

REPUBLIC OF KENYA



THE JUDICIARY  
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. 23 OF 2017

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

-versus-

MICAH KIPLAGAT SAMOEL..... RESPONDENT

**RULING**

**Hearing:** 16<sup>th</sup> May, 2018

**Panel:** Elynah Shiveka Deputy Chairperson  
Peter Ochieng Member  
Gichuru Kiplagat Member

**Appearances:** Mr.Omariba for Applicant  
Mr.Bett HB for Mr.Anyoka for Respondent

## THE PARTIES

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016.
2. The Respondent is a male athlete competing in national events and international events.

## BACKGROUND AND THE APPLICANT'S CASE

3. The proceedings have been commenced by way of filing a charge document against the Respondent by the Applicant dated 10<sup>th</sup>October, 2017.
4. The Applicant brought charges against the Respondent that on 04/09/2016 NADO ITALIA Doping Control Offices in an in-competition testing at Maratona Running Coop collected a urine sample from the Respondent and split into two and gave it code numbers A3578069 ("A" sample) and B 3578069("B" sample ) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. The "A" sample was subsequently analyzed at the WADA accredited laboratory of in Rome, Italy and an Adverse Analytical Finding revealed the presence of prohibited substance *prednisone* and *prednisolone* which are prohibited under the 2016 WADA prohibited list. They also are specified substance under Article 4.2.2 WADC.
6. The findings were communicated to the Respondent by Japhter Rugut, Chief Executive Officer of ADAK through a Notice of Charge and provisional suspension vide letter dated 29/03/2017 to which the Respondent failed to respond to.
7. The Applicant states that the Respondent's did not request a sample B analysis.

8. Moreover, the Applicant states that there is no departure from the international standards for laboratories and international standards for testing and investigations that could reasonably have caused the AAF as outlined in Article 3.2.3.
9. Subsequently, ADAK preferred the following charges against the Respondent:

**Presence of a prohibited substance prednisone and prednisolone in the athlete's sample.**

10. The Applicant further stated that the Respondent had no TUE recorded at the IAAF for 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 adverse analytical finding. Furthermore, the Applicant states that the Respondent has a duty to know what he ingests or drinks or whatever gets into his body in whichever way and comply with the WADA international standards as per Article 22.1 of the ADAK ADR.
11. ADAK also notes that the ingestion was intentional and no possible explanation can be given on fault or negligence by the athlete or a third party.
12. ADAK prayed for:
  - a) All competitive results obtained by Micah K.Samoei from and including 4<sup>th</sup> September, 2016 until the date of determination of the matter herein be disqualified with all resulting consequences including forfeiture of medals and prizes as outlined by Article 10.1 ADK ADR
  - b) Micah K.Samoei be sanctioned to a two year period of ineligibility as provided by the ADAK Anti-Doping Code as per Article 10 of ADAK and WADC Rules.
  - c) Costs as per Article 10.10

13.The Applicant contends that this Tribunal has jurisdiction to entertain the matter under Sections 55,58 and 59 of the Sports Act and sections 31 and 32 of the Anti-Doping Act.

## THE RESPONSE

14.The Respondent represented by the firm of Dennis Anyoka Moturi & Company Advocates filed his statement of defence dated 12/02/18 denying each and every allegation contained in the Charge Document.

15.The Respondent states that few days before the 04/09/2016 "Maratona Running Coop" he experienced soreness of the eyes, severe itching, blocked nostrils which led to breathing difficulties and skin rashes.

16.The Respondent contends that he sought medical attention at the private St.Lukes Hospital in Eldoret Town but could not raise the requisite appointment fees of Kshs.12, 000.He then went to Moi Teaching and Referral Hospital where he was diagnosed as allergic when it becomes cold.

17.The doctor prescribed *Betamethasone/Dexchlorphenamine Maleate (Celestamine)*.TheRespondent bought the drugs from a local chemist and took them through to "Maratona Running Coop". It is at this point while in Italy that Nada Italia Doping Officers collected a urine sample from him in-competition testing.

18.He states further that the he was unwell and time was limited for him to apply a TUE and that the AAF outcome should be attributed to the medication he took following his allergic condition.

19.He notes that he did not violate the WADA Prohibited list as the same section does not list *prednisone* and *prednisolone* as prohibited substances.

20. He further maintains that he is not in violation of Article 2.1 of ADAK ADR since at no point did he plan to ingest the substances or use them intentionally even though his sample A exhibited an AAF outcome.

21. The Respondent prayed that:

- a) The Honourable Tribunal finds the Respondent not guilty of the ADRV and therefore to dismiss this appeal as it is misinformed and misconstrued without legal basis.
- b) The provisional suspension be lifted and that the Respondent be allowed to participate in competitions, events and other activities organized by WADA.

## HEARING

22. When the matter came up for mention on 16/05/2018 both parties confirmed to have filed written submissions. They urged the Tribunal to adopt the written submissions and set a date for the delivery of the decision.

23. The Applicant filed submissions on the 11/10/2017 dated 10/10/2017 which reiterated the contents of the charge sheet verbatim. The Applicant however noted that failure by the Respondent to respond to the Notice of Charge and Provisional Suspension amounted to admission of the ADRV by the Respondent to the charge and consequences as outlined by Rules 7.10.2 and 7.10.3 of ADK ADRs.

24. Secondly, the Applicant stated that since the Respondent was unsatisfied with the testing process he should have requested to have a Sample B analysis.

25. Thirdly, the Applicant notes that under Article 3 of ADAK ADR and WADC, it has the burden of proving the ADRV to the comfortable

satisfaction of the hearing panel and may be established by any reliable means as outlined by Article 3.2.

26. The Applicant submitted that the prohibited substance is prohibited under S9 of the 2016 WADA Prohibited List. It stated that that Article 4.2.2 provides that "*...all prohibited substances shall be specified substances except substances in the classes of anabolic agents and hormones and those stimulants and hormones antagonists and modulators so identified on the prohibited list.*"
27. The Applicant quoted the case of **CAS 2015/A/4129 & 10 Others V International Weightlifting Federation (IWF)** where the court stated that:

*"...Under the applicable ADRV in order to benefit from a reduced sanction, the burden of proof is placed on the Athlete to establish that the ADRV was not intentional and/or that he/she bears no fault or negligence or no significant fault or negligence. The standard of proof is the balance of probabilities."*
28. The Applicant stated that the Respondent has failed to adduce such evidence. They added that the Respondent did not declare any use of medication or supplements that could have otherwise resulted or occasioned the AAF.
29. The Applicant therefore prayed for sanction provided for in Articles 10.1 and 10.2 of the ADAK Rules.
30. The Respondent on his part relied on submissions dated 15/05/2018 which were filed on the same day at the Tribunal.
31. The Respondent to a larger extent relied on his response to the charge sheet while making his submissions.
32. The Respondent did not dispute that he ingested the substances in question. He noted that he took prescribed medication from a hospital when he became unwell. He further stated that he sought

medication from a chemist as he could no longer afford the medical bills at the hospital any more.

33. The Respondent denied that he intentionally used the prohibited substances to enhance his performance and that prior to his positive test he had not received any training on anti-doping. He noted further that he was not aware of the existence of a prohibited list.
34. The Respondent prayed to the Tribunal to impose a substantial reduction from the standard penalty which should be reduced to a reprimand.
35. The Respondent quoted the case of **CAS 2015/A/3945 Sigfus Fossdal v International Powerlifting Federation (IPF)** where the court stated that "*...a pre-condition for having the period of ineligibility 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.*"
36. In this case the Respondent submitted that the prohibited substances entered his body through prescribed medication to treat allergic reactions.
37. The Respondent submitted further that a range of factors determines the period of ineligibility that should be applied. These included type of violation, the prohibited substance or method used, the nature of the athlete's conduct and the degree of fault.
38. The Respondent contended that for violations involving no fault or negligence, Athletes are not subject to any period of ineligibility. For violations involving no significant fault or negligence and prohibited substances that are not specified substances Athletes are subject to a 12 to 24 month period of ineligibility.
39. The Respondent relied on the case of **CAS 2013/A/332 Cilic v. International Tennis Federation** where an elite tennis player was

found to have an ADRV after she consumed glucose tablets that contained prohibited substances. The product label though was in a foreign language. Since Mr.Cilic inadvertently consumed a specified substance his "light" fault in committing the ADRV yielded a four-month period of ineligibility.

- 40.The Respondent noted that his case should be approached with leniency since he was undergoing doping for the first time and admitted in a timely fashion that he had ingested the prohibited substances that arose from his medication.
- 41.The Respondent went into extensive jurisprudential research to help enrich his arguments as to what constitutes "period of ineligibility", "fault of athlete", "proportionality of the sanction" to dissuade the Tribunal from agreeing with the charges.
- 42.In particular the Respondent proceeded to submit that in the case of **UEFA V.Mamadou Sakho 29251-Uel-2015/16** while dismissing the case against the footballer the hearing panel noted that the identity of prohibited substances ought to be expressly mentioned in the prohibited list in order to safeguard the rights of athletes.
- 43.In closing the Respondent submitted that athletics is his only source of income and that he is a first time offender and regretted his actions. He also prayed for costs and any other relief that the Tribunal deemed just and fit.

## **DECISION**

- 44.The panel has taken the liberty to examine all the documents and taken into account written submissions of the parties. These are our findings.



45. *Prednisone* and *prednisolone* which is prohibited under S9 of the 2016 WADA prohibited list is alleged to have been found in the Respondent's urine sample.

46. Article 2 of the WADC states that:

*"Athletes or other persons shall be responsible for knowing what constitutes an anti-Doping rule violation and the substances and methods which have been included on the prohibited list"*

47. Additionally Article 2.1 WADC provides that:

*"It is each athlete's personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their sample.*

*Accordingly, it is not necessary that intent, fault negligence or knowing on the athlete's part be demonstrated in order to establish an anti-doping rule violation under WADC Article 2.1 (emphasis ours).*

48. Consequently, as provided in Article 2.1.2 WADC sufficient proof of an anti-doping rule violation under 2.1 is:

*"presence of a prohibited substance or its metabolites or markers in the athlete's A sample where the Athlete waves analysis of the B sample and the B sample is not analyzed or....."*

49. The Applicant has demonstrated the presence of a prohibited substance in the Athlete's A sample and this has not been denied by the athlete.

50. Article 2.1 of the WADA code establishes "strict liability" upon the athlete. Where presence is established as in this case the onus is upon the athlete to render an explanation and to dispel the presumption of guilt on his part. Such explanation must however be assessed while

bearing in mind sections of Article 2.1.1 of WADC as set out above and emphasized.

51. Despite the fact that the athlete admitted to using the prohibited substances in his pleadings and written submissions he did not reveal the drugs namely *celestamine* that were prescribed to him by the doctor at Moi Teaching and Referral Hospital in doping control form. He only disclosed that he had ingested *Aspirin* tablets.

52. The Tribunal has invariably stated in various decisions that Athletes bear the ultimate duty to ensure that anything that gets into their system does not result into an ADRV. In the Tribunal Case of **Anti Doping Case No.13 Of 2017 ADAK V Sarah Kibet** while reprimanding the athlete we stated:

*"...that even with her modest education and at 26 years of age the Respondent has been able to muster her resources and piece up a response and defence to the notice to the ADRV from the Applicant as seen from her letter dated 13/07/2017. She has travelled the world finding her way out of and into international airports without much difficulty. With such kind of international exposure we find it hard to comprehend why the Respondent who has been competing in world marathons has not taken the liberty to understand what doping entails."*

53. The Respondent is no different here. He is a high school graduate who is exposed to the world. His actions are inexcusable especially where now with the internet revolution he is able to access information on doping easily and freely.

54. We have always said that the drafters of the Code were also alive to the fact that athletes would occasionally fall sick and seek medical attention. But they also gave a window of opportunity for athletes to

seek Therapeutic Use Exemption (TUE) under Article 4.4 of the Code and use it as a defence against any charge of this nature or an ADRV outcome. The Respondent sought never sought any such exemption.

55. Of course it is the Applicant's burden to establish whether the ADRV by the Respondent was intentional under Article 10.2.3 of WADC. While the Respondent carries much of the blame for the ADRV we find that the Applicant has not established the ADRV by the Respondent to have been intentional.

56. What about the question of "no significant fault"? The Respondent's Counsel whom we single out with exceptional commendation for his apt research skills and analysis brought the case of **Cilic** quoted above to our attention. We also sought wisdom from the case of **CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation** where the court prodded us to apply our mind to these factors when assessing the degree of fault on the part of an Athlete: the Athlete's professional experience; his age; the perceived and actual degree of risk; whether the athlete suffers from any impairment; the disclosure of medication on the Doping Control Form; the admission of the ADRV in a timely manner; any other relevant factors and specific circumstances that can explain the athlete's conduct. The relevant legal provision is WADA Code Article 10.5.1.1.

57. In the **Cilic** case the court said:

*"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, any personal impairments such as those suffered by an athlete who has taken a certain product for a long period of time without incident,..... an athlete who is suffering from a high degree of stress and an athlete whose level of awareness has been reduced by a careless but understandable mistake."*

58. We are alive to the fact that the Respondent is a first time offender, he is also remorseful and admitted to the ADRV in his pleadings and written submissions. However, in every sport including athletics there are rules and it is the duty of every sportsman and woman including the Respondent to abide by them faithfully.

## **CONCLUSION**

59. In the circumstances, the Tribunal imposes the following consequences:

- a. The period of ineligibility (non-participation in both local and international events) for the Respondent shall be for 2 years from 12/04/17 pursuant to Article 10.2.2 of the WADC;
- b. The disqualification of the Maratona Running Coop Marathon results of 04/09/16 and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;
- c. Each party to bear its own costs;
- d. Parties have a right to Appeal pursuant to Article 13 of the WADC and Part IV of the Anti-Doping Act No.5 of 2016.


60. The Tribunal thanks all the parties for their extremely helpful contribution and the cordial manner in which they conducted

themselves.

Dated and delivered at Nairobi this <sup>12<sup>th</sup></sup> day of \_\_\_\_\_ August \_\_\_\_\_, 2018.

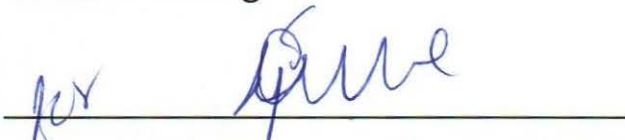
Signed:

Elynah Shiveka

  
\_\_\_\_\_  
Vice-Chairperson, Sports Disputes Tribunal

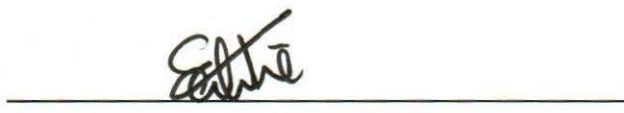
Signed:

Peter Ochieng

  
\_\_\_\_\_  
Deputy Chairperson, Sports Disputes Tribunal  
Member, .

Signed:

Gichuru Kiplagat

  
\_\_\_\_\_  
Member, Sports Disputes Tribunal