CAS 2015/A/3899 Flomena Chepchirchir Chumba v. Athletics Kenya

ARBITRAL AWARD

delivered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: His Hon. James Robert Reid QC, retired judge, in West Liss, United Kingdom

in the arbitration between

Flomena Chepchirchir Chumba, Embu, Kenya

Represented by Mr MI van Dijk and Mr Tim Wilms of CMS Derks Star Busmann NV, BH Utrecht, Netherlands.

-Appellant-

and

Kenya Athletics, Nairobi, Kenya

Represented by Mr Elias Mazeka Juma of TripleOKlaw, Nairobi, Kenya.

-Respondent-

I. THE PARTIES

1. The Appellant, Flomena Chepchirchir Chumba (the "Athlete"), is an International-Level Athlete specialising in long-distance athletics events.

2. The Respondent, Kenya Athletics ("KA" or the "Respondent") is the governing body of the sport of athletics (track and field) in Kenya and is a member of the International Federation of Athletics Federations ("IAAF").

II. FACTS

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions and evidence and the additional material emerging from the oral hearing. Additional facts and allegations may be set out, where relevant, in connection with the discussion of law and merits that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 6 September 2014, the Athlete competed in the Birell Prague GP 10,000m race, following which she gave a urine sample as a part of routine anti-doping testing. When completing her Doping Control Form ("DCF") the Athlete disclosed on her declaration that she ingested a medication called "DROCEDEK". This was in fact a misspelling of "Bro-Zedex", a cough syrup.

5. On 4 November 2014, Mr Thomas Capdevielle, the IAAF Anti-Doping Administrator informed KA by e-mail that the analysis of the Athlete's urine sample revealed the presence of a prohibited substance, Terbutaline, and that upon conducting the review prescribed under IAAF Rule 37.3 it appeared (i) that the Athlete had no Therapeutic Use Exemption ("TUE") recorded at the IAAF for the substance in issue and (ii) there was no departure from the IAAF Anti-Doping Regulations or from the WADA International Standard for laboratories which might have caused the adverse analytical finding. The IAAF requested that KA inform the Athlete in writing as soon as possible of (i) the adverse analytical finding, (ii) that it constituted an anti-doping rule violation under IAAF Rules 32.2(a) and 32.2(b), (iii) of the opportunity to provide an explanation for the adverse analytical finding; (iv) of her right to have the B sample analysed and (v) of her right to be provided at her own cost with the A sample documentation package.

6. The e-mail requested that KA inform the Athlete that she had until Tuesday 11 November 2014 to provide Mr Capdevielle with a written explanation for the finding in her sample. The explanation could be submitted directly to Mr Capdevielle or through KA.

7. The e-mail also gave details of what the Athlete should do to exercise her right to have the B Sample analysed. It stated "if the athlete waives her right to the B sample analysis, she will be deemed to have accepted the adverse analytical finding in her A sample. She will not be able to contest these results later on in the disciplinary procedure."

8. The e-mail continued:

"Please note that the athlete declared 'Bro Zedex', a syrup containing Terbutaline (see drug information attached) on her DCF.

Taking into account the athlete's good faith as well as the explanation provided by her DCF, IAAF recommend the following sanction (under IAAF rule 40.4):

-Reprimand
Disqualification of the athlete's results obtained on the 6th September 2014 at the 'Birrell Prague GP in Prague."

9. A copy of the e-mail was sent to the Athlete's representative.

10. According to the Respondent, it wrote to the Athlete on 10 November, 2014 notifying her of the issues in compliance with IAAF's directive. No copy of that e-mail or letter was produced.

11. By e-mail dated 10 November 2014, the Athlete wrote her account of what had happened to Mr Capdeville with a copy to AK. The material part of that e-mail read as follows:

"On the 2nd of September, I went to the local chemistry in Embu (Kenya) to buy a medicine for my soar (sic) *throat. I was not feeling well for days and I wanted to buy a medicine to feel better. The people in the chemistry shop advised me to use Bro Zedex for my throat and I used this for a few days before I travelled to Prague. I was not aware that this medicine was containing any ingredients that are not allowed to use and I had the expectation that the medicine did not contain any prohibited substances. This was also confirmed to me by the employees of the chemistry shop. After the race in Prague I had to undergo a doping control as I had done many times before. As required, I wrote on the Doping Control Form that I used this medicine. I was still under the assumption that the medicine was allowed and did not contain any prohibited substances.*

Herewith, I admit the use of the syrup Bro Zedex, which contained Terbutaline, and I want to offer my sincere apologies for the use of this syrup. I am very sorry that I made the mistake to not check well the medicine before I used it and it is a big lesson to me for next time when I buy something in Kenya.

I hope you understand my situation and trust me that I did not take this medicine to improve my level of performance or hide any other prohibited substances, but I used just to treat my sore throat.

I do not want to request the analysis of a B sample and I do not want to use the right to be provided with the documentation package of the A sample."

12. On 1 December 2014, the IAAF sent by e-mail a template of a letter to be sent to the Athlete. The substance of the template letter, which KA sought to e-mail on to the Athlete, care of her agent, was as follows:

> *"The analysis of your urine sample code 2936460 collected.in competition during the Birell Prague GP in Prague (Czech Republic), on 6th September 2014, revealed the presence of the prohibited substance Terbutaline. The analysis was performed' at the WADA accredited laboratory of Kreischa, Germany. You will find attached copies of the corresponding laboratory reports and doping control forms.*
>
> *Terbutaline is prohibited under the 2014 WADA Prohibited List (S3 - Beta-2 Agonists). Pursuant to IAAF Rule 32.2 (a) and Rule 32.2 (b), the presence and use of a prohibited substance or its metabolites or markers in an athlete's sample constitute an anti-doping rule violation. Terbutaline is also identified by the WADA 2014 Prohibited List as a specified substance.*
> *This finding therefore constitutes an anti-doping rule violation under IAAF Rule 32.2 (a) and Rule 32.2 (b).*
>
> *According to IAAF Rules, you have now the opportunity (i) to provide an explanation of the finding of Norandrosterone in your urine sample and (ii) to request the analysis of your B sample.*
> *(i) Written explanation*
>
> *You have Monday 8 December 2014 to provide us (preferably by e-mail,with.a written explanation for the finding in your sample. Should you fail to provide. us with an explanation by the deadline, you will be immediately provisionally suspended and a date will be set for your hearing.*
> *(ii) B-sample analysis*
>
> *If you wish to have your B samples analysed, you must equally inform us -by no later than Friday 5 December 2014. You have the right to attend in person and/or to be-represented. In any event, you must provide me with the identity of the persons attending on your behalf. You will be required to pay the cost of the analysis, as well as all other related costs (travel, accommodation). Should you fail to request the B analysis by the above deadline, we will consider that you have waived your right to the B sample analysis and you will have no further opportunity to request it."*

It is worth noting that the template is itself inaccurate in that in it refers to Norandrosterone. There had been no such finding: the explanation should have been requested in respect of the finding of Terbutaline. Presumably the template had originally been drafted in respect of a different case and not been altered as it should have been.

13. The letter appears to have been sent as an attachment to an e-mail addressed to the Athlete's agent, Mr van de Veen, and copied to Mr Capdeville, and one of his

assistants, Ms Gallo, but the e-mail address was wrongly typed as "@volaresport" rather than "@volaresports". On the letter itself (sent only as an attachment to the e-mail) the correct e-mail address has been written in by hand. A copy of the e-mail and its attachment was sent (correctly addressed) to, among others, Ms Gallo who responded by sending KA a copy of the Athlete's explanation of 10 November 2014. Ms Gallo sent a copy of that e-mail to the Athlete's agent, but at the incorrect address given by KA. Her e-mail bears the timing "lundi 1 décembre 2014 14.21".

14. She evidently realised the error very quickly because by an e-mail bearing the timing "Monday, December 1, 2014 5.02pm" she sent another e-mail to KA. That e-mail attached the template of a letter to be sent to the Athlete. The body of the letter was in these terms:

> *"We are in receipt of your written explanation, dated 10th November 2014, sent through your manager to IAAF, concerning the adverse finding in your above coded sample.*
>
> *We have carefully reviewed this explanation and note that you have waived your right to the counter-analysis. Please be aware that pursuant to IAAF Rule 37.6, by waiving your right to the B sample analysis, you are deemed to have accepted the A sample adverse analytical finding.*
>
> *You have now 14 days to request a hearing in writing. Should you fail to make such a request in writing, you will be deemed to have waived your right to a hearing and to have accepted that you have committed an anti-doping rule violation under IAAF Rules. Athletics Kenya will then proceed with your case accordingly.*
>
> *If you confirm that you wish a hearing in writing, in accordance with IAAF Rule 38.9, the hearing will be held within three (3) months of the date of notification of your request.*
>
> *Please be reminded that IAAF has recommended the following sanction (under IAAF rule 40.4):*
>
> - *Reprimand*
> - *Disqualification of the athlete's results obtained on the 6th September 2014 at the `Birell Prague GP' in Prague*
>
> *I look forward to hearing from you."*

15. The e-mail which was classified as "Importance High", ended "Please note that the email address you used in your previous email for Mr Van De Veen is not correct, the correct address is: gerardvandeveen@volaresports.nl."

16. Mysteriously, the template letter bears the date "26/02/2015". In any event KA

transcribed the letter and e-mailed it to the Athlete care of her agent, presumably as an attachment to an e-mail, though no such e-mail has been disclosed. The letter bears the date "09 Tuesday, 2014" [sic]. Despite the warning given in Ms Gallo's e-mail the e-mail address typed on the letter was the incorrect address: gerardvandeveen@volaresport.nl.

17. According to the undisputed account of the Athlete, she was unaware of the communications from KA and therefore did not respond to request a hearing or to take any other steps. So far as she was concerned, she had admitted the anti-doping violation, supplied her explanation and noted the sanction proposed by the IAAF. So far as KA was concerned, she had not sought a hearing but had provided an explanation for the offence. Accordingly, on Friday 19 December 2014 without a hearing, KA resolved to impose a sanction of 6 months ineligibility commencing on 6 September 2014, the date of the Birell Prague GP.

18. The decision letter, bearing the date 19 December 2014, was addressed to the Athlete care of her agent at the correct e-mail address. However, the decision was sent as an attachment to an e-mail (copied to Mr Capdeville) and the address on that e-mail was incorrect, being gerardvandeveen@volaresport.nl. The letter is as follows:

> *"RE: IAAF NOTIFICATION OF ADVERSE ANALYTICAL FINDING, SAMPLE CODE NO. 2936460*
> *Reference is made in regard to the above subject matter.*
> *Following consultations with IAAF, we would like to notify you that Athletics Kenya has resolved to sanction you for Six months in reference to IAAF Rule 40.11(b). In this regard your sanction is effective from 6th September, 2014 which is your last date of competition when you took part in Birell Prague GP. Your suspension therefore will end on 6th March, 2015 after which you may resume training and competitions in accordance to IAAF Rules.*
> *Please be informed that your name will be published on the IAAF website and the same will be added to the list of the sanctioned athletes.*
> *You are advised to take matters of anti-doping very seriously failure to which such offences if repeated in future will attract stiffer sanctions.*
> *Please acknowledge and confirm receipt."*

19. No acknowledgement of receipt was forthcoming. According to the Athlete, she was unaware of the decision until the fact that she was listed as subject to a six-month ban appeared on the IAAF website and in the IAAF News 159- Newsletter. The Athlete's agent promptly contacted the IAAF and as a result the Respondent's decision letter was communicated to her on 28 January 2015. The Athlete then commenced the appeal to Court of Arbitration for Sport (the "CAS") (the "Appealed Decision").

20. In the period between the Birrell Prague Grand Prix and the sending of the decision letter the Athlete competed in two races: a 15K race at Ustia nad Laben on 14 September 2014 in which she was third and the Macau Marathon on 7 December 2014, which she won. It was common ground that her taking of the prohibited substance before the race in Prague

could not have affected her performance in either of these races.

21. On 9 May 2015, after the expiry of the period of ineligibility imposed by the Respondent, the Athlete competed in a marathon in Kenya in which she was third.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. By a statement of appeal dated 30 January 2015, the Athlete filed her appeal against the Appealed Decision with the CAS in accordance with Article R38 *et seq.* of the Code of Sports Related Arbitration (the "Code"). Within such statement of appeal, the Athlete requested that her appeal be submitted to a three-member Panel and nominated Mr. Jeffrey G. Benz as arbitrator. In addition, the Appellant filed a request for provisional measures seeking a stay of the Appealed Decision in accordance with Article R37 of the Code.

23. The Appellant filed her appeal brief on 10 February 2015 in accordance with Article R51 of the Code.

24. On 23 February 2015, the Athlete requested that a Sole Arbitrator be appointed instead of a three-member Panel for cost purposes. On 24 February 2015, KA was granted a short deadline to state whether it agreed to such request. KA failed to respond.

25. On 3 March 2015, KA filed its answer in accordance with Article R55 of the Code.

26. On 10 March 2015, the President of the CAS Appeals Arbitration Division pursuant to Article R50 of the Code determined that the matter be submitted to a Sole Arbitrator.

27. On 13 March 2015, the Athlete requested that the matter be determined without a hearing. The Athlete also sought permission to file a response to the answer, to put into evidence the A Sample documentation, and to produce medical evidence.

28. On 19 March 2015, KA objected to the Athlete being permitted to lodge a Response or otherwise supplement her case but did not respond on the request that the matter be determined without a hearing.

29. On 31 March 2015, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the parties that His Honour James Robert Reid QC, retired judge, was appointed Sole Arbitrator.

30. On 7 April 2015, the Sole Arbitrator directed the Athlete to substantiate her request to file a response submission.

31. On 10 April 2015, the Athlete responded to the Sole Arbitrator's request.

32. On 14 April 2015, the Sole Arbitrator directed the Athlete to file a reply limited to the issue of the Respondent's reasons for imposing the six-month penalty on the Athlete.

33. On 20 April 2015, the Athlete filed her Reply.

34. On 22 and 25 May 2105, the Appellant and Respondent, respectively, signed and return the Order of Procedure in this appeal.

35. A hearing was held in this appeal on 27 May 2015 at the CAS Court Office in Lausanne. The Sole Arbitrator was assisted by Mr. Brent J. Nowicki, counsel at the CAS and was joined by the following in accordance with Article R44.2 of the Code:

For the Appellant: Mr Michiel van Dijk and Mr Tim Wilms, advocates, by telephone; the Athlete participated by Skype to make a statement and to answer questions put to her by the advocates and the Sole Arbitrator. She was assisted so far as necessary by Ms Hilda Kigen as interpreter.

For the Respondent: Mr Elias Masika Juma, advocate, who was assisted by Mr Isaac Mwange Kamande, chief executive officer of the Respondent.

36. At the conclusion of the hearing, both parties expressly confirmed that their right to be heard had been fully respected.

IV. JURISDICTION OF THE CAS AND ADMISSIBILITY

37. Article R47 of the Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body."*

38. By Rule 42.3 of the IAAF Competition Rules 2014-2015 (the "IAAF Rules"), being the relevant rules in effect, it is provided:

> *"Appeals Involving International Level Athletes: in cases involving International Level Athletes or their Athlete Support Personnel, the first instance decision of the relevant body of the Member shall not be subject to further review or appeal at national level and shall be appealed only to CAS in accordance with the provisions set out below."*

39. By Rule 42.13 of the IAAF Rules:

> *"Unless stated otherwise in these Rules (or the Doping Review Board determines otherwise in cases where the IAAF is the prospective appellant), the appellant shall have forty-five (45) days in which to file his statement of appeal with CAS starting from the date of communication of the written reasons of the decision to be appealed*

(in English or French where the IAAF is the prospective appellant) or from the last day on which the decision could have been appealed to the national level appeal body in accordance with Rule 42.8(b). Within fifteen (15) days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS and, within thirty (30) days of receipt of the appeal brief, the respondent shall file his answer with CAS."

40. The Appellant filed her statement of appeal with CAS on 30 January 2015, having received the written reasons of decision on 28 January 2015 and her appeal brief on 10 February 2015. The appeal is accordingly within the jurisdiction of CAS and is admissible.

V. APPLICABLE LAW

41. Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

42. The body issuing the decision in this case is domiciled in Kenya.

43. Accordingly, this dispute should be decided on the basis of the IAAF Rules and Regulations, including the IAAF Rules, and the law of Kenya and subsidiarily to Swiss law.

VI. THE PARTIES' SUBMISSIONS

A. The Appellant

44. The Athlete, in summary, submitted that she had never been made aware of the disciplinary proceedings because the Respondent had sent all relevant correspondence to the wrong e-mail address. She had therefore never had any opportunity to request a hearing and was wrongly sanctioned without having any chance to present her case. The Respondent had breached multiple procedural rules and she therefore she ought to be acquitted of any anti-doping rule violation or with a lesser sanction than that imposed, either in the form of a reprimand with no disqualification or (at worst) a period of disqualification of less than six months.

45. So far as the facts of the case were concerned, the Terbutaline entered her body as a result of taking the syrup Bro-Zedex, which was used to cure her sore throat. On 2 September 2014, she bought this syrup, which is known to help a sore throat, at a local pharmacy "Mbeti Pharmacy" in Embu, Kenya, which she regarded as a trustworthy and reliable source. She had visited the pharmacy several times in the past to receive medical advice and purchase medicines for illness. The pharmacy had provided her with any products

that contained a prohibited substance. It was her practice to go to the pharmacy for minor symptoms. For more major problems she would go to the hospital.

46. The Athlete had visited the pharmacy due to her sore throat and explained her symptoms to the pharmacists. The pharmacy was well aware that she was a professional athlete and therefore the World Anti-Doping Code applied to her. In her appeal brief, it was specifically asserted that she explicitly asked whether Bro-Zedex contained any prohibited (doping) substances and that the employees of the pharmacy assured her that Bro-Zedex was allowed and did not contain any prohibited substances included in the WADA Prohibited List. In addition, it was asserted that the Athlete read the label of the syrup, and checked whether the ingredients were included on the 2014 WADA Prohibited List. She did not find any of the ingredients (including Terbutaline) on the 2014 WADA Prohibited List and therefore concluded that the syrup did not contain any prohibited substance.

47. She used the syrup for several days in the days before the 2014 Birell Prague GP. She does not dispute that Bro Zedex contains Terbutaline. She did not use the Bro-Zedex and/or Terbutaline to enhance her sport performance or to mask the use of a prohibited substance, but only to cure her sore throat. She was unaware of the fact that the syrup contained a prohibited substance. The fact that she was not aware that the syrup contained a prohibited substance is shown by her acknowledging its use on the DCF and that she did not request a Therapeutic Use Exemption. After the notice of a positive doping test, the Athlete immediately provided IAAF with a statement in which she declared that she used Bro-Zedex, which contained Terbutaline, explaining that the medicine was intended to cure a sore throat and that she had no intention to enhance her sporting performance and/or to mask the use of prohibited substances. Indeed, since she was unaware of the fact that Bro-Zedex contained a prohibited substance, no intent to use a prohibited substance, for any purpose, could be imputed on her.

48. The Athlete submitted that all the conditions of Article 40.4 of the IAAF Rules were met. She had no, or a very light, degree of fault. She was a well-respected athlete with a clean anti-doping record, and should be sanctioned (if at all) with only a reprimand and no period of ineligibility. This was the view of the IAAF Anti-Doping Administrator, Mr Thomas Capdevielle.

49. If she was to be sanctioned with a period of ineligibility, it should be less than six months. Moreover, if a period of ineligibility was to be imposed, the Appellant requested that it run from 19 December 2014, the day of disputed decision, in accordance with Article 40.10 IAAF Rules, as an earlier commencement date would not be fair due to the fact that the Appellant did not receive a Provisional Suspension and had competed in races in the intervening period unaware of any possible disciplinary proceedings.

B. The Respondent

50. The Respondent submitted that the sanction given to the Athlete was guided by the recommendation from the IAAF that she be sanctioned under IAAF Rule 40.4 as she had declared ingesting a syrup containing Terbutaline, and also taking into account

her good faith and declaration of the product on her doping control form. The penalty imposed was not grossly disproportionate to the offence. By agreeing to begin the Athlete's sanction as of the test date (i.e. the earliest possible date (6 September 2014)), KA took into consideration the special circumstances of this case and demonstrated fairness to the Athlete, though KA would not object to any period of ineligibility fixed on the appeal running from 19 December 2014 rather than from the date of the collection of the sample if that was felt more appropriate.

51. The IAAF's suggestion that KA issue a reprimand was not binding and the sanction was imposed by the Respondent independently, taking into account the IAAF Rules, the circumstances of the case including the Athlete's own conduct and the nature and severity of doping allegations. In taking its decision, the Respondent was guided by the increase in doping cases which had seen more than 15 Kenyan Athletes given varying sanctions in the recent past.

52. Although it was accepted that the Athlete had not received the various notifications from the Respondent because of the error in the e-mail address to which the communications were sent, the Athlete had made an unequivocal admission of taking a syrup contained a prohibited substance, it is clear that even if a hearing had taken place, the sanction handed to her would still have been as prescribed under IMF Rule 40.4. Due process was followed and observed as provided for under the Anti-Doping Rules and there had been no violation of the required results management process.

VII. MERITS OF THE APPEAL

53. By the conclusion of the appeal hearing, the Respondent accepted that because of the error in the e-mail address to which communications to the Athlete had been sent, the Athlete was deprived of her opportunity for a hearing before the Respondent on her anti-doping rule violation. As a result, she was deprived of an essential right. However, this fatal defect in the procedure below is overcome by the fact that this CAS appeal is by way of "a hearing de novo of the issues on appeal" (*see* Article R57 of the Code).

54. In the present case, the Athlete accepted from the outset that she was guilty of an anti-doping rule violation by virtue of her ingestion of Bro-Zedex. The issue for determination on appeal is simply one as to the applicable sanction and the suggestion that because of the flaws in the procedure below the Athlete is entitled on this appeal to be entirely absolved and acquitted of any anti-doping rule violation on the basis of earlier procedural errors is unfounded.

55. The substance Terbutaline which was contained in Bro-Zedex cough syrup was at the material time (and still is) a Prohibited Substance under the World Anti-Doping Code Prohibited List, being prohibited at all times under category S3 Beta-2 Agonists. It is also a Specified Substance as defined in that Code.

56. By IAAF Rule 32.2(a) and (b), the presence and use of a prohibited substance in an athlete's sample constitutes an anti-doping rule violation.

57. By IAAF Rule 40.4 (so far as material in this case), where an Athlete can establish how a Specified Substance entered his body and that such Specified Substance was not intended to enhance the Athlete's sport performance, the penalty for the anti-doping offence on a First Violation will be "At a minimum, a reprimand and no period of Ineligibility from future Competitions and, at a maximum, two (2) years' Ineligibility." This Article only applies where "the hearing panel is comfortably satisfied by the objective circumstances of the case that the Athlete, in taking a Prohibited Substance, did not intend to enhance his sport performance."

58. In the present case, it was not contended by the Respondent that the Athlete had any intention of enhancing her sporting performance by taking Bro-Zedex. The Sole Arbitrator is comfortably satisfied of this, taking into account all the objective circumstances of the case and in particular the facts that she openly declared that she had taken Bro-Zedex on her doping control form, that the substance was recommended to her by a pharmacist and that it was openly acquired in a pharmacy which the Athlete had used on previous occasions without any untoward consequences.

59. The Athlete had a responsibility under IAAF Rule 32.2 "for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List." Furthermore, under Rule 32.2(a)(i), it was her "personal duty to ensure that no Prohibited Substance enter[ed] her body".

60. Despite the assertions made on her behalf in the Appellant's case and (to a lesser extent by the Athlete herself in her explanation of 10 November 2014) it was apparent from the Athlete's answers to questions put to her during the hearing that she had taken no real precautions to ensure that against the Prohibited Substance not entering her body.

61. She did not, according to the information she gave during the hearing, specifically ask the pharmacist whether Bro-Zedex contained any substance on the Prohibited List. Instead, she relied solely on the fact that she was well known locally as an international-level athlete (indeed the only one in the area) as sufficient guarantee that the pharmacist would not supply anything to her which contained any substance on the Prohibited List. She did not check whether the pharmacist knew of or had a copy of the Prohibited List (which would be most unlikely in the case of a pharmacist practising in a comparatively remote area such as Embu). She did not check with her management company or with any doctor or anybody else whether there could be any problem with her taking Bro-Zedex. She did not, as appeared from her answers to questions during the hearing, try herself to check the Prohibited List herself, though if she had done so it is most unlikely she would have been any the wiser since Terbutaline is not specifically named but is simply caught by being a Beta-2 Agonist. In summary she singularly failed to take any of the precautions required of her and which as an experienced international-level athlete she could reasonably have been expected to take.

62. It is of no assistance to the Athlete to point out that the low levels of the Prohibited Substance found would not have given her any advantage. The basis of the lesser penalties imposed in cases in which IAAF Rule 40.4 can be invoked is that there was no intention to improve sporting performance.

63. The reason given by the IAAF Anti-Doping Administrator for recommending that the sanction under IAAF Rule 40.4 should be only a reprimand and disqualification of the Athlete's results obtained in the Birell Prague GP were her "good faith" and the fact that she declared that she had taken Bro-Zedex on her doping control form. This recommendation was made in an e-mail dated 4 November 2014 on the basis of the material then available. It was done without the benefit of seeing the Athlete's explanation of 10 November 2014 or hearing her statement at the hearing or her answers to questions. While such a recommendation is entitled to respect, it is (as the Respondent correctly noted) merely a recommendation and does not impose any binding requirement that it should be followed.

64. The primary factors weighing in favour of the Athlete receiving a sanction at the low end of the possible range of penalties are that she declared the product on her doping control form, that she immediately recognised her error that she had committed an anti-doping violation (and that she immediately admitted such violation). Moreover, it is noted that she did not ingest a supplement or other performance-based product. Instead, she ingested a cough syrup to remedy a cough. Indeed, while the Athlete did not consult a doctor, her undisputed testimony and evidence was that she had previously consulted the pharmacy for minor ailments and did not on such occasions seek out a doctor. So her reliance on the pharmacist, who was aware that she was an international athlete, carries some slight weight in assessing her degree of fault. The fact that she had never previously committed any such violation is not a separate factor in her favour. The credit she receives for this is built into the rule which provides a lower range of penalties for first offenders.

65. A substantial factor weighing against her is that despite being an experienced international athlete she took no real steps to ensure that she did not commit an anti-doping violation by taking the substance. While it is correct that she said that she had received no anti-doping training from Athletics Kenya, she is an established international-level athlete with her own agent who has competed around the world for a decade or more. And while she did consult her pharmacist, she should have consulted a doctor. In these circumstances, it is very difficult for give her to credit for her apparent ignorance of the need to take proper precautions.

66. The fact that there has (according to the Respondent's answer) been an increase in doping cases in Kenya is not a factor which weighs against the Athlete. Each case has to be judged on its own particular merits. Furthermore, the 11 others cases listed by the Respondent did not seem to bear any relevance to the present case. In 9 of them sanctions of two years or more were imposed for substances falling with category S1 Anabolic Agents. One other case involved EPO. Only one case involved a sanction of 6 months ineligibility. There the Prohibited Substance was methylprednisolone but no information was given as to why that penalty was imposed, the circumstances of the offence, or why it should be regarded as a suitable comparable for the present case.

67. Approaching the matter *de novo* with the benefit of all the available material both written and oral, this is not a case which can be regarded as being one for which a sanction at the extreme bottom end of the available range is suitable. The Athlete took no real precautions

to avoid committing an anti-doping offence and had scant regard for her obligations under the IAAF Rules. She has only herself to blame for the situation in which she finds herself. However, the offence was committed by negligence and not by any deliberate decision to take a Prohibited Substance or gain any competitive edge. She must be given credit for her immediate acknowledgement of her fault and the other factors that went into anti-doping rule violation.

68. The decision of the Respondent took into account the apparent prevalence of doping cases in Kenya. It appears that the penalty imposed was to some extent conditioned by those other cases. Those other cases (apart from one, the details of which were not disclosed) were all of a very different type, involving different Prohibited Substances and a Prohibited Method. In none of them does it appear that Rule 40.4 came into play. The penalty was also fixed without having the advantage of hearing from the Athlete. It appears likely that had the Respondent not taken those other cases into account and had the advantage of seeing all the material produced on the appeal, a lesser sanction would have been imposed.

69. In all the circumstances, although a period of Ineligibility is the proper penalty in this case, the penalty of six months Ineligibility is more severe than the offence warrants. The appropriate penalty is one of four (4) months Ineligibility which sufficiently marks the seriousness of the offence but gives proper credit for all that can be said on behalf of the Athlete.

70. The question then arises as to the date from which the period of Ineligibility should run. The case is one to which the provisions of IAAF Rule 44.10(a) apply. The Athlete promptly admitted the anti-doping rule violation in writing and thus the period of Ineligibility could be back-dated to commence as early as the date of sample collection (which is what the Respondent did). That is subject to the limitation that under the terms of IAAF Rule 44.10(a) "the Athlete ... shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete ... accepted the imposition of a sanction, the date of a hearing imposing a sanction or the date the sanction is otherwise imposed".

71. In the usual case, the original order that the period of Ineligibility should run from the date of sample collection would be regarded as the most favourable outcome from the point of view of the athlete. However, there are special circumstances in the present case. The period of ineligibility was not imposed until 19 December 2014. The Athlete was not made aware of the imposition of the period of ineligibility until 28 January 2015. No Provisional Suspension had been imposed on her in the interim period. She was therefore free to run, and she did so. In particular, she won the Macau Marathon on 9 December 2014.

72. It was submitted on her behalf that the proper course would be for the suspension to run from the date the penalty was imposed. The apparent aim of the submission was to enable her to retain the fruits of that victory. The difficulty with this submission is IAAF Rule 40.8 which provides (so far as material) that "In addition to the automatic disqualification of the results in the Competition which produced the positive sample under Rules 39 and

40, all other competitive results obtained from the date the positive Sample was collected … through to the commencement of any … Ineligibility period shall be Disqualified with all of the resulting Consequences for the Athlete including the forfeiture of any titles, awards, medals, points and prize and appearance money."

73. This may appear to be a draconian consequence in this particular case where the Athlete's offence was caused by negligence and not design, and where it is not suggested that her achievements in the subsequent races were in any way tainted by any anti-doping violation. Indeed, IAAF Rule 40.8 seems to be an independent sanction not imposed on athletes under the World Anti-Doping Code.

74. The Athlete was not at any time made subject to a Provisional Suspension so she was entitled to race as she did. On the face of it the effect of the rule is that commencing the period of Ineligibility at a later date than that of sample collection would not have the effect of enabling the Athlete to retain the benefit of her victory in Macau. It should be noted that the effect of the terms of the Rule was not addressed in either the appeal brief or the answer and was not the subject of any oral argument or evidence save by way of brief response to questions raised by the Sole Arbitrator. The Athlete did not assert in her appeal brief that she should be entitled to retain the benefit of her victory even if a period of Ineligibility was imposed on her. Thus, severe as the provision may appear to be on the facts of this case, the issue of whether the effect of IAAF Rule 40.8 was so disproportionate as to make it void in respect of the Athlete's results between the date of sample collection and the date of the commencement of any period of Ineligibility is not an issue to be determined on this appeal. To the extent the Athlete takes issues with this rule or her right to retain any such awards, prizes, etc., such dispute would, if at all, have to be the subject of separate proceedings which might well require parties other than the parties to the appeal (i.e. the Appellant and Respondent) who would be affected by or have an interest in the outcome.

75. The Athlete's period of Ineligibility was imposed by the decision of the Respondent on 19 December 2014. Thus under the terms of IAAF Rule 44.10(a), the reduced period of 4 months' Ineligibility could not be back-dated to commence more than two months before that date, so the start date imposed by the original decision could not stand. Since the Respondent does not oppose the Athlete's request that the start date should be the original date of imposition of the penalty and since she would in any event be entitled to credit for the period of Ineligibility served since that date, the appropriate date to take as the start date for the period of four (4) months Ineligibility is the date of the decision of 19 December 2014.

VIII. CONCLUSION

76. It follows that the Athlete's appeal is partially upheld. She is sanctioned for a period of four (4) months commencing as of 19 December 2014. In addition, all results, prizes, awards, etc. earned at the Birell Prague GP are disqualified.

IX. COSTS

77. In accordance with IAAF Rule 42.24 "The CAS Panel may in appropriate cases award a party its costs, or a contribution to its costs, incurred in the CAS appeal."

78. Such rule follows Article R64.5 of the Code whereby the Sole Arbitrator, at the conclusion of a procedure, shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. R64.5 of the Code further provides: "As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters."

79. In the circumstances of this case, as a result of the procedural errors of the Respondent, the Athlete was deprived of her opportunity to put her case at any stage before this appeal. She was unable to request or to participate in an initial hearing (which may have eliminated the need for a CAS appeal) nor did she have any means of knowing why the Respondent had reached the decision which it did since the decision letter contained no statement of reasons. An athlete should not have to file an appeal at the CAS to be able to exercise such fundamental rights. She has succeeded in obtaining a decision more favourable to her than the procedurally defective decision made by the Respondent and in order to have the chance to put the case which she should have been able to put to the Respondent before its initial decision she had to bring this appeal.

80. Notwithstanding the above, the Sole Arbitrator also notes that the Athlete was unsuccessful in her Request for a Stay of the Appealed Decision and as a result, the costs deriving from such order are to be determined in this final award.

81. In these circumstances, the Sole Arbitrator determines that costs of the arbitration, to be calculated and communicated to the parties by the CAS Court Office, shall be borne by 80% by the Respondent and 20% by the Appellant. Moreover, the Sole Arbitrator determines that the Respondent shall pay a contribution to the Appellant's legal costs in the sum of CHF3000.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal of Ms Filomena Chipchercher Chumba is partially upheld.

2. The decision of Athletics Kenya dated 19 December 2014 is set aside. Ms Filomena Chipchercher Chumba is sanctioned with a period of four (4) months Ineligibility commencing as of 19 December 2014.

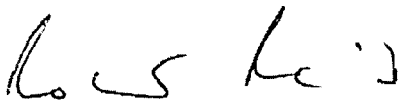
3. All competitive results obtained on 6 September 2014 during the Birell Prague GP are disqualified, including the forfeiture of any titles, awards, medals, points and prize and appearance money.

4. The costs of the arbitration, to be calculated and communicated to the parties by the CAS Court Office, shall be borne 80% by Athletics Kenya and 20% by Ms Filomena Chipchercher Chumba.

5. Athletics Kenya shall pay a contribution of CHF3000 towards Ms Filomena Chipchercher Chumba's legal costs and expenses.

Lausanne, 3 July 2015

THE COURT OF ARBITRATION FOR SPORT



His Hon. James Robert Reid QC

Sole Arbitrator