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Case Class:	Civil
Court:	Sports Disputes Tribunal
Case Action:	Decision
Judge:	John M Ohaga Chairperson, Sports Disputes Tribunal Gabriel Ouko Member Mary N Kimani Member
Citation:	Khaaliqa Nimji v Kenya Squash Racquets Association [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Tribunal
History Magistrates:	-
County:	Nairobi
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Case Outcome:	-
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**APPEAL No. 1 OF 2018**

**KHAALIQA NIMJI.....APPELLANT**

**VERSUS**

**KENYA SQUASH RACQUETS ASSOCIATION.....RESPONDENT**

**DECISION**

**Hearing:** 8<sup>th</sup> March, 2018

**Panel:** John Ohaga Chairperson

Gabriel Ouko -Member

Mary Kimani -Member

**Appearances:** Mr. Arnold Kwesiga for Applicant

Mr. David Ngunjiri Theuri for Respondent

Mr. Billy Jusa –Interested Party

Mr. Ndirangu Gakuo – Interested Party

**The Parties**

1. The Applicant is a female adult competing in the Kenya Squash Rackets Association (KSRA) league. She is represented in this matter by Counsel Arnold Kwesiga
2. The Respondent is the Sports Association charged with the responsibility of running the sport of squash in Kenya and is represented by its chairman David Ngunjiri Theuri in this matter.
3. Billy Jusa has been joined as an interested party on the basis of his representation that he is a player participating in the game of squash in Kenya.
4. Ndirangu Gakuo has been similarly been joined as an interested party on his representation that he is the captain of squash at the Parklands Sports Club.

**Background**

5. The proceedings have been commenced the filing of a Notice of Appeal dated 28<sup>th</sup> February 2018.

6. The Appellant challenges the selection by the Respondent of the players to represent Kenya at the Commonwealth Games in Gold Coast, Australia. It is the Appellants contention that the selection of the team as presently constituted was unfair and was not in accordance with the criteria previously published by the Respondent.

### **Preliminaries**

7. Upon the filing of the appeal, the matter came before the Chairman of the Tribunal who certified the matter as urgent and directed that the Appellants serve the Notice of Appeal on the Respondent and the Interested Parties, and that the matter be mentioned on 6<sup>th</sup> March 2018 for further directions.

8. On 6<sup>th</sup> March 2018 when the matter came up, the Appellant was represented by Counsel while the Respondent was represented by its Chairman. The Respondent protested that it had only been served with the Directions, but not the Notice of Appeal. The Tribunal accordingly directed the Appellant to serve the Respondent as well as the persons who had expressed interest to be enjoined as Interested Parties and for all parties to attend before the Tribunal on 8<sup>th</sup> March 2018 at 4.00 pm for the hearing of the appeal. The short time allowed was due to the fact that the National Olympic Committee was required to submit the final list for Team Kenya to the Commonwealth Games by 7<sup>th</sup> March 2018, and it was therefore necessary that the appeal be heard and determined as soon as possible.

9. 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.**

10. 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 and the Tribunal will at an appropriate time arrange a forum at which the other issues arising in relation to the running of the Respondent can be ventilated further.

11. The submissions set out below are a summary of the arguments made on behalf of both 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 on evidence we have considered necessary to explain our reasoning.

#### **i. The Appellants Arguments**

12. Mr. Arnold Kwesiga, Counsel for the Appellant, contended that the rules regarding selection for International assignments which have been published by the Respondent were changed by the Executive Committee without consultation with the members and to the prejudice of the players, who had no knowledge that the rules had been changed. He asserted that the original rules set out a process which required that team selection be undertaken after trials and that the manner in which the team had been selected was opaque and the members had no knowledge as to how this had been undertaken.

13. He contended that there was a conflict of interest because some members of the Executive Committee were also interested parties because they were players and coaches and the selection was designed to favour members of the Executive Committee. He cited the case of Leon Kea who is the Secretary of the association is also responsible for the rankings, is a player and has also been selected as a coach to the team selected for the Commonwealth Games. He also asserted that Elizabeth Mulwa also sits on the Executive Committee and has been selected as the female representative. It was his contention that she is certainly not the best female squash player.

14. The Appellant therefore asked the Tribunal to exercise its jurisdiction by reviewing and quashing the selection of the individuals selected by the Respondent to represent the country.

15. The Interested Parties, Billy Jusa and Ndirangu Gakuo supported the submissions of Mr. Kwesiga and contended that all players needed to be given an equal chance to participate in the trials. They suggested that since a selection process had already been undertaken for the World Championships that was to be held in Glasgow, Scotland in 2017, the individuals selected at those trials should be nominated to represent the country at the Commonwealth Games.

## **ii. Respondent's Submissions**

16. The Respondent articulated its position through its Chairman, Mr. David Ngunjiri Theuri. He stated that all decisions made by the Executive Committee are properly reached at meetings which are constituted in accordance with the Constitution of the Association and at which there is a full quorum. He informed the Tribunal that NOCK had informed the Association in September 2017 that they would be participating in the Commonwealth Games and would be required to select a team. On this basis, the Association asked interested players to indicate their interest and about 25 players did. The Association indeed sent out the criteria of selection to the Commonwealth Games, part of which required trials to be held. However, in December 2017, the Association found out that the number allocated to squash had been reduced from what they had expected to only two (2) places, being one male and one female player. Accordingly, the Executive committee held a meeting to deliberate on this new position and arrived at the decision that given the reduction in number of participants, they would change the criteria for selection from trials to a ranking system based on points accumulated over various tournaments played over the calendar year. He asserted that the ranking system is what is used internationally because it rewards commitment and participation in the Association's various tournaments.

17. It was his view that it was within the discretion of the Executive Committee to change the selection criteria in view of the places available to the Association. He therefore was of the view that the selection of James Dalidi and Elizabeth Mulwa as the male and female players was justified as they were the top ranked players, and that the selection of Leon Kea as coach was also merited because he was the best coach available in the committee's view.

18. He therefore urged the Tribunal not to interfere with the decision of the Association because it had been made objectively, without bias and in any event, it was in his view too late to change the selection at this stage.

## **Jurisdiction**

19. 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*

20. *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.*

## **Discussion**

21. We have carefully considered the submissions made by the parties as well as the documents made available to us relating to the criteria for selection and the various decisions of the Association relating to this issue.

22. The Association was informed in good time by NOCK regarding participation of squash in the Commonwealth Games and therefore given sufficient time to prepare. Indeed, the Association very wisely requested all players who were interested in participating in the games to declare their interest and received from approximately 25 players.

23. The Association further went ahead in September 2017 to set out the criteria by which the selection would be carried out using trials as the basis amongst other requirements. This was fair and equitable to all the interested participants. This provided a transparent and verifiable process that would be agreeable to ALL players.

24. However, in December 2017, when the Committee found out that the number of members had been reduced, they decided to change the selection to rankings from the initial process which was based on trials. This was done without any consultation of the members and it was Mr. Ngunjiri's view that this was a valid and proper decision which fell within the discretion of the Executive Committee.

## **Decision**

25. The Sports Act has introduced a new era of transparency, accountability and good governance in the management of sports organizations and sporting facilities for the benefit of the sportsman. Unfortunately, many sports organizations have not woken up to this reality.

26. The purpose of a criteria is to enable both players and officials to have an objective and verifiable basis upon which selection decisions can be made. Whilst the Tribunal is alive to the difficulties that Sports organizations face when the number of places available to send players to international events are reduced, this does not change the principal which requires the criteria be followed unless there are extraordinary circumstances which militate against strict adherence to the criteria. Contrary to the Association's position that the selection decision is within the discretion of the Executive Committee, the position articulated by this Tribunal is that the Executive Committee is required to be guided by the criteria in making its selection decisions, and where there is a change in the criteria, this must be brought to the attention of the players and coaches, and the rationale for the change properly explained to the interested parties. Officials of Sports Organizations can no longer arrogate to themselves the power to run associations at their whim and without consultation with their members. Indeed, it is for this reason that the Sports Act requires every sports organization to have a constitution and that selection of athletes to national teams be based on verifiable criteria.

27. Whilst it may appear on the face of it that the selection based on rankings is justifiable, it is questionable that this in fact produces the best talent to participate on the international arena. As a matter of fact, the Tribunal notes that the Executive Committee decided to exclude some tournaments on the basis that some certain band individuals had attended those tournaments. The rankings cannot therefore be said to be completely objective. In any event, as was explained by Counsel for the Appellant the rankings do not tell us which player would indeed be the best when two players have to compete against each other. Despite Mr. Ngunjiri's attempt to explain that rankings are in fact adopted internationally, he did not explain why it is then that the Association published a criteria which required

trials to be held. Having determined that the Executive Committee did not follow its own published criteria, the Tribunal is impelled to the conclusion that the selection by the Association of the players and coach to the Commonwealth Games must be set aside.

28. We hereby Order the Executive Committee of the KSRA to come up with a transparent and verifiable trials program for both men and women and which will be placed before the tribunal on Tuesday, 13 March 2018. The program should have a timetable which must be finalised by latest Monday, 19 March 2018. The final team list should be presented to the Tribunal by Tuesday, 20 March 2018.

29. The program should include players plying their trade out of the country and who had shown interest. It should also include all players who are on indefinite suspension, since the cases have not been finalised to the Tribunal's satisfaction.

30. For the coaches we want a fair and transparent process to be carried out showing a verifiable and transparent process. All coaches who are interested should be asked to apply through the usual communication channels. The process to be used to choose should also be presented on Tuesday, 13 March 2018 and finalised by Monday, 19 March 2018. The final choice should be presented to the Tribunal by Tuesday, 20 March 2018.

31. As we observed at the beginning of this decision, there are many issues which plague the Association and we were alarmed to hear that the Association is not in fact registered with the Sports Registrar and is therefore in fact not a recognized sports organization. The legal effect of this would in fact be that the Association cannot even nominate players to participate in an international event. However, as the Tribunal has observed time and again, players are at the apex of the sporting pyramid and to enforce this legal position would be to deny the players the opportunity to play at the Commonwealth Games. The Tribunal however will investigate this matter further in consultation with the sports registrar in order to ensure that the sport of squash takes its rightful place within the sporting fraternity. This ruling therefore presents the first step in this journey.

32. The Tribunal reserves the determination on costs until it has dealt with all the other issues that have arisen in the course of hearing this matter. The matter shall be mentioned on **Tuesday 13<sup>th</sup> March 2018** for further directions.

**Dated and delivered at Nairobi this day of 9<sup>th</sup> March, 2018.**

Signed:

**John M Ohaga**

Chairperson, Sports Disputes Tribunal

In the presence of:

1. Gabriel Ouko

**Member**

2. Mary N Kimani



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