

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

APPEAL NO. ADAK CASE NO. 01 OF 2017

ANTI-DOPING AGENCY OF KENYA.....APPLICANT

-versus-

VINCENT KIPCHICHIR..... RESPONDENT

JUDGEMENT

Hearing: 14 December, 2017

Panel: Elynah Shiveka Chairperson
GMT Ottieno Member
Gabriel Ouko Member

Appearances: Mr. Erick Omariba for Applicant
Mr. Allan Odongo for Respondent absent
Vincent Kipchirchir the Respondent absent

1. The Parties

1.1 The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016. Represented in this matter by Counsel Erick Omariba of Omariba & Company Advocates.

1.2. The Respondent is a male adult competing in international events. He is represented by Counsel Allan Odongo (absent) in this matter.

2. Background

2.1. The proceedings have been commenced by way of filing a charge document against the Respondent by the Applicant dated 2nd March, 2017.

2.2. The Applicant brought charges against the Respondent that on 30th of April, 2016 the Respondent was at the Polokwane Mayors Marathon in Polokwane South Africa, when South Africa Institute for Drug Free Sports, Doping Control officers collected a Urine Sample. Aided by the Doping Control Officer, the respondent split the sample into two separate bottles, which were given reference numbers as follows; A 3927578 (the "A Sample") and B 3927578 (the "B Sample") under the prescribed World Anti-Doping Agency (WADA) procedures.

2.3 The sample A was subsequently analysed at the WADA accredited laboratory of Qatar in Doha and an Adverse Analytical Finding (AAF) disclosed the presence of prohibited

substance 19 – Norandrosterone and its metabolite 19 noretiocholanolone which are listed as Endogenous Anabolic Androgenic steroids (AAS) under S1 Anabolic Agents of WADA's 2016 prohibited list (S1.1B – Endogenous AAs). This is according to the test report dated 10th September, 2016 and availed to this tribunal.

2.4. The findings were communicated to the Respondent athlete by one Japhter K. Rugut, the Chief Executive Officer of Anti-Doping Agency of Kenya (ADAK) vide a notice of charge and provisional suspension dated 12th November, 2016.

2.5. In response to the notice of Adverse Analytical Finding, the athlete through emails dated 18th November 2016 and 16th January, 2017 addressed to Erick Omariba, counsel for ADAK and Sarah Shibusse, Ag. Director, Compliance and testing, ADAK, indicated that he had denied the use of any substance during training or race and that he was 100% clean. He asked for the Sample B to be tested since he was in South Africa Pretoria and would avail himself for "B testing" anytime from 10-12 at 18 Ivy Street Sunnyside Pretoria. When informed that the B Testing would be at his cost he insisted on the test being done in Kenya but that he had no money to meet the cost of the testing.

3. Charges

3.1. Subsequently, ADAK preferred the following charges against the Athlete Respondent:

Use of Norandrosterone a specified Substance Under Class S1 - Anabolic Androgenic Steroid, of the 2016 WADA Prohibited List.

Under Article 4.1 of ADAK Anti-Doping Rules, as read together with IAAF Rules 32.2(a) and Rule 32.2(b) the presence and use of prohibited substances or its metabolites or markers in an athlete's sample, constitutes an Anti-Doping Rule Violation (ADRV).

3.2. The Applicant further stated that the Respondent had no Therapeutic Use Exemption (TUE) recorded at the IAAF to justify the substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International standards or laboratories which may have caused the adverse analytical finding. Furthermore, the Applicant states that there is no plausible explanation by the respondent to explain the adverse analytical finding.

3.3 The Applicant also avers that the athlete had no comment on the process of collection of samples and therefore it must have been done according to set WADA rules. Further the tests revealed a concentration level of 6.2 ng/mL against a permitted level of 2.5 ng/mL. The athlete did not request for the Sample B test, hence waiving his rights and this confirms his admission.

3.4 The applicant further states that the athlete has been accorded adequate opportunities to appear before the Tribunal as set out in Article 3 of ADAK rules but has failed to do so despite the Tribunal granting several adjournments for the athlete to present himself, thus confirming the inference of an adverse finding.

3.5 The applicant stated that they would rely on their submissions of 6th September 2017 setting out their case and the case law they would rely on. They stated that the responsibility of the Agency was to demonstrate that there has been a doping violation.

3.6. The Applicant contends that this Tribunal has jurisdiction to entertain the matter under Sections 55,58 and 59 of the Sports Act No: 25 of 2013 and sections 31 and 32 of the Anti-Doping Act No. 5 of 2016 as amended to hear and determine this case.

3.7. The Applicant prays that:

- a) The disqualification of the “*Polokwane Mayors Marathon in Polokwane South Africa*” results and any subsequent event as per Article 10.1 of the WADA Code.
- b) Sanctions as provided by WADA Code Article 10, ineligibility for 4 years.
- c) Costs, as per WADA Article 10.10

4. The Respondent’s Arguments/Submissions

4.1. The Respondent represented by Counsel Allan Odongo did not attend the hearing.

4.2. The respondent’s counsel also did not attend the hearing and therefore the respondent was not represented by any party.

5. Discussion

5.1. We have carefully considered the matter before us and the Counsel's submissions and these are our observations;

5.2. Section 31 of the Anti-Doping Act states that;

"The Tribunal shall have jurisdiction to hear and determine all cases on anti-doping rule violations on the part of athletes and athlete support personnel and matters of compliance of sports organizations. (2) The Tribunal shall be guided by the Code, the various international standards established under the Code, the 2005 UNESCO Convention Against Doping in Sports, the Sports Act, and the Agency's Anti-Doping Rules, amongst other legal sources."

5.3. Consequently, our decision will be guided by the Anti-Doping Act 2016, the WADA Code, the IAAF Competition Rules and other legal sources.

5.4. The Athlete respondent has failed to explain how the prohibited substance got into his system and whether it was ingested intentionally and was to enhance his performance. This can only be construed as an act of negligence and intent. **In CAS 99/A/234 & 235 the Panel stated that, "The Raising of unverified hypothesis is not the same as clearly establishing the facts"**.

5.5 The athlete when granted the opportunity to have the Sample B tested refused to have the same done due to the cost he was to bare and therefore by inference admitted to the adverse findings.

“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 bears no fault or negligence or no significant fault or negligence. The balance of proof is the balance of probabilities.” The respondent has failed to adduce any such evidence. **CAS 2008/A/15151, at para 116.**

5.6 The respondent and his counsel have been given several opportunities by the Tribunal through adjournments to enable them attend and present their cases but none of those have been taken. On the mention of the case on 23 November 2017, Mr Mwaniki who was holding brief for Mr Odongo did inform the Tribunal that Mr Odongo was contemplating withdrawing from the case and he was prevailed to stay until the hearing that was set for 14 December 2017.

5.7 The applicant’s counsel asserted that according to Article 2.1 and 2.1.1 of the WADA Code and as read together with ADAK rule 2.1 and 2.1.1, it is the athlete’s responsibility to ensure what goes into his system is suitable for an athlete thus liable for the consequences in contrary.

6.1. Decision

6.1. WADA Code Article 10.2 ‘Ineligibility for Presence, Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method’ is applicable in this matter.

6.2. WADA Code Article 10.2.1 expressly states ‘The period of Ineligibility shall be four years where Article 10.2.1.1 applies

and I quote ' 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.' In this matter it is relevant. **In our view as a tribunal it was intentional. The Tribunal therefore finds that the full period of ineligibility of four years shall apply from the date of the provisional Suspension on 12 November 2016.**

6.3. The results of the Polokwane Mayors Marathon in Polokwane South Africa of 30 April 2016 and any subsequent event pursuant to Articles 9 and 10 of the WADA Code are hereby disqualified;

6.4. The respondent to bear costs.

Dated and delivered at Nairobi this day of 25th ^{June} ~~January~~, 2018.

Signed:
Elynah Shiveka



Deputy Chairperson, Sports Disputes Tribunal

In the presence of:

1. Gabriel Ouko 

2. Gilbert M. T. Otieno 