REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
APPEAL NO. RADO 4 OF 2016

KEN KIRUI…… APPELLANT

-VERSUS-

AFRICA ZONE V REGIONAL ANTI-DOPING ORGANIZATION (RADO)……RESPONDENT

JUDGEMENT

Hearing: 18th May, 2017

Appeal Panel:

Elynah Shiveka	Chairperson
Mary Kimani	Member
Gabriel Ouko	Member

Appearances: Ms. Sarah Ochwada, Advocate for the Appellant

Mr. Erick Omariba Advocate, for the Respondent

1.0 The Parties

1.1 The Appellant, Ken Kirui is a male athlete currently affiliated to the Kenya Defence Forces Athletics Team. He is represented in these proceedings by Counsel Sarah Ochwada of the Centre for Sports Law (CSL).

1.2 The Respondent, the Africa Zone V Anti-Doping Organization (RADO) is the body charged with the implementation of the Anti-Doping Code in the countries who are members of Zone V. The Respondent is represented in this matter by Counsel Erick Omariba of Omariba & Company Advocates.

1.3 RADO has published rules governing anti-doping in conformity with the responsibilities of anti-doping organizations under the World Anti-Doping Agency (WADA) Code, which rules have been adopted by the signatory member countries including Kenya. The signatory members have also donated to RADO the mandate to conduct result management.

2.0 Background

2.1 The Appellant, Mr. Ken Kirui is a national athlete ('**the Appellant**') attached to the Kenya Defence Forces Athletics Team is currently on a four (4) year sanction following the decision of an independent tribunal panel appointed by the Africa Zone V Regional Anti-Doping Organization (RADO) delivered on the 18th of October, 2016

2.2 By notice dated 21st July, 2016, RADO charged the Appellant with violation of RADO ADR (ADRV) in relation to a urine sample collected from the Appellant in competition on 29th April, 2016 during the Kenya Defence Forces Athletics championships.

2.3 The samples A and B were taken to the WADA accredited Laboratory in Doha, Qatar for analysis in accordance with procedures set out in WADA International Standard for Laboratories.

2.4 Analysis of the A sample returned an Adverse Analytical Finding (AAF) for Betamethasone. The AAF in sample "A" was reviewed in accordance with Article 7.2 ADR and it was determined that the Appellant had violated Article 2.1 ADR, namely the presence of a prohibited substance or its metabolites or markers in an Athlete's sample. He was thus charged with an Anti-Doping Rule Violation in terms of Article 2.1.

2.4 The hearing was conducted on the 14th September, 2016, where RADO was represented by Ms. Christine Mugera its Executive Manager whereas the Appellant appeared in person.

2.5 Upon consideration of the documents that had been filed and the verbal representations made by both parties, the 3 member panel of the Independent Tribunal appointed by RADO, imposed a four (4) year period of ineligibility on the Appellant in terms of Article 10.2.1 of RADO Anti-Doping Rules with effect from the date of the Provisional Suspension which was 21st July, 2016, subject to a right of appeal as set out at Article 13 of RADO ADR and the WADA Code.

2.6 As a further consequence and in tandem with Article 9 of RADO ADR and WADA Code, all results achieved by the Appellant in any individual events in the competition on the specific date were disqualified with all resulting consequences as applicable.

2.7 The above decision was delivered on the 18th October, 2016 and is the subject of this Appeal/Review.

2.8 The matter commenced by an email dated 11th November, 2016 from the Appellant who contacted the Executive Manager of Africa Zone V RADO upon receiving the verdict requesting for an appeal as provided for under Article 13 of RADO Anti-Doping Rules describing the decision as being unfair to him.

2.9 Upon receipt of the email, Mr. Omariba, duly instructed by Africa Zone V RADO notified the Independent Tribunal of the proposed appeal and further that Africa Zone V RADO had appointed him to defend the matter on its behalf. He further, by letter dated 28th November 2016 addressed to the Chairman of the Tribunal, requested for a panel to be constituted to hear and determine the appeal/review.

3.0 Preliminaries

3.1 The matter came up for mention on 16th February, 2017 when Ms. Sarah Ochwada of Centre for Sports Law came on record as representing the Appellant who was himself present. Mr. Erick Omariba appeared for the Respondent. A further mention was scheduled for 23rd February, 2017.

3.2 When the matter came up for mention on 23rd February 2017, Counsel for the Appellant filed an application for review of the decision of the independent panel in confirmation of the request set out in the letter from Counsel for RADO filed on 29th November, 2016 and previously referred to. Simultaneously with the application for review, Counsel for the Appellant also filed a request for production of various documents which were in the custody of the Respondent and which were said to be necessary for the preparation of the review. The documents sought included the follow:

i. Complete text of RADO rules both substantive and procedural;

ii. Comprehensive list of Anti-Doping education seminars and outreach programmes that RADO has carried out in Kenya from 2011 to date;

iii. Comprehensive list of attendees of RADO Anti-Doping seminars carried out in Kenya from 2011 up to date

3.3 Both parties consented to the matter being mentioned again on 9th March, 2017 for further directions. There were subsequent mentions on 9th and 30th March, 6th and 27th April and 4th May, 2017 and on each occasion both Counsel requested additional time to allow them to file the necessary documents and prepare comprehensive submissions in readiness for the hearing. In particular, Counsel for the Appellant required time to retrieve what were described as crucial medical records.

3.4 The hearing was finally scheduled for 18th May 2017.

4.0 The Hearing

4.1 At the hearing on 18th May, 2017, Counsel Sarah Ochwada continued to appear for the Appellant while Counsel Erick Omariba appeared for Africa Zone V Regional Anti-Doping Organization (RADO).

4.2 Ms. Ochwada confirmed that she would rely on the written submissions and oral arguments supported by the list of documents filed at the Tribunal. The following were the documents upon which she intended to rely in advancing the appeal:

i. *Email from the Appellant to Africa Zone V RADO dated November 2016;*

ii. *Letter from Respondent's Counsel to the Sports Disputes Tribunal dated 28th November, 2016;*

iii. *Letter from Appellant's Counsel to Athletics Kenya dated 16th February 2017;*

iv. *Response from Athletics Kenya dated 22nd February 2017;*

v. *IAAF World Youth Championships 2011 Results sheet;*

vi. *Order of Events for Kenya Defence Forces Championships April 2016;*

vii. *Medical Report from Tegat Sub-County dated 31st March 2017.*

4.3 Counsel for the Respondent elected to rely on his written submissions and to make brief oral observations.

5.0 The Appeal

5.1 Ms. Ochwada opened her case by asserting that the Appellant is a national athlete and that therefore the decision of the Independent Panel delivered on 18th October, 2016 was too severe. She posited that the sanction imposed on the Appellant was grossly disproportionate given the totality of circumstances of the case and that this is what necessitated the appeal.

5.2 Counsel argued that the first instance panel had not considered the aspect of proportionality of sanctions when dealing with the matter; that according to Article 10.2 of the WADA Code, elimination or reduction of the period of Ineligibility for Specified Substances under Specified Circumstances can be granted where:

> *"The participant can establish how a specified substance entered his/her body or came into his/her possession and can further establish, to the comfortable satisfaction of the Independent Tribunal, that such specified substance was not intended to enhance the Player's sport performance or to mask the use of a performance enhancing substance, the period of ineligibility established shall be replaced (assuming it is the participant's first anti-doping offence) with, at a minimum, a reprimand and no period of*

ineligibility, and at a maximum, a period of ineligibility of two (2) years. To qualify for any elimination or reduction, the participant must produce corroborating evidence in addition to his/her word that establishes, to the comfortable satisfaction of the Independent Tribunal, the absence of an intent to enhance sport performance or mask the use of a performance-enhancing substance. Where the conditions set out are satisfied, the participant's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility."

5.3 Counsel stated that the prohibited substance in question, *Betamethasone,* which was the basis of the Adverse Analytical Finding (AAF) is a specified substance under the WADA prohibited list and as such the Appellant is entitled to consideration of reduction of the standard sanction based on evidence proving credible non-doping reasons for its use. The Appellant in this instance has asserted that he had no intention of enhancing his performance. He gave reasons for having used *Celestamine,* an over the counter drug that contains the prohibited substance *Betamethasone* to treat his allergies on several occasions and that this was a drug that is not controlled in Kenya by the Kenya Medical Practitioners, Pharmacists and Dentists Board (KMPDB).

5.4 Ms. Ochwada reckoned that whereas the burden in doping matters points to 'who' has the duty of proving a fact, the standard of proof on the other hand indicates 'to what level' that can go to. Since the prohibited substance falls under specified substance it was incumbent upon RADO as the Results Management Authority (RMA) to prove that the Appellant indeed used the substance intentionally for doping purposes. However, as this was not taken into consideration by the panel, the burden now lies with the Athlete.

5.5 In ***CAS 2015/A/3945 SigfusFossdal v. International Powerlifting Federation (IPF),*** the Sole Arbitrator stated as follows:

"a pre-condition for having the period of ineligibility either eliminated or reduced is that the athlete should establish how the prohibited substance entered his or her system. The burden of proof is on the athlete and this should be established on the balance of probabilities."

5.6 In the case at hand, the Appellant had explained that the prohibited substance *Betamethasone* entered his body through ingestion of *Celestamine* tablets, a fact that is not disputed.

5.7 In ***CAS 2015/A/4129, Demir De Mirve et al International Weightlifting Federation (IWF),*** the Panel asserted as follows:

> *"Under the applicable anti-doping rules, in order to benefit from an eliminated or reduced sanction, the burden of proof is placed on the athlete to establish that the violation of the anti-doping rules was not intentional and/or that he/she bears no fault or negligence or no significant fault or negligence.* ***The standard of proof is on the balance of probabilities."***

5.8 Therefore according to Ms. Ochwada if an athlete adduces sufficient evidence on the premise of a balance of probabilities, that is more likely than not, that the prohibited substance was for a credible non-doping explanation then the athlete may be absolved from any severe penalty and may, for first instance offenders, have the penalty reduced to the minimum of a reprimand with no period of ineligibility depending on the degree of fault.

5.9 For this particular case, Ms Ochwada produced a medical report from her set of documents filed at the Tribunal from Tegat Health Centre indicating that the athlete had been treated on 31st March 2016 complaining of sneezing especially in the morning when it is cold; that the Appellant is a known allergic patient who has been on Celestamine tablets since 2011. The treatment that was administered on the Appellant was as follows;

> (1) Inj *(injection)* Hydrocatisson *(hydrocortisone-steroid)* 200 mg stat (at once);
> (2) Tabs*(tablets)* Cetrizin *(antihistamine)* 1/1 b.d x 5/7 *(one tablet twice daily for 5 days);*
> (3) Tabs *(tablets)* Panadol 1/1 tide x 5/7 *(one tablet three times daily for five days);*

5.10 The above medical report demonstrates that the Appellant has been using such medication for many years without prohibition or incident primarily due to lack of guidance and awareness concerning substances on the prohibited list, and that lack of such guidance contributed to his

negligence in the standard of care required of him as an athlete to seek treatment that is not against anti-doping rules.

5.11 Ms. Ochwada also touched on the issue of subjective fault of an athlete being an aspect for consideration in the present case. She cited ***CAS 2013/A/3327 Marin Cilic v. International Tennis Federation (ITF)*** and ***CAS 2013/A/3335 International Tennis Federation (ITF) v. Marin Cilic,*** in which the Panel highlighted matters which can be taken into account in determining the level of subjective fault of an athlete, for instance; *"...an athlete's youth and/or experience; language, or environmental problems encountered by the athlete; the extent of anti-doping education received by the athlete (or the extent of anti-doping education which was reasonably accessible by the athlete); any other 'personal impairments' such as those suffered by (i) an athlete who has taken a certain product over a long period of time without incident; (ii) an athlete who has previously checked the product's ingredients; (iii) an athlete who is suffering from a high degree of stress; (iv) an athlete whose level of awareness has been reduced by a careless but understandable mistake."*

5.12 Ms. Ochwada proffered that mitigating circumstances such as inadvertent breach by the athlete and inaccessibility to anti-doping education and awareness should be considered by the Panel in order to make a reasoned and proportional decision. She expressed the view that the Appellant should be treated with leniency for the following reasons;

(i) *he was undergoing a doping procedure for the first time in his career and complied with the process despite his unfamiliarity and lack of experience with doping controls.*
(ii) *he was honest and disclosed the medication that he was taking on the doping control form despite not having been educated about Therapeutic Use Exemptions (TUES).*
(iii) *he regularly purchases the medication over the counter from a pharmacy or chemist which is a safe environment to purchase medication from.*

5.13 That the foregoing is a demonstration that the Appellant in his circumstances and with his diminished capacity in doping awareness was not attempting to thwart anti-doping regulations or intentionally use a substance to enhance his performance but was simply the victim of an inadvertent mistake.

5.14 Ms. Ochwada averred that inaccessibility to anti-doping education and awareness is key to this case and implored the Panel to consider this when arriving at its decision. She stated that the evaluation of an athlete's fault should take into account the anti-doping awareness responsibility of Result Management Authority, in this case RADO, which prove not to be up to the task and which invariably leave athletes to their own devices when it comes to education.

5.15 She termed a RADO tent at the venue where the Kenya Defence Forces Athletics Championships took place according to RADO's position should have inspired the athlete to visit and receive anti-doping education on the day of his races as logically absurd. She reasoned that for any competing athlete, the focus is usually to put full body, mind and energy towards racing hard and well. It was not possible for a serious athlete competing in several heats to take a break to receive education when in fact such a break is best utilized to cool down and prepare for the next race. For instance looking at the order of events scheduled during the KDF athletics championships that took place between 27th April and 29th April, 2016, the Appellant was taking part in two races every day making it impossible to go to a tent pitched by RADO. She wondered of what use such education would serve if the sample collected on the material day was the one which tested positive like in the case of the Appellant. She opined that education would have better served the athlete if provided appropriately long before the event. She noted that an athlete should not be admonished for the failures of a poorly strategized anti-doping awareness.

5.16 Ms Ochwada went further and stated that RMAs have increasingly come under criticism for not doing enough when it comes to athletes' education and sensitization. She referred to an article posted in The Australian, entitled ***"Stephen Dank tells Festival of Dangerous Ideas - WADA is embarrassing"*** in which the following remarks were made:

> *Dr. Mazanov said anti-doping was a half-billion-dollar industry full of vested interests. "There are a lot of people who make a lot of money, get a lot of power, out of anti-doping." "We need to get our money back," said Mr. Ings. "It's not working...Before we inject - pardon the pun - more money into the system, we need to ensure we're getting the best value from that massive half-billion-dollar global spend, which is not catching those seriously involved in doping and catching too many athletes who are inadvertently falling a foul of the system."* [The article can be retrieved

at http//www.theaustralian.com.au/sport/stephen-dank-tells-festival-of-dangerous-ideas-wada-is-embarrassing/news-story/aace1af6eb0c60be7c837702194656cd

5.17 Ms. Ochwada posited that doping education in Kenya has over the years been minimal and selective and the focus of education and awareness is mostly on elite and international level athletes leaving the rest to fend for themselves, the Appellant falling in this category. A study undertaken by Kenyatta University and the University of Sterling entitled: DOPING EDUCATION STATUS IN KENYA: EVALUATION OF KNOWLEDGE, ATTITUDES AND PRACTICE OF DOPING AMONG ELITE KENYAN ATHLETES REPORT COMPILED FOR THE WORLD ANTI-DOPING AGENCY confirmed the inadequate education and awareness of doping issues amongst the Kenyan athletes. Another study conducted by Professor Moni Wekesa on the regulation of doping in Kenya disclosed that *"sporting bodies had inherent structural weaknesses and lacked procedures and policies for implementing doping education. In fact, implementation of anti-doping education was non-existent."*

5.18 Ms. Ochwada also confirmed that she had never received the documents she requested from RADO regarding their educational, outreach and awareness programmes/campaigns on doping in the region. Therefore this confirms that the athletes have an enormous task of getting the same information on their own or minimally from RADO when they pitch a tent during a championship and assume that all athletes will visit like in this case.

5.19 Accordingly, Counsel sought the following:

(i) A substantial reduction from the maximum penalty of 4 years ineligibility period to a reprimand;
(ii) All costs of the suit to be borne by the RADO;
(iii) Any other relief to the Appellant that the Tribunal deems just and fair

6.0 The Response

6.1 Mr. Omariba representing RADO commenced by submitting that the ruling by the Independent Panel appointed by RADO was in line with the rules whereby an Anti-Doping Rule Violation (ADRV) had been committed by an athlete.

6.2 Mr. Omariba asserted that it is the athlete's responsibility to ensure that no prohibited substance enters his body and he is obliged to take responsibility for the presence of prohibited substances found in his system under Article 2.1 of both RADO Rules and WADA Code.

6.3 He noted that the independent panel had not departed from the rules and that the facts had informed their reasoned decision in all aspects of the case.

6.4 Mr. Omariba averred that the burden of proof expected to be discharged by the Anti-Doping organization was ably met by the prosecution as expected under Article 3 of both the RADO Rules and WADA Code which was premised on the accredited laboratory finding and the athlete's admission.

6.5 According to Mr. Omariba it was clear that the Appellant did not have a Therapeutic Use Exemption (TUE) and neither had he applied for one. The independent panel did not get any plausible explanation from the Appellant regarding how the substance entered his body and no medical records were produced therefore whatever he said remained hearsay.

6.6 Mr. Omariba, however, admitted that RADO in consultation with WADA and IAAF finds that the sanction meted on the Appellant was too strict and harsh for the following reasons:

(i) Article 10.2.1.1 provides for a sanction of 4 years where the ADRV involves a non specified substance unless the athlete can establish no intention and 10.2.1.2 where a specified substance is involved and the ADO can establish that the ADRV was intentional. In all other cases the period of ineligibility shall be 2 years;

(ii) The Appellant admitted the ADRV in a timely manner and the panel ought to have considered this under Article 10.6.3 to give a lighter sanction and not the maximum as was imposed in this case;

(iii) The Appellant in the Doping Control Form (DCF) declared the medication he was using being *Celestamine,* which has an active ingredient of *Betamethasone* which is a banned or prohibited substance.

(iv) The Appellant was fairly honest and sounded innocent and as such he ought to have been considered for his seeming ignorance in issues of anti-doping and not having attained the level of an elite athlete his plea would have been taken into consideration.

6.4 Based on the aforegoing, Mr. Omariba while concluding proffered that the appeal panel should consider a lesser sanction than that handed down to the Appellant herein in accordance with the Code.

7.0 Consideration

7.1 Having heard the submissions and arguments both written and oral by both counsel representing the Appellant and Respondent, we find that they are in agreement regarding the reduction of the sanction imposed by the independent panel.

7.2 Both Counsels agreed that the AAF involved a Specified Substance namely *Betamethasone;* that the athlete, either very honestly or in utter ignorance of what constituted prohibited substances/potential doping offences, disclosed use of the specified substance - for a medical condition by declaring on his Doping Control Form (DCF) that he had indeed used *Celestamine* tablets 3 days prior to sample collection. Consequently the applicable RADO Rule is Article 10.2.2 which provides for 2 years of ineligibility as it is asserted by Counsel for the Appellant and accepted by Counsel for RADO that there was no intention on the part of the athlete to cheat. Therefore our starting point is a reduction to 2 years.

7.3 Counsel for the Appellant argued that the athlete promptly admitted after being confronted with a violation sanctionable under Article 10.2.1, so that Article 10.6.3 is the applicable RADO Rule. This provides for 2 years of ineligibility. The Panel, however, disagrees that this the appropriate rule in the present matter because, it having been established that a Specified Substance was unintentionally used by the Athlete, then Article 10.2.2 automatically eliminates Article 10.2.1. The positive credit of the athlete's prompt admission can be taken into account under Art. 10.6.4 'Application of Multiple Grounds for Reduction of a Sanction' where at least a ¼ reduction period of ineligibility is proposed for it.

7.4 Continuing on the premise of 'Multiple Grounds Reduction', the Appellant gave a reasonable account of how the prohibited substance got into his body (and adduced medical evidence -not presented to the previous panel) which explained the AAF to the comfortable satisfaction of the Appeals panel therefore a ¼ period of the ineligibility can be waived on account of this crucial piece of evidence.

7.5 Further, the following have also been satisfactorily argued by the Athlete's Counsel: (a) That this was the Athlete's 1st doping offence (b) That he dutifully continues to comply with the severe sanction imposed on him (c) That he suffered the personal impairment caused by lack of doping awareness because RADO was slack in their due duty of delivering anti-doping education to him, including not having duly/appropriately educated him regarding their Rules so he could fashion a suitable defence. Taking into account this conglomeration of factors to the credit of the Appellant another reduction of a ¼ period of ineligibility is proposed.

7.6 There is no doubt that an ADVR has been committed by the Appellant under Article 2.1 of the RADO Rules and WADA Code. The primary principle is that the Appellant having chosen to pursue an athletics career of his own free will is bound by the strict liability stricture and cannot escape the consequences of a breach of the rules.

7.7 As a National Level Athlete certain basic responsibilities did fall on the Appellant; for instance, for the right to participate in competitive athletics events, the Appellant ought to have educated himself on basic issues such as TUE. At 24 years of age, he is definitely not a minor and he is employed by an institution that allows him access to information, including internet, which can help him navigate the basic areas of sports anti-doping in order to keep his personal career afloat.

7.8 Having said that, established CAS jurisprudence holds that the principle of proportionality requires the panel to assess whether a sanction is appropriate to the violation committed in the case at stake. Excessive sanctions are prohibited. Consequently the sanction applicable to the Appellant is hereby reduced to 1 year and 3 months with effect from the date of Provisional Suspension which was 21st July 2016. The effect of this is that the decision of the independent panel is hereby set aside.

7.9 The normal principle is that costs follow the event. In this case, however, the panel is of the view that the Appellant has had the benefit of being able to introduce arguments which were not available to the independent panel and has further had the benefit of fresh evidence and a *de novo* consideration of the facts and principles. It was the Appellant's responsibility to have placed this before the first instance panel which may well have reached a different conclusion if it had the benefit of the arguments so well articulated by Counsel for the Appellant. On the other hand, the panel notes that Counsel for the Respondent has supported the reduction of the sentence imposed while RADO in fact sought imposition of the maximum period of ineligibility before the first independent panel. The panel therefore reaches the conclusion that RADO should be liable for 50% of the costs attendant to the successful appeal.

7.10 The panel will hear representations as to the proper quantum of costs to be imposed.

DATED THE.....14.TH.....DAY OF---------JUNE----------2017

Shiveka.

ELYNAH SHIVEKA (CHAIRPERSON)

MARY KIMANI (MEMBER)

GABRIEL OUKO (MEMBER)