Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2017/A/5295 World Anti-Doping Agency v. Anti-Doping Agency of Kenya & Athletics Kenya & Sally Chelagat Kipyego

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President: Prof. Jens Evald, Professor in Aarhus, Denmark

Arbitrators: Mr. Mark Andrew Hovell, Solicitor in Manchester, United Kingdom

Ms. Petra Pocrnic Perica, Arbitrator in Zagreb, Croatia

in the arbitration between

WORLD ANTI-DOPING AGENCY, Montreal, Canada
Represented by Mr. Ross Wenzel and Mr. Nicolas Zbinden, Attorneys-at-Law, Kellerhals Carrard, Lausanne, Switzerland

Appellant

v.

THE ANTI-DOPING AGENCY OF KENYA, Kenya
Represented by Mr. Erick G. Omariba and Damaris Ogama Alukwe , Attorneys-at-Law, Nairobi, Kenya

First Respondent

and

ATHLETICS KENYA, Kenya
Represented by Mr Elias J. Masika, Attorney-at-Law, Triple O Law, Nairobi, Kenya

Second Respondent

and

MS. SALLY CHELAGAT KIPYEGO, Kenya
Represented by Ms. Sarah Ochwada, Centre for Sports Law (CSL), Nairobi, Kenya

Third Respondent

I. PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Appellant") is a Swiss private law Foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. The Appellant is an international independent organization created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms.

2. The Anti-Doping Agency of Kenya (the "ADAK" or the "First Respondent") is the National Anti-Doping Organization of Kenya.

3. Athletics Kenya (the "AK" or the "Second Respondent") is the governing body for athletics in Kenya and it is a member of the International Associations of Athletics Federation (the "IAAF") and Confederation of African Athletics.

4. Ms. Sally Chelagat Kipyego (the "Athlete" or the "Third Respondent") is a Kenyan long distance national-level-athlete affiliated to AK.

II. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the parties' submissions on the merits of this appeal. Additional facts and allegations found in the parties' written submissions may be set out, where relevant, in connection with the legal discussion that follows. While the Panel considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

6. On 27 December 2015, the Athlete underwent an in-competition doping control at the Taihu International Marathon in Suzhou (China) (the "Event").

7. The analysis of the sample revealed the presence of 19-norandrosterone ("19-NA"). 19-NA is an Endogenous Anabolic Androgenic Steroid prohibited under the S1.1.b of the 2015 World Anti-Doping Agency Prohibited List.

8. On 25 January 2016, the IAAF informed AK of the positive finding and of the Athlete's right to *inter alia* request the B Sample analysis and to provide an explanation.

9. On 17 February 2016, the IAAF wrote to the Chinese National Anti-Doping Agency ("CHINADA") that it had been informed that CHINADA had organised the B Sample analysis. The IAAF attached to this letter a "Letter of Authorization for the B Sample Analysis" signed by the Athlete as well as an email sent by CHINADA indicating that the B Sample opening had taken place on 4 February 2016. The IAAF therefore requested CHINADA to confirm that they would handle results management of the Athlete's case.

10. On 19 February 2016, CHINADA informed the IAAF that it would conduct results management and that the B Sample analysis had confirmed the results of the A Sample analysis.

11. On 12 May 2016, the IAAF requested an update from CHINADA on the Athlete's case.

12. On 13 May 2016, CHINADA informed the IAAF that it had finished results management for the Athlete's case (as the B Sample analysis had been performed) and that, *"in additional, Chinese Athletic has suspended* [the Athlete *inter alia*] *to take part in any competition in China"*.

13. In the same letter, CHINADA added that "*as all athletes* [including the Athlete] *are not Chinese nationalities or residence, according to the Code and CHINADA's Doping Control Rules, neither CHINADA nor Chinese Athletic Association has suspended* [the Athlete *inter alia*] *to take part in any competition in China"*.

14. On the 15 June 2016, the IAAF asked CHINADA to forward the decision rendered by CHINADA in the case of *inter alia* the Athlete.

15. On 16 June 2016, CHINADA reiterated that *"Chinese Athletic Association can only suspend them to take part in any competition in China, but they cannot make sanctions on them. As mentioned in its last letter, I wonder if IAAF or the athlete's national federations could make sanctions on them"*.

16. On the same date, the IAAF asked once again whether CHINADA could send through the decision in the case of the Athlete.

17. On 2 September 2016, CHINADA stated that it had *"no power to make penalty decision on any individual or unit according to the anti-doping regulations in China. More practically, these athletes should be punished by the testing authority. In specific to the five foreign marathon cases* [including the Athlete's], *it is the Chinese Athletic Association. We have informed them relative information recently. So could you please contact them for this matter directly"*.

18. On 9 September 2016, the IAAF wrote to the Chinese Athletics Association (the "CAA"), setting out that CHINADA had referred the Athlete's case to the CAA for adjudication and requesting whether a decision had been rendered and that such decision be sent to the IAAF.

19. Following a reminder, an Eric from the CAA sent an email on 14 October 2016 (the "Email"), which read as follows: *"we have discussed the issue of the Kenya athletes. As the result, we have banned those 2 athlete from the competition held in china in whole those career as athlete. but as Chinese federation, we can not give them the punishment at international level, i.e. pending from the international competition"*.

20. On 1 November 2016, the Athlete was charged by ADAK with an anti-doping rule violation ("ADRV") before the Sports Disputes Tribunal of Kenya.

21. On 29 March 2017, the Sports Disputes Tribunal rendered the Appealed Decision, in which it held the following:

6.3 The Panel accepts [the Athlete's counsel]'s *submission that the IAAF effectively delegated results management and hearing of the matter to the CHINADA in accordance with Article 7 of WADA.* [...]

6.4 Having made this election, IAAF must accept the decision of CHINADA however, flawed it might be. If IAAF does not agree with the decision, it should have appealed the same to CAS rather than attempt to have ADAK commence fresh trial before the Tribunal. [...]

6.7 [...] *Nevertheless, a decision has been arrived at and sanction imposed by the forum selected by the IAAF. No appeal having been preferred to the relevant Tribunal, this Panel must presume that the decision by CHINADA constitutes the sanction imposed on the Athlete and cannot attempt to undertake a fresh trial or to sit on appeal on the decision by CHINADA.*

22. On 6 July 2017, the IAAF informed WADA that they had received the full case file related to the Appealed Decision on such date and intended to review it.

23. On 12 July 2017, WADA wrote CHINADA with the following request:

[...] *We are currently reviewing the case file in the matter of* [the Athlete] [...] *The case file contains an email sent by Eric from the Chinese athletics federation to IAAF which refers to the fact that* [the Athlete] *has been banned "from the competitions held in China in whole those whole career as athlete"* [...]. *Could you please send us the decision to which Eric refers to at the earliest convenience?*

24. On 13 July 2017, CHINADA informed WADA that the CAA would revert to it in respect of WADA's query.

25. On 28 July 2017, the CAA responded to WADA that they did not have other information in respect of the Athlete's case.

26. On 11 August 2017, CHINADA indicated the following:

"After the conmmunacation with the relative departments we reach the following consensus. CAA has sent the case to IAAF and copy the Kenya athletics Federation and after Kipyego was tested positive, but still did not get the decision from the Kenya athletics Federation, therefore, CAA put this athlete into banned list, so he cannot join

any race competitions held in China. CAA will follow decision by Kenya athletics Federation if they have. [...]" (sic)

27. On 6 September 2017, CHINADA indicated the following:

"CHINADA has reiterated for a few times, that according to the Code and CHINADA's Doping Control Rules, neither CHINADA nor CAA could make available penalties on foreign athletes. So the CAA Measure is certainly a provisional suspension against the Athlete, limited to the Chinese territory, pending a decision of the Kenyan authorities imposing a relevant sanction on the Athlete.

This morning we discussed with CAA about the issue. We totally agreed with each other that the CAA make sure that their Measure is a provisional suspension against the Athlete. And they will contact with WADA to explain their position asap."

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 16 August 2017, the Appellant filed its Statement of Appeal against the Sports Disputes Tribunal Decision with the Court of Arbitration for Sport (the "CAS") in accordance with Article 47 et seq. of the Code of Sports-related Arbitration (the "Code"). In its Statement of Appeal, the Appellant nominated Mr. Mark Hovell as an arbitrator.

29. On 23 August 2017, the CAS Court Office opened this procedure and invited the Respondents jointly to nominate an arbitrator, and if the Respondents failed to nominate an arbitrator, the President of the CAS Appeals Arbitration Division, or her Deputy, would proceed with the appointment *in lieu* of the Respondents.

30. On the same date, the Appellant requested an extension of five days, until 4 September 2017, of its deadline to file the Appeal Brief.

31. In letters dated 29 August 2017, the CAS Court Office granted the Appellant until 4 September 2017 to file its Appeal Brief in accordance with Article R32 of the Code.

32. In her letter dated 5 September 2017, the Third Respondent suggested to consolidate the present proceeding with the proceeding CAS 2017/A/5294. Furthermore, the Third Respondent requested the participation of the IAAF in the proceeding. Finally, the Third Respondent nominated Mr. Jeff Benz as an arbitrator.

33. In its letter dated 5 September 2017, the CAS Court Office invited the Appellant, First and Second Respondents to submit their positions with regard to the Third Respondent's suggestions by 7 September 2017. In the meantime, the deadlines mentioned in the CAS Court Office letter of 23 August 2017 were suspended.

34. In its email on 7 September 2017, the Appellant opposed to the Third Respondent's suggestion for consolidation stating, *inter alia*, that a consolidation of the two procedures was not possible on the face of Article R52 of the Code, which only allows a consolidation in respect of appeals against the same decision. Further, the Appellant asserted that there was no basis upon which the Third Respondent could bind the IAAF to an existing CAS appeal if it did not voluntary wish to participate.

35. In its letter dated 11 September 2017, the First Respondent stated, *"We shall be glad to make substantive submissions on the issue of joinder of the current case with any other before the said joinder"*. The First Respondent objected to the appointment of Mr. Jeff Benz as an arbitrator and instead proposed the appointment of Mr. Mauricio Chiriboga Merino as an arbitrator.

36. In its letter dated 11 September 2017, the CAS Court Office advised the Parties that pursuant to Article R52 of the Code consolidation is only possible in respect of appeals against the same decision, which was not the case in proceedings in question. In the view of the Respondent's disagreement regarding the name of the arbitrator, unless the Second and Third Respondents agreed with such nomination on or before 14 September 2017, it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to proceed with such nomination.

37. In its letter of the same date, the CAS Court Office granted the IAAF a deadline until 15 September 2017 to submit its position on the Third Respondent's requested joinder of the IAAF.

38. On 11 September 2017, the Appellant filed its Appeal Brief.

39. In its letter dated 13 September 2017, the CAS Court Office invited the Respondents to submit to CAS an Answer within twenty days of receipt of the letter pursuant to Article R55 of the Code.

40. In its letter dated 14 September 2017 to the CAS Court Office, the IAAF respectfully declined to participate in the present proceedings.

41. In her email letter dated 15 September 2017, the Third Respondent clarified *"the reasons for choosing to address the matters jointly as well as the reasons for requesting for joinder of cases and for joinder of the IAAF to the proceedings*".

42. In its letter dated 26 September 2017, the CAS Court Office advised the Respondents that in absence of any joint nomination within the prescribed deadline, pursuant to Article R53 of the Code, it was for the President of the CAS Appeals Arbitration Division, or her Deputy, to nominate an arbitrator *in lieu* of the Respondents.

43. In her letter dated 17 October 2017, the Third Respondent informed that due to severe financial constraints she would not be advancing any costs.

44. In its letter dated 24 October 2017, the CAS Court Office informed the Parties that the deadlines for the Respondents to file an Answer expired on 12 October 2017 for the First Respondent and 5 October 2017 for the Second and Third Respondent. To date, neither of the Respondents had submitted an Answer. Further, the Parties were invited to confirm by 31 October 2017 on whether they preferred a hearing to be held in the present matter or for the Panel to issue an award solely on the written submissions.

45. On 30 October 2017, the First Respondent filed its Answer and in an email the First Respondent stated that it was "*desirous of filing a statement of support to the appeal herein. This is a request for an extension of the time Filling the same by three (3) days from the date hereof*" and it "*also request that we have an oral submissions at the hearing of this procedure*".

46. In its email of 31 October 2017, the Appellant stated that it considered that this matter should be decided on the basis of the written record.

47. In its letter dated 1 November 2017, the CAS Court Office invited the Appellant, the Second and Third Respondent to comment on the admissibility of the First Respondent's Answer within three days of receipt of the letter.

48. On the same date, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division and in accordance with Article R54 of the Code, constituted the Panel as follows:

President:	Prof. Jens Evald, Professor of Law, Aarhus, Denmark
Arbitrators:	Mr. Mark Hovell, Solicitor in Manchester, United Kingdom Ms. Petra Pocrnic Perica, Arbitrator in Zagreb, Croatia

49. In its email dated 6 November 2017, the Appellant informed CAS that it did not object to the admission of the First Respondent's Answer and maintained its preference for a decision based on the Parties' written submissions.

50. On 5 December 2017, the CAS Court Office advised the Parties that the Panel had decided, pursuant to Article R57 of the Code, that it deemed itself sufficiently well-informed to decide the case based solely on the Parties' written submissions, without the need to hold a hearing.

51. In the same letter, the CAS Court Office, on behalf of the Panel, requested the Second Respondent to clarify i) whether or not the Athlete should be considered as an "International Level Athlete", and ii) to confirm whether it informed the Athlete of her provisional suspension pursuant to the IAAF's letter to the Second Respondent of 25 January 2016.

52. The Second Respondent never responded to the requested clarifications.

53. On 5 December 2017, the CAS Court Office, on behalf of the Panel requested the IAAF to clarify whether the Athlete should be considered as an "International Level Athlete" or not, in accordance with the IAAF Rules.

54. In its letter dated 6 December 2017, the Second Respondent requested an extension of ten (10) days to "*furnish the Court with the Statement of Defence*". The Second Respondent stated that it was unable to file the Statement of Defence because i) there was confusion whether it was actually a party to this proceeding, ii) the Second Respondent was no longer in charge of results management at the relevant time, iii) the Second Respondent was informed by the IAAF that CHINADA would handle the case, and iv) the Second Respondent did not have the "*requisite quorum to handle any Results management due to the suspension of its officials [...]*"

55. In its letter dated 6 December 2017, the First Respondent reiterated that it preferred a hearing to be held and "*in the unlikely event that, the request for a hearing is disallowed we wish to state that it will be seeking leave of the panel to file written legal submissions to fortify our position in this matter*".

56. In its letter dated 7 December 2017, the CAS Court Office, on behalf of the Panel, requested the Appellant's comments on the First and Second Respondent's letters on or before 11 December 2017.

57. On 7 December 2017, the IAAF confirmed that the Athlete should not be considered as an international-level athlete as she on 27 December 2015 was not part of the IAAF Registered Testing Pool and the competition she took part in, the Taihu International marathon held in Suzhou, China, was not an international competition under IAAF Rules.

58. In its email of 11 December 2017, the Appellant asserted that the Panel should not allow the First and Second Respondent to file any further submissions and should not revisit its decision to decide the matter on the basis of the written record.

59. On 12 December 2017, the Appellant signed and returned the Order of Procedure. The First, Second and Third Respondent did not return the signed Order of Procedure or otherwise object to its contents.

60. In its letter dated 13 December 2017, the CAS Court Office, on behalf of the Panel advised the Parties that no further submissions were allowed in this case and the decision to render the Award without holding a hearing was maintained.

IV. PARTIES' SUBMISSIONS

A. The Appellant's submissions

61. The Appellant's submissions, in essence, may be summarized as follows:

- The Appealed Decision is manifestly flawed. The Sports Disputes Tribunal was wrong to consider that a valid decision had been rendered in China, capable of producing *ne bis in idem* effect.

- No valid decision was ever made by CHINADA or the CAA: i) no written decision, ii) no minutes of a hearing or meeting, iii) no indication of when any decision was rendered, iv) no indication of who rendered it (i.e. which organ of the CAA), v) no indication of whether this organ was empowered to render a decision, vi) no indication of any process leading to that decision (no charge letter, summons to a hearing, etc.), vii) no evidence that any decision was ever notified to any relevant parties, including the Athlete, and viii) no evidence that any decision was ever implemented (e.g. inclusion of the Athlete on a banned list).

- Even assuming that a decision was rendered, it is so procedural flawed that it simply cannot be valid or enforced. No due process was followed, and all the fundamental rights of the Athlete were manifestly disregarded in total breach of procedural public policy. Therefore the decision must be null and void.

- Neither CHINADA nor the CAA had jurisdiction to render a decision in this case.

- Even assuming that the alleged decision did exist and was not null and void, it would not have prevented a decision by the Sports Disputes Tribunal as *ne bis in idem "is known only in relation to court judgement and decisions of arbitral tribunals"* (CAS 2012/A/2912 Murofushi & JOC v. IOC, para. 105).

- According to Article R57 of the Code, the Panel has the power to render a new decision imposing a sanction on the Athlete. In the unlikely event that the Panel is not willing to render a decision "*de novo*", WADA requests subsidiarly that the case be sent back to the Sports Disputes Tribunal for a new decision on the merits.

- An ADRV occurred on basis of Rule 32.2(a) of the IAAF Rules:

- The ADRV involves a non-specified substance prohibited under S1.1.b of the 2015 WADA Prohibited List. In order to reduce the sanction, the Athlete must establish that the ADRV was not intentional and therefore follows that the Athlete must establish how the substance entered her body.

- Even if an Athlete in exceptional cases might be able to demonstrate a lack of intent when he/she cannot establish the origin of the prohibited substance, there are no exceptional circumstances in this case which show to the relevant standard of proof that the ADRV was not intentional.

- The Athlete is required to prove the origin of the prohibited substance on the "balance of probability" and it is clear from abundant CAS case law that an athlete must provide

concrete evidence to demonstrate that a particular supplement, medication or other product that the Athlete took contained the substance in question.

- In the present case, the Athlete indicated that the positive finding must have come from a painkiller called Celebrex. Although the Athlete disclosed a painkiller on her doping control form, there is no evidence whatsoever showing that such product was contaminated. As a result, not only is the scenario of a contamination based on pure speculation, it is also highly implausible.

- There is no doubt that the Athlete should have been sanctioned with a four year ineligibility period. She was positive for an anabolic steroid and has offered not even the semblance of a plausible and substantiated explanation. The Athlete has manifestly failed to establish the origin and the violation must therefore be deemed intentional.

- The Athlete was not provisionally suspended, therefore, she cannot receive any credit for any period of Provisional Suspension pursuant to Rule 40.11 c) of the IAAF Rules.

62. The Appellant makes the following requests for relief, asking the CAS:

1. *"The Appeal of WADA is admissible.*

2. *The decision dated 29 March 2017 rendered by the Sports Disputes Tribunal in the matter of Sally Chelagat Kipyego is set aside.*

Primarily:

3. *Sally Chelagat Kipyego is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force, with no credit for any period of Provisional Suspension or Ineligibility.*

4. *All competitive results obtained by Sally Chelagat Kipyego from and including 27 December 2015 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).*

Subsidiarily

5. *The Athlete's case is sent back to the Sports Dispute Tribunal for a decision on the merits, including imposing the relevant Consequences on the Athlete.*

In any event:

6. *The costs of the arbitration are borne by all Respondents jointly and severally.*

7. *All Respondents jointly and severally shall be ordered to pay a significant contribution to WADA's legal and other costs in connection with these appeal proceedings."*

B. The First Respondent's submissions

63. The First Respondent's submissions, in essence, may be summarized as follows:

- The Sports Disputes Tribunal made an erroneous finding that "*a forum appointed by the IAAF had made a decision on the athlete with regard to the ADRV and the case before it was* ***ne ibis in idem*** *and proceeded to dismiss the same. The 1st respondent adopts the arguments made in paragraph 35 of the Appeal Brief and all related supportive arguments in paragraphs 36-65*".

- The Sports Disputes Tribunal erred in fact and in law "*in failing to fully appreciate that according to rule 40.2 of 2015 IAAF competition rules and WADC and as such the purported life ban was not in line with the rules hence irregular*".

- The Sports Disputes Tribunal erred in law and fact "*in making a finding that the decision by CHINADA to ban the athlete from participating in any race in China was a reasoned decision and hence should be upheld universally. (we adopt the submissions in paragraphs 18-23 of the Appeal Brief)*".

- The Athlete has not given any plausible explanation with regard of the origin of the prohibited substance.

64. The First Respondent makes the following requests for relief, asking the CAS:

I. "The appeal of WADA is admissible.

II. The decision rendered by the Sports Dispute tribunal on 29th March, 2017 in the matter Sally Chelagat Kipyego on SDT Anti-Doping case no 43 of 2016 be set aside.

III. The results attained by the Athlete Sally Chelagat Kipyego in the "Taihu International Marathon", in Suzhou. China on 27th December 2015 be disqualified.

IV. Sally Chelagat Kipyego be sanctioned to a term of 4 years of ineligibility.

V. All competitive results obtained by the Athlete Sally Chelagat Kipyego from 27th December, 2015 be disqualified with all resultant consequences.

VI. All parties to bear their own legal and other costs in connection with these appeal proceedings."

C. The remaining Respondents' submissions

65. The Second and Third Respondents both failed to submit an Answer in the matter at hand.

V. JURISDICTION

66. 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 CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body."

67. Rule 42.1 c) of the IAAF Rules provides as follows:

"Where WADA has a right of appeal under Rule 42 and no other party has appealed a final decision within the Anti-Doping Organisation's process, WADA may appeal such decision directly to CAS without having to exhaust other remedies in the Anti-Doping Organisation's process."

68. As Rule 42.6 of the IAAF Rules provides that WADA has a right of appeal against the Appealed Decision, WADA has a right to appeal such decision directly to CAS.

69. Hence, it follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VI. ADMISSIBILITY

70. According to Rule 42.16 of the IAAF Rules, "*the filing deadline for an appeal to CAS filed by WADA shall be the later of (a) twenty-one days after the last day on which any other party entitled to appeal in the case could have appealed; or (b) twenty-one days after WADA's receipt of the complete case file relating to the decision*".

71. The IAAF had a right of appeal within 45 days from receiving the case file under Rule 42.8 *cum* 42.15 of the IAAF Rules. The IAAF received the case file on 6 July 2017. WADA's 21-days deadline to appeal only starts after expiry of *inter alia* the IAAF's. As the Statement of Appeal was filed on 16 August 2017, the appeal was lodged within the deadline set forth under Rule 42.16 of the IAAF Rules. The appeal complied with all other requirements of Article R47 of the Code.

72. It follows that the appeal is admissible.

VII. APPLICABLE LAW

73. The Panel notes that pursuant to Article 1.7 of the IAAF Anti-Doping Rules (the "IAAF ADR") the IAAF ADR applies *inter alia* to (a) all athletes who are members of a national federation or (b) all athletes participating in Competitions and other activities organised, convened, authorized or recognized by the IAAF, any national federation or any member or affiliated organization of any national federation. Article 1.7 of the IAAF ADR adds that "*each [athlete] is deemed, as a condition of membership, accreditation and/or participation in the sport, to have agreed to be bound by these Anti-Doping Rules*".

74. Therefore, the IAAF ADR apply to the Athlete.

75. Article 21.3 of the IAAF ADR provides the following:

"Any case pending prior to the Effective Date, or brought after the Effective Date but based on an Anti-Doping Rule Violation that occurred before the Effective Date, shall be governed, with respect to substantive matters, by the predecessor version of the anti-doping rules in force at the time the Anti-Doping Rule Violation occurred and, with respect to procedural matters, by the version of the anti-doping rules in force immediately prior to the Effective Date save that (i) Article 10.7.5 of these Rules shall apply retroactively; (ii) Article 18 of these Rules shall also apply retroactively, unless the statute of limitations applicable under the predecessor version of the Rules has already expired by the Effective Date; and (iii) the relevant tribunal may decide it appropriate to apply the principle of lex mitior in the circumstances of the case."

76. The Panel notes that the ADR in force at the time of the ADRV were the 2016-2017 IAAF Competition Rules, in force from 1 November 2015 (the "IAAF Rules"). These rules shall apply for substantive matters.

77. Further, the Panel notes that the version of the rules in place immediately prior to the Effective date is the IAAF Rules, which are therefore also applicable for procedural matters.

78. Article R58 of the Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 the law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

79. In accordance with Article R58 of the Code, the applicable regulation to this case is the IAAF Rules 2016-2017.

80. The Panel notes that the Appellant and the First Respondent assert that Monegasque law shall apply subsidiarily. The Panel observes these assertions correspond to Rule 42.24 of the IAAF Rules 2016-2017 (and Article 13.9.5 of the IAAF ADR).

VIII. MERITS

81. The Panel will address the issues as follows:

A. Legal framework and the alleged decision in China; and

B. Should the Panel refer the case back or render a decision on the merits?

In case that the Panel decides to render a decision on the merits:

C. The occurrence of an ADRV and the Standard Sanction;

D. Burden and Standard of Proof;

E. Was the Athlete's ADRV Intentional?

F. Sanctions.

A. Legal Framework and the Alleged Decision in China

82. Rule 37 (1-4) of the IAAF Rules, *inter alia,* sets out the following:

1. *"Upon receipt of an A Sample Adverse Analytical Finding or Atypical Finding or upon evidence of another anti-doping rule violation under these Anti-Doping Rules, the matter shall be subject to the results management process set out below.*
2. *In the case of an International-Level Athlete, the results management process shall be conducted by the IAAF Anti-Doping Administrator and, in all other cases, it shall be conducted by the relevant person or body of the Athlete or other Person's National Federation. The relevant person or body of the Athlete or other Person's National Federation shall keep the IAAF Anti-Doping Administrator updated on the process at all times. Requests for assistance or information conducting the results management process may be made to the IAAF Anti-Doping Administrator at any time [...]*
3. ***Review of Adverse Analytical Findings:** Upon receipt of an A Sample Adverse Analytical Finding, the IAAF Anti-Doping Administrator shall conduct a review to determine whether:*

(a) *the Adverse Analytical Finding is consistent with an applicable TUE; or*
(b) *there is any apparent departure from the Anti-Doping Regulations or the International Standard for Laboratories that caused the Adverse Analytical Finding.*

4. If the review of an Adverse Analytical finding under Rule 37.3 above does not reveal an applicable TUE or a departure that caused the Adverse Analytical Finding, the IAAF Anti-Doping Administrator shall promptly notify the Athlete of:
(a) the Adverse Analytical Finding;
(b) the anti-doping rule that has been violated.
(c) The time limit which the Athlete is to provide the IAAF, either directly or through his National Federation, with an explanation for the Adverse Analytical Finding;

[...]

83. Rule 37 (16) of the IAAF Rules reads as follows:

*16. **Provisional Suspension:** If following the review and notification described in Rules 37.3, 37.4 or 37.9, no explanation, or no adequate explanation, for an Adverse Analytical Finding is received from the Athlete or his National Federation within the time limit set by the IAAF Anti-Doping Administrator in Rule 37.4c), the Athlete (other than in the case of an Adverse Analytical Finding for a Specified Substance) shall be suspended promptly, the suspension at this time being provisional pending resolution of the Athlete's case by his National Federation. In the case of an International-Level Athlete, the Athlete shall be suspended by the IAAF Anti-Doping Administrator. In all other cases, the National Federation of the Athlete shall impose the relevant Provisional Suspension by written notification to the Athlete. Alternatively, the Athlete may accept a voluntary suspension provided that this is confirmed in writing to his National Federation [...]."*

84. The Panel notes that the Athlete should not be considered as an International-Level Athlete as she on 27 December 2015 was not part of the IAAF Registered Testing Pool and the competition she took part in, the Taihu International Marathon held in China, was not an international competition under IAAF. Therefore, pursuant to Rule 37 (2) of the IAAF Rules, the National Federation was responsible for the result management and responsible for imposing a provisional suspension on the Athlete in the present matter.

85. The Panel observes that the Sports Dispute Tribunal in its Decision asserts that "*IAAF effectively delegated results management and hearing of the matter to the CHINADA in accordance with Article 7 of the WADA Code*".

86. The Panel notes that Article 37 (4) of the IAAF Rules states that the National Federation is responsible for the result management, and that the IAAF Rules does not contain any provision allowing the IAAF to delegate the responsibility for result management or the hearing from the Athlete's National Federation to another country's National Federation, *in casu* CHINADA.

87. Further, the Panel observes that IAAF Anti-Doping Administrator in his letter dated 25 January 2016, *inter alia*, provided the Second Respondent with the following instructions:

[...]

In accordance with the results management procedure set out in IAAF Rule 37, therefore, you are hereby notified of the following:

[...]
*(iii) that the athlete may provide an explanation for the Adverse Analytical Finding, either directly to me at the IAAF by fax [...] or e-mail [...], alternatively via your National Federation, within a deadline of **Monday 1st February, 2016.***

[...]

Provisional Suspension

*Please be advised that, if no explanation, or no adequate explanation, for the Adverse Analytical Finding is received from the athlete at the IAAF by **Monday 1st February, 2016,** the athlete shall promptly be suspended, such suspension being provisional pending resolution of the athlete's case before the relevant tribunal of her National Federation [..].*

Ineligibility

*The Ineligibility for a violation of Rules 32.2(a) and 32.2(b) not involving a Specified Substance, subject to a potential reduction under Rules 40.5-40.7, is **4 years** for a first anti-doping rule violation unless you can establish that the violation was not intended [...].*

Disqualification of Results

In addition to the Ineligibility described above, an anti-doping rule violation in connection with an In-Competition Test automatically lead to the Disqualification of the athlete's individual results obtained in that Event with all resulting Consequences for the athlete, including the forfeiture of all titles, awards, medals, points and prize and appearance money (Rule39).

[...]

I trust this letter is clear. We nevertheless remain at the athlete's disposal for any questions/clarifications the athlete may have in relation to the laboratory results, the application of applicable IAAF Rules or Regulations, or more generally on the procedure to be followed in this case.

88. It appears from the IAAF Anti-Doping Administrator letter to the Second Respondent that the notification was *"In accordance with the results management procedure set out in IAAF Rule 37"*. Therefore, The Panel understands the letter as part of the normal IAAF procedure as set out in Rule 37 of the IAAF Rules.

89. The Panel observes that the IAAF in its letter dated 17 February 2016 to CHINADA stated that the IAAF had been informed that CHINADA had organised the B Sample analysis. Therefore, IAAF requested CHINADA to confirm that they would handle results management of the Athlete's case. The Panel understands this request as strictly limited to handle the result management of the B Sample.

90. Furthermore, the Panel notes CHINADA in its letter dated 6 September 2017 stated that neither CHINADA nor the CAA had jurisdiction to impose sanctions on foreign athletes.

91. For the sake of completeness, the Panel notes that there is no written evidence to support the existence of a decision (no written decision, no minutes of a hearing or meeting, no evidence that a decision was ever notified to the parties etc.) being taken in China.

92. Therefore, the Panel concludes that there is no basis for the assertions that the IAAF delegated the responsibility of results management and hearing to CHINADA, or that CHINADA/the CAA ever rendered a decision.

93. As the Panel has concluded that no decision was rendered in China, there is no need for the Panel to consider the application of the legal principle *ne bis in idem.*

B. Should the Panel Refer the Case Back or Render a Decision on the Merits?

94. Article R57 of the Code reads, *inter alia*, as follows:

"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance."

95. According to CAS case law, a *de novo* hearing consists in complete fresh hearing of the disputes between the parties and any defect or procedural error even in violation of the principle of due process which may have occurred in the first instance, will be cured by the arbitration proceedings before the appeal panel (cf. CAS 2008/A/1574 at para. 42, and Mavromati & Reeb, "The Code of the Court of Arbitration for Sport", 2015, p.509 *et seq.* with further references to CAS case law).

96. Pursuant to Rule 42.1 (a) of the IAAF Rules expressly set out, "*the scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker*".

97. Given the clear language of Article R57 of the Code and Rule 42.1 (a) of the IAAF Rules, the Panel finds that the case need not to be sent back to the first instance for a new hearing and a decision.

98. Further, the Panel finds that a decision not to refer the case back to the first instance is supported by the facts that i) the Parties were not deprived from a first instance hearing,

and ii) a significant time has elapsed since the Athlete's ADRV and it is in the Athlete's best interest, and in all parties' interest, to have the Panel to determine the present case.

99. Therefore the Panel decides not to refer the case back to the first instance, but instead to render a decision on the merits.

C. The Occurrence of an ADRV and the Standard Sanction

100. Pursuant to Rule 32.2(a) of the IAAF Rules, the *"[p]resence of a Prohibited Substance or its Metabolites or Markers in the Athlete's Sample"* is an ADRV.

101. With regard to the Athlete's ADRV, the Panel notes that it is undisputed that the Athlete's A and B Samples revealed the presence 19-NA. Norandrosterone is a Prohibited Substance under Category S1 (Anabolic Agents) of the 2015 WADA Prohibited List, known to be sport performance enhancing.

102. Accordingly, the Panel holds that the Athlete has committed an ADRV.

103. With respect to the appropriate period of ineligibility, Rule 40.2(a)(i) of the IAAF Rules, provides that:

> "
> *(a) the period of ineligibility shall be four years where:*
> *(i) the anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional;*
> *(ii) the anti-doping rule violation involves a specified Substance and it can be established that the violation was intentional."*

104. The Panel notes that the standard sanction for an ADRV involving a non-specified substance is 4 (four) years, unless the Athlete (or other Person) can establish that the ADRV was not intentional.

D. Burden and Standard of Proof

105. In the present case, the burden of proof that the ADRV was not intentional bears on the Athlete, cf. Rule 40.2 (a)(i) of the IAAF Rules and it naturally follows that the Athlete must also establish how the substance entered her body.

106. Pursuant to Rule 33.2 of the IAAF Rules, the standard of proof is the balance of probabilities:

> *"Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption*

or establish specified facts or circumstances, the standard of proof shall be by balance of probability."

107. The Panel notes that this standard requires the Athlete to convince the Panel that the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence, cf. CAS 2016/A/4377, at para. 51.

E. Was the Athlete's ADRV Intentional?

108. The main relevant rule in question in the present case is Rule 40.3 of the IAAF Rules, that reads as follows:

"As used in Rules 40.2 and 40.4, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited in-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited in-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was used Out-of-Competition in a context unrelated to sport performance."

109. The 2003 WADA Code Appendix 1 (Definitions) provides the following guidance:

*"**No Fault or Negligence:** The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of the utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.*

***No Significant Fault or Negligence:** The Athlete's establishing that he or her negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation."*

110. The Panel aligns with the Panel in cf. CAS 2014/A/3820, at para. 80 that *"In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide **actual evidence** as opposed to mere speculation"* and CAS 2016/A/4377 at para. 52 that it is not enough for Athletes to establish the origin of Prohibited Substances "*merely to protest their innocence and suggest that the substance have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather the athlete must adduce*

concrete evidence to demonstrate that a particular supplement, medicine or other product that the athlete took contained the substance in question."

111. In the present case, the Panel finds that the Athlete's explanations have virtually no evidentiary basis supporting them. The Athlete asserts that the Prohibited Substance found in her sample was related to the consumption of a painkiller called Celebrex. Although the Athlete disclosed the painkiller on her doping control form, the Panel holds that the Athlete's explanation is unsubstantiated. The Panel finds that the Athlete did not prove on the balance of probability how the prohibited substance entered her body or the origin of the prohibited substance.

112. The Panel is mindful of CAS 2016/A/4534 and CAS 2016/A/4676, where the CAS Panels considered that an Athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance. In CAS 2016/A/4676, at para 72, is, *inter alia*, stated that *"the Panel can envisage the theoretical possibility that it might be persuaded by a Player's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history, even if such a situation may inevitably be extremely rare"*. The Panel finds, however, that there are no exceptional circumstances in the present case which show on the balance of probability that the ADRV was not intentional (without the Athlete having to establish the origin of the prohibited substance).

113. Accordingly, the Panel finds that the Athlete has not met her burden of proof, and the ADRV must be deemed to be intentional. The Athlete must therefore be sanctioned with a four-year period of ineligibility under the IAAF Rules.

F. Sanctions

1. Disqualification

114. Rule 40.9 of the IAAF Rules reads as follows:

"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all the resulting Consequences including forfeiture of any medals, points and prizes."

115. The Panel rules that pursuant to Rule 40.9 of the IAAF Rules, all competitive results obtained by the Athlete from and including 27 December 2015 (i.e. the date of sample collection) are disqualified, with all resulting consequences, including forfeiture of medals, points and prizes.

2. Period of Ineligibility Start and End date

116. With respect to the sanction start date, the Panel is guided by Rule 40.11 of the IAAF Rules which provides as follows:

"Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed."

117. Rule 40.11 (c) of the IAAF Rules is titled "Credit for Provisional Suspension or Period of Ineligibility" and states as follows:

"If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal."

118. In this case, it is undisputed that the Athlete was not provisionally suspended and therefore the Athlete is not entitled to receive any credit for a period of provisional suspension against the period of ineligibility which is ultimately imposed.

119. The Panel finds, however, that the Athlete's four-year period of ineligibility shall start on 29 March 2017 (the date of the Sports Dispute Tribunal Decision). In its decision, the Panel has taking into consideration that i) the Second Respondent was notified by IAAF on 25 January 2016 to provisional suspend the Athlete, but failed to do so, ii) the hearing before the Sports Dispute Tribunal was held on 29 March 2017, 14 months after the Second Respondent was notified by IAAF of the Athlete's ADRV, and iii) due to the present proceedings a starting date commencing on the date of this Award would consequently lead to more than a six-year suspension of the Athlete if, in addition all results since 27 December 2015 would be disqualified, which the Panel deems to be unfair.

IX. COSTS

120. Article R64.4 of the Code provides:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the costs of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators, the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters."

121. Article R64.5 of the Code provides:

"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. 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. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."

122. The Panel notes that the First Respondent as a National Anti-Doping Organization is the only organization permitted to carry out anti-doping activities in Kenya. In the present case, the First Respondent prosecuted the case before the Sports Disputes Tribunal. As the National Federation of Kenya, the Second Respondent is responsible for the results management under the IAAF Rules. Based on the above, the Panel holds that the First and Second Respondents bear the responsibility for the Decision, and ensuring that legally proper and justified decisions are rendered.

123. Considering the outcome of this case (the Appellant's appeal is upheld in substance and the Decision is set aside) as well as the facts set out in the above paragraph, the Panel determines that the costs of this arbitration, to be calculated by the CAS Court Office and communicated to the Parties, shall be borne 40% by the First Respondent, 40% by the Second Respondent, and 20% by the Athlete.

124. For the same reasons, the Panel further determines that the Respondents shall pay jointly and severally a total amount of CHF 3,000 (three thousand Swiss francs) to the Appellant as contribution for the legal costs and other expenses incurred by the Appellant in these arbitration proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 16 August 2017 by the World Anti-Doping Agency against the 29 March 2017 Decision of the Sports Dispute Tribunal of Kenya is partially upheld.

2. The Decision rendered by the Sports Disputes Tribunal of Kenya on 29 March 2017 is set aside.

3. A period of ineligibility of four (4) years is imposed on Ms. Sally Chegalat Kipyego, starting from 29 March 2017.

4. Ms. Sally Chegalat Kipyego is disqualified from the Taihu International Marathon in Suzhou (China) held on 27 December 2015, with all the resulting consequences including forfeiture of any medals, points, and prizes.

5. All competitive results of Ms Sally Chelagat Kipyego from 27 December 2015 are disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes, and appearance money).

6. The costs of arbitration, to be determined and notified to the parties by the CAS Court Office, shall be borne in 40% by the Anti-Doping Agency of Kenya, 40% by Athletics Kenya and 20% by Ms. Sally Chelagat Kipyego.

7. The Anti-Doping Agency of Kenya, Athletics Kenya and Ms. Sally Chelagat Kipyego are jointly and severally ordered to pay a total amount of CHF 3,000 (three thousand Swiss francs) to the World Anti-Doping Agency as contribution to its legal costs and other expenses that it has incurred in these proceedings.

8. All further and other requests for relief are dismissed.

Seat of arbitration: Lausanne

Date: 1 March 2018

THE COURT OF ARBITRATION FOR SPORT

Jens Evald
President

Mark A. Hovell
Arbitrator

Petra Pocrnic Perica
Arbitrator