance for fair hearing both before the Kenya rugby judicial Independent Committee and the Appellate Tribunal of the Kenya Rugby Union.

23. In their submissions they state that before appearing before the KRU Judicial Committee on 23rd March 2021, they were served with only the Notice of Disciplinary Hearing on 22nd March 2021 and thus were not able to prepare sufficiently before their appearance. The set time before appearance being 72 hours. The KRU have not disputed this fact. Once again World Rugby and KRU own regulations require that any accused should be granted sufficient time and notice to prepare for the hearing. 24 hours cannot be sufficient time to do so.

24. Regulation 18 Appendix 2.1 states prerequisites of a disciplinary hearing. It reads:

“2.1?

*The procedure of Judicial Committees or Judicial Officers in all proceedings shall be as the appointed Judicial Committee or Judicial Officer shall determine in each case. However, subject to the power to regulate its own procedures, it shall:*

*(a) seek to conform generally with the procedures set out in Section 1 above, this Section 2 and Section 3 below; and*

*(b) ensure that a Player and/or Person subject to disciplinary proceedings has a reasonable opportunity to be heard and be informed of the charge(s) and to present his case.*” (emphasis ours)

25. Despite the above provision, Regulation 18 appendix 2.3 goes further to indicate instances where the disciplinary proceedings may be held in the absence of the person concerned or their representative. It reads:

*“The Judicial Committee or Judicial Officer shall endeavour to ensure that disciplinary proceedings are heard in the presence of the Union, Player and/or Person who is the subject of the proceedings. Nothing in the Regulations, or otherwise, shall prevent a Judicial Committee or Judicial Officer hearing and determining disciplinary proceedings in their absence where the Union, Player and/or Person concerned (and/or their representatives) do not attend the hearing.*

**However, hearings may only be held in the absence of any of the parties if those parties have first been given the opportunity to attend and have declined the opportunity without reasonable excuse or consented to a hearing in absentia. In such circumstances the Judicial Committee or Judicial Officer may take any written representations into account in making its decision.”**

26. In their submissions the Appellant states that before appearing before the KRU Judicial Committee on 23rd March 2021, they were served with the Notice of Disciplinary Hearing on 22nd March 2021 and thus were not able to prepare sufficiently before their appearance. The set time before appearance being 72 hours. The request for more time was denied.

27. Further, Regulation 18 appendix 1.13 provides for application of general principles of natural justice. It reads;

*“In respect of any matter not provided for in this Regulation 18, Appendix 1, the appropriate body or person shall take a decision according to general principles of natural justice and fairness.”?*

28. In the case of **Republic v Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019] eKLR** the Judge in reaching his decision stated the importance of the principles of natural justice. He postulated:

*“47. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not being followed **or if the 'rules of natural justice' are not adhered to.** Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.*

29. The Judge goes further to define when a decision can be said to be contrary to natural justice. He states:

*“A decision contrary to natural justice is where the presiding Judge or Magistrate or **Tribunal denies a litigant some right or privilege or benefit to which he is entitled to in the ordinary course of the proceedings, as for instance refusing to allow a litigant to address the court,** or where he refuses to allow a witness to be cross-examined, or cases of that kind”*

30. The Judge in **Apollo Mboya** (supra) goes ahead to state that the Constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person’s rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.

31. With the above caselaw, regulations and evidence tabled before the Tribunal, it is clear that not only did the KRU Independent Judicial Committee fail to adhere to the World Rugby Regulations, they also did not adhere to the principles of natural justice and fair administration action enshrined in Section 4 of the Fair Administrative Act and Article 47 of the Constitution of Kenya 2010.

32. As this Tribunal also noted in the case of **Charles Cardovillis & Godfrey Okoth v KRU (SDT Appeal No.19 of 2019)** we once again note the union’s **failure to nominate a designated disciplinary officer** who would ideally undertake initial procedure to determine whether the complaint lodged constituted a misconduct on the part of the Interested Party.?

33. This is in clear departure of the guidelines laid out in Regulation 17 of WR Regulations.

34. Having cited the Interested Party for violations contrary to regulation 17 of WR Regulations, it would be expected of the Respondent to clearly adhere to the procedure laid down in Regulation 20.6.1 on the nomination of a Designated Disciplinary

officer.

35. The Appellant herein is alleging that the Respondent exercised its disciplinary powers without due regard to the procedures established by the WR Regulations. The Appellant submits that the proper procedures were not followed and as a result the player's rights were infringed, thus inviting the jurisdiction of the Tribunal under Section 58(a)i of the Sports Act.

36. The Appellant states that this amounts to the Respondent acting ultra vires. To ascertain this claim, we need to understand what the proper procedure is and then conclude on whether it was followed.

37. As stated in paragraph 33 hereinabove, the procedure is set out in regulation 20 of the WR Regulations. It reads:

**"20.8.1 Subject to Regulations 20.6.1 and 20.7.2 any Misconduct complaint by the designated disciplinary officer shall be sent in writing to the Union of the Player, Person or body against whom the Misconduct complaint is made**

*(or other applicable body). The Misconduct complaint should contain the following information:*

*(a) date and place of the alleged Misconduct;*

*(b) the name of the Player, Person or other party in respect of whom the complaint is made and (where applicable) his/their Rugby Body or*

*Union; and*

*(c) details of the alleged Misconduct (including brief details of the evidence to be relied upon).*

**20.8.2 On receipt of a Misconduct complaint, the Union shall send a copy of the Misconduct complaint and applicable information and/or reports to the Player or Person (and their Rugby Body) or other party in respect of whom it is made together with notification of the appointed Judicial Committee or Judicial Officer and relevant details regarding the Misconduct hearing.**

**20.8.3 A Union, Tournament Organiser, Player or Person may refer an allegation of Misconduct to the designated disciplinary officer appointed by the Host Union or Tournament Organiser having jurisdiction. The designated disciplinary officer shall consider the matter and determine whether to bring a Misconduct complaint or not as a result of a referral subject always to the provisions of this Regulation."**

38. From a reading of the above regulations, there needs to be an appointed Designated Disciplinary Officer to deal with matters of misconduct that may occur within the jurisdiction of the Host Union.

39. Regulation 20.6.2 states that the role of the designated disciplinary official may be delegated to the Citing Commissioner or the Citing Commissioner Liaison Officer, the Match commissioner or other suitable person.

40. Regulation 20.8.3 cited hereinabove also provides that the Union itself may refer an allegation of misconduct to the DDO appointed by the Host Union or tournament organiser.

41. It is clear from the above regulations that before any misconduct proceedings are commenced, there needs to be a DDO in place before the Judicial Committee may come into the picture in Regulation 20.8.3 or 20.9.

42. In **Republic v Public Procurement Administrative Review Board & 2 others [2019] eKLR; Nairobi HC Misc. Civil Application No. 187 of 2018** it was postulated that:

**"29. Procedural impropriety generally encompasses two things: procedural ultra vires, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness. Lord Diplock noted that "failure by an administrative tribunal to observe**

*procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety...."*

43. It is clear from the above regulations that before any misconduct proceedings are commenced, there needs to be a DDO in place before the Judicial Committee may come into the picture in Regulation 20.8.3 or 20.9.

44. Further, an ultra vires action is defined in **Apollo Mboya** as "*one which is taken either when the administrator does not have the capacity to make a particular decision or take a particular action; or where the administrator has the capacity but fails to follow the laid down procedure for making such a decision or action.*"

45. KRU has the mandate to deal with cases involving alleged misconduct that occur within its jurisdiction but, exercise of such powers must still be done according to the law.

46. It is thus our considered opinion that the KRU did not follow the laid down procedure in the WR Regulations and thus is said to have acted ultra vires.

47. The Panel has not bothered to deal with the issue of the sanction or its proportionality. This is because both parties did not provide it with the evidence to do so but most important because it is not within its jurisdiction at this point.

### **Summary**

48. The Appellant has demonstrated that the Respondent acted ultra vires of their mandate and that their right to fair administrative action was violated. They are therefore entitled to appropriate reliefs.

49. On its part, the Respondent have not shown why the discretion bestowed upon this Tribunal to review and uphold or vary from their decision should be exercised in its favour. As we have determined above the Appellant has established their case against the Respondent.

50. To summarize therefore, the Tribunal has come to the following conclusions:

- a. We find that the Appellant has demonstrated procedural impropriety, breach of the rules of Natural Justice and unfairness in the manner the complaint against their player was heard and determined.
- b. We find that the that the Appellant has clearly demonstrated that the Respondent acted ultra vires in their handling of the matter.

51. In view of the above, we hereby order and direct as follows:

- a. That the findings, decision and sanctions imposed by the KRU Independent Judicial Committee and upheld by the KRU Appeals Committee are declared null and void as they are founded on procedural impropriety and violations of rules of natural justice.
- b. The suspension imposed by the KRU Independent Judicial Committee and upheld by the KRU Appeals Committee is thus quashed as it is a result of a flawed process and cannot be binding on the Appellants.
- c. Costs to be borne by the respondent.

**DATED AT NAIROBI THIS 6 DAY OF AUGUST, 2021.**

Signed:

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**Elynah Shivekah**

**Panel Chairperson**

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**Mr. Gabriel Ouko, Member**



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